

19-5934

ORIGINAL

no. \_\_\_\_\_

In The Supreme Court  
Of The United States  
\_\_\_\_\_ Term

Supreme Court, U.S.  
FILED  
SEP 09 2019  
OFFICE OF THE CLERK

Bruce Randol Merryman  
Petitioner

v.

Lorie Davis, Director  
of T.D.C.J.  
Respondent

Petition for Writ of Certiorari to  
The United States Court of Appeals  
For The Federal Circuit

Petition For Writ Of Certiorari

Respondent

Lorie Davis, Director  
of Texas Department  
of Criminal Justice,  
Correctional Institution  
Division.

Attorney for Respondent

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Assistant Attorney General  
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Austin, Texas, 78711

Petitioner

Bruce Randol Merryman  
T.D.C.J. no. 1730381  
La Blance Unit  
3695 FM 3514  
Beaumont, Texas 77705

Pro Se

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals Fifth Circuit erred in affirming the lower tribunals ruling and denied petitioner a gateway claim of actual innocence based on a constitutional claim of insufficiency of evidence.

Can petitioner under the Federal writ of habeas corpus establish a gateway claim of actual innocence, based on a valid constitutional claim of insufficiency of evidence to sustain petitioner's conviction and entitled petitioner to equitable tolling to overcome the A.E.D.P.A. one year statute of limitation.

2. Whether the United States Court of Appeals Fifth Circuit and the erroneous decision of the lower tribunal erred in their determination that petitioner did not have new evidence that was not presented at trial to establish a gateway claim of actual innocence.

As such, That would overcome the A.E.D.P.A. one year statute of limitation and entitled petitioner to equitable tolling.

3. Whether petitioner under the federal writ of habeas corpus can establish a gateway claim and be entitled to equitable tolling to overcome the A.E.D.P.A. one year statute of limitation, Based on the accused secured constitutional right to be present at their own trial, When in fact, petitioner did not voluntarily absent himself from his own trial.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE  
SUPREME COURT OF THE UNITED STATE

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

- ① The opinion of the United States Court of Appeals appears at Appendix-A, B, to the petition and is unpublished.
- ② The opinion of the United States District Court appears at Appendix-D, E, to the petition and is unpublished.

JURISDICTION

- ① The date on which the United States Court of Appeals decided my case was July-12, 2019
- ② No petition for rehearing was timely filed in my case.
- ③ The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1)

## STATEMENT OF THE CASE

Petitioner is challenging the Conviction in the 175<sup>th</sup> District Court of Bexar County, Texas, pursuant to his Conviction and on Sentences in Cause number 2011-CR-0310 on June-24, 2011, for counts one through six, pertaining to charged by indictment, with three counts of Theft and three counts of Misapplication of Fiduciary Property, which petitioner entered pleas of Not Guilty of all charges.

Petitioner challenges the respondent, Director of Texas Department of Criminal Justice, 'Lorie Davis', that petitioner is in custody pursuant to judgment and sentences, and petitioner is being held unconstitutionally for all six Conviction.

A jury found petitioner Guilty as charged and assessed punishment at sixteen years imprisonment for Counts one and two, Ten years imprisonment for count three and Two years imprisonment for Counts Four, Five and Six and that each count to be served Concurrently.

The Fourth Court of Appeals of Texas Affirmed the Trial courts Judgment as modified on November-30, 2012; Merryman V. State, 04-11-00513 - CR, SBE Appendix - J, Case Law,

Petitioners Petition for Discretionary Review (P.D.R.) was refused by the Texas Court of Criminal Appeals

On April-24, 2013, Merryman v. State, number PD 005 -13 (Tex. crim. App. 2013) See Merryman v. State, 391 S.W. 3d 261 (2012), see Appendix-J, Case Law.

Petitioner filed his first state Application for Writ of Habeas Corpus, challenging his convictions on August-20, 2014. See Appendix-I, Trial Courts opinion.

The Texas Court of Criminal Appeals denied the Application for Writ of Habeas, without order on the findings of the Trial Court without a hearing on December-10, 2014. See Appendix-H, white carded by Court of Appeals.

Petitioner filed his second state Application for Writ of Habeas Corpus, challenging his convictions on June-15, 2015. See Appendix-G, Trial Courts opinion. The Texas Court of Criminal Appeals dismissed petitioners Writ as a subsequent Application on March-22, 2017. See Appendix-F, white card by Court of Appeals.

Petitioner filed a Federal Application for Writ of Habeas Corpus, challenging his convictions on April-5, 2017, which the United States District Court, Western District of Texas, San Antonio Division, required an show cause order on April-25, 2017. See Appendix-E, Courts order to show cause.



Petitioner filed an Reply to show cause order on May-19, 2017, "See United States District Court" Cause number SA-17-CA-0311-OAE, per the courts record (DE 5) United States District Court. "Petitioner request, the United State Supreme Court clerk, please, pull said Reply to show cause order (DE 5) from the United States District Court record".

Petitioners federal Application for writ of habeas corpus was Dismissed on September-28, 2017, by the (A.E.D.P.A.) one year statute of Limitation set fourth in 28 U.S.C. § 2244 (d). See Appendix-D, United States District Court Memorandum and Opinion.

Petitioner filed a Notice of Appeal in the United States District Court on October-11, 2017.

Petitioner recieved a letter from the United States Court of Appeals, Fifth Circuit, stating petitioners case was docketed on October-26, 2017, cause number 17-50914. See Appendix-C

Petitioner filed a motion for C.O.A. and was Granted by the United States Court of Appeal, Fifth Circuit on May-7, 2018, Petitioner Motion for C.O.A. was Granted in part and denied in part. See Appendix-B, Fifth Circuits order to grant.

Petitioners case was denied by the United States Court of Appeals, Fifth Circuit and Affirmed

that petitioner had not established a gateway claim, see Appendix - A, Memorandum and Opinion of the Fifth Circuit.

## STATEMENT of FACTS

Petitioner was original charged with theft in the Richard and windy Clifton Hair salon project out of Schertz, Texas, which took place in 2008. From the first instance of signing a contract with the Cliftons to build there Hair Salon, I Bruce Merryman had know intent to steal the Cliftons money and not complete the Cliftons Hair Salon!

And petitioner will back up this claim through out this 'Petition for a writ of Certiorari'.

After being arrested for the Clifton charge, which petitioner beleaves was some time in late 2009, the officer ~~me~~ McGuire never took the time to get my side of what took place in the Clifton case, and the prosecuting attorney was offering petitioner a five year plea deal, which petitioner would not take because, I did not commit the crime I was charged with. Just a few months before the trial took place in June-2011, petitioner was reindicted for more charges, because petitioner would not take the plea deal the prosecuting attorney was offering, Again, no investagating officer or the prosecuting attorney asked for my side of what took place.

In the new indictment petitioner was charged with

Theft and Misapplication of Fiduciary Property.

Just in the Clifton case, petitioner was charge with one count of Theft and one count of Misapplication of Fiduciary Property for the same elleged crime.

The prosecuting attorney brought new charges against petitioner any way he could, even if the person named as elleged victome in the indictment new there was no crime committed against them and petitioner will back up this claim, because during trial Mr. Dodwell testified petitioner did do the work he was paid for. I got paid \$20,000.00, and I did \$20,000.00 worth of work on the Stephen Dodwell charge. Petitioner will back up this claim, per the transcripts, during trial. Petitioner was time barred by the one year statatal of limitition by the United States District Court and this was affirmed by the United States Court of Appeals, Fifth Circuit. Petitioner disagrees with this erroneous decision by the said courts opinions. Petitioner did not commit any crime he was convicted of and was not present at his own trial 'Physical and or mentally' and this in it self, is an miscarriage of justice. All these claims made by petitioner will be backed up, per evidence persented to the State and federal courts and will back it up in these Writ of certiorari. Petitioner tried his best to learn the rules of courts and the rules of Law as fast as he could, but with no prior legal experience before my conviction and the fact petitioner was born with 'dyslexia' A learning disability marked by difficulty in reading,

writing and spelling, there is per any Dictionary and petitioner tried his best to get the lower court in Texas to even look at his case, 'with justice'. Even going as far as filing two state writ's, but was white carded without written order in both attempts by petitioner to get his case heard by the court of appeals of Texas. It is therefore Hoped that this Supreme Court of the United States will give me justice by ruling in my favor, since my case involves the same legal and constitutional facts in both the state courts and the federal courts.

### STATEMENT of ARGUMENT

McQuiggin V. Perkins, 133 S.Ct. 1924 (2013), A credible showing of Actual Innocence may allow a prisoner to pursue his constitutional claims (Here ineffective assistance of counsel) on the merits not with standing the ~~exist~~ existance of a procedural bar to relief. This rule, or Fundamental Miscarriage of Justice Exception, is grounded in the 'Equitable Discretion' of Habeas Courts to see that Federal Constitutional Errors do not result in the incarceration of innocent person's. Id. Under Schlup, 513 U.S. 298 (1995) He was able to get his case heard because he had affidavits to back up the claim he did not have the time to commit the crime he was convicted of. In petitioners case, I have " E-mails, invoices, Building inspection records, signed contracts with sub workers on my project that

were paid in full for work they did complete and

can be back up this claims with checks that were paid out to subs and receipts that were not presented at trial, in my defence. But yet the federal courts stated in said document, 'Erroneous', state Merryman has know newly evidence to back up his gateway claim of actual innocence to over come the (R.E.P.R.)

one year statute of limitation.

Schlap v. Delo, 115 S.Ct. 851. To be credible such a claim

requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be accounts or critical physical evidence that was not presented at trial. Id.

In schlap case he only had those affidavits, but in petitioners case over 40 pages of documents that were not presented at trial in any way shape or

forms; Plus, the states evidence. Petitioner has sent the District Court cause no. SA-17-CA-0311-DAE and is requesting the United States Supreme Court Clerk to call the records pertaining to 'Petitioner Reply to show cause order = (OES)' in the United States

District Court record 'If needed petitioner will

have his wife Karen Merryman send him all Exhibits sent in said (OES) all the Clerk needs to do is request petitioner to send said records, if needed.

Per those records (OES), see Exhibits = 1, 2, 3 and 4 which is the master index of evidence presented at trial. These Exhibits show that the evidence I will

Write about are not on the master index of of the evidence, per the transcripts, during my trial.

In petitioner's case the federal courts should have Equitable tolled his case and allowed him an actual innocence gateway claim, based on new reliable evidence.

In the Clifton case, petitioner did do the work and did spend the money on their Hair Salon project and did not steal the money, as convicted. Charged and convicted with Theft and Missapplication of fiduciary property; more than \$20,000.00 but less than \$100,000.00.

Per the record (DES) see Exhibit = B, pages-1 and 2. It is an accounting statement done by petitioner on money paid to petitioner by the Cliftons for their Hair Salon project \$48,360.00 and how much petitioner spent on the Hair Salon project for Labor for myself, Wages for workers, money paid out for material, money paid out for subs and money paid out for expense's \$47,618.03. There was no Theft or Missapplication of more than \$20,000.00 per my conviction.

Per the record transcripts: Volume-3, page-25, Lines-9, 10 and 25, page-26, Lines-1 through 25 and page-27, Lines-1 through 4, state the following;

(A) The amount paid by the Cliftons to Mr. Merryman was \$48,360. STOP.

(A) Every thing that I could verify that he paid out on the project. Yes, I did. (Q) And how much

was that? (A) \$7,514.56 sir. (Q) And Corporal McGuire, do you know what percentage \$7,514.56 is of \$48,360.00? (A) I would have to estimate between 10 and 15 percent. (Q) I think it's 15 percent. (A) Yes, sir. (Q) And in your report, did you give the defendant the benefit of the doubt? (A) Yes, sir, I did. (Q) Can you explain that to the Jury? (A) In addition to the amount that I could verify yes. This money went to this project, which is the subcontractors, the concrete, a door that was bought for the back of the Business, all of those -- All of that output from Mr. Merryman's account was consolidated and in addition to that, I contacted Mc Coys and a couple of other building supply companies and priced out the ~~number~~ number of sheets of sheet rock that he purchased and the number of sheets of metal studs that he had purchased for the job and added those amounts, Even though I didn't have documentation of that, added those amounts in there on my own, because screws to put them in, and I added all of those amounts in to come up with \$7,514 that Mr. Merryman had put out on the project. (End)

Yes, officer McGuire had my Bank Records at trial But, failed to get the Sub contractors amount paid to them by petitioner on the Clifton Hair Salon project and never got an C.P.A. to go over my Bank Records before trial and my own trial attorney

did not get a C.P.H. to go over my Bank Records and did not sit down with petitioner at any point and go over what I put into any projects. After the Cliftons fired petitioner on 8-1-2008, petitioner still paid Dave plumbing a sub that worked on the Clifton project, \$566.00 on 8-5-2008. Per the contract between the Cliftons and petitioner was paid \$6,342.50 as a last payment, per the contract payment plain, but petitioner still paid out over \$8,000.00 on the Clifton project, knowing the fact it was the last payment to be paid out by the Cliftons. Petitioner paid more out after his last payment from the Cliftons, which was \$8,330.99, then what officer McGuire stated petitioner paid out for the hole Clifton project \$7,515.00, Again, per petitioners accounting statement I put \$47,618.03 in to the Clifton project with expenses." Per the record (DE5) see Exhibit - B, page - 3, It is about petitioners true bill of Indictment for Theft and Miss application of fiduciary property charges. Per the record (DE5) see Exhibit - B, page - 4, shows deposits into my Bank Account, for my company care Construction Service (C.C.S.) It shows petitioner was paid between 1-9, 2008 and 8-1, 2008 \$46,515.75 from other projects petitioner worked on during the Clifton hair salon project. Petitioner had other crews working on projects for (C.C.S.) "petitioners company". In total petitioner was paid \$48,360.00 from the Clifton project and \$46,515.75 from other project petitioner



was working on, during the Clifton project, In total \$94,875.15 was put in to petitioners account. Ft trial Officer ~~Mc~~ Mc Guire stated Mr Mervyn had no other money put in to his Bank Account other than the Cliftons projects money. This misled the jury to believe that petitioner was paying his personal bills with the Cliftons money, which was not a true statement. Petitioner had other available funds in his Bank Account to pay his personal bills. Petitioner was told many years ago to pay his bills out of his Bank account, to so where the money was going for Tax purpose.

Per the record (DE5) see Exhibit - B, pages - 5 and 6.

which shows expenses for (C.C.S.) during the Clifton project, out side of personal bills or items, that total \$9,299.85. These items are company expenses

sh. such as, Yahoo website for C.C.S., Alltill cell

phone for C.C.S., news paper adds for C.C.S. and more. These items are not personal bills, they were company expenses for Tax purpose, and were paid as such.

Per the record (DE5) see Exhibit - B, pages - 7 through 20.

These exhibits are my Bank records for C.C.S. and will

support any money paid out by petitioner as owner of C.C.S. Petitioner has colored in the parts of the Bank account

Statements, to match the money spent as stated in

Exhibit - B, pages - 1 through 6. As you can see

under Deposits it does not show where the money

came from, with out my input. The same as the

checks and there check # does not show where

the money was paid out to, with out my input. As Stated no one before trial took the time to go over said Bank Records, so there was know way any one could have known were money was spent on the Clifton with out my input or an C.P.A.s. input, which did not happen. Petitioner did not get a fair trial and the jury was given false information about what was spent on the Clifton project. This is the true amount, as stated:

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\$ 31,618.03 = Subs, wages for my workers and materials.

\$ 2,000.00 = For tools and personal items petitioner lost on the Clifton project, after be fired by the Cliftons and not being allowed back on the job site.

\$ 4,650.00 = Expense's for C.C.S. during the Clifton project as stated on Exhibit - B, pages - 5 and 6.

\$ 9,350.00 = Which are my labor for work on Clifton project as General Contractor.

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\$ 47,618.03 = Total accounted for on the Clifton project, as stated in Exhibits - B, 1 - through 20 pages.

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Per the record (DE5) see Exhibit = B, pages - 21 and 22.

They are two e-mails not persented at trial.

Page - 21 and 22, show the Cliftons new what petitioner was spending on the subs used in there hair salon project = "HVAC, Plumbing and Electrician \$ 34,600.00".

The Cliftons also agreed to a proposed \$67,000.00 to

finish the hair salon project. These E-mails were dated

April-10, 2008 and July-1, 2008. Understand that the

contract between petitioner and Clifton's was signed

Feb-1, 2008. That's five months petitioner was

doing some sort of work on the Clifton project.

Per the record transcripts = Volume-3, page-87,

Lines-4 through 14; state as follow:

Okay. Let me ask you Mr. Clifton at some point

after you parted ways with the defendant, did you

end up, I guess hiring Great Dane Plumbing?  Yes,

Did you hire on Carter Electric?  Yes,  Did you

pay them to complete the work?  Yes. I did.  Okay.

Can you tell this jury how much extra did it cost you

to complete the job?  \$18,474.69. stop.

The Cliftons fire petitioner and use his subs to complete the hair salon project. These subs were paid in full by petitioner for work they completed while working under C.C.H. Building permit. <sup>11</sup> Again C.C.H. was petitioner's own Company.

So at trial it was stated petitioner only put around \$

7,500 into the Cliftons project and it only took \$18,

474.69 for the Cliftons to complete the hair salon,

that's a total of around \$25,000.00 to complete the

Cliftons hair salon project, from start to finish, per

what was stated at trial, but yet, per the E-mails

petitioner was paying the three subs on the Clifton

project \$34,600.00, that does not add up; plus,

the fact the Clifton after five months agreed to an proposed \$67,090.00 to complete there project, but were asking for extra work to be done for free, per the E-mail. The Cliftons were conarist and got petitioner to do alot of work, then fired petitioner, and used my Subs to complete there hiar salon project.

What was stated at trial was not true and the only way the Cliftons were able to complete the project for \$18,474.69, was because petitioner paid the rest of the money, from the begining of the Clifton project, to the day he was fired from the project. But yet petitioner after 8 years is still in prison for crimes he did not commit.

per the record (D.E5) see Exhibit-B, pages-23 and 24. This is the signed contract between petitioner and the Cliftons. "Which states the owner shall pay the contractor for material and Labor to be preformed under the contract " And " This is due to the fact the contractor has an obligation to it's employezs and to C.C.S. to keep working in order to pay their Bills".

At no point during the trial, prosecuting attorney would allow any wages for petitioner Labor on the Clifton project or any project for that matter.

Per the record (D.E5) see Exhibit-D, pages-1 through 12. Are documents backing up the amount of money paid out by petitioner. Such as Subs, ABC Air and Heating, Carter electric and Great Dane Plumbing and are signed proposals for work to be done

on the Clifton project, between petitioner and Subs.  
All payments made to three Subs, were paid by checks,  
But the fact that the proposals were not presented at  
trial, which would have backed up the fact of why the  
checks were paid and for what reasons. So far as the  
proposals, accounting statement were not used at trial  
as evidence, And they are new reliable evidence  
not presented at trial. "Schlup v. Delo, 115 S.Ct. 851 and  
McQuiggin v. Perkins, 133 S.Ct. 1924."

Per the records (DES) Exhibits-D, pages-13, 14 and 15.  
Are checks Petitioner paid to Shawn Kaarlsen, Architect  
that did the drawings or prints on the Clifton project.  
Per the records (DES) see Exhibit-D, pages-16 and 17  
Are an invoice and check to Texdoor, who installed  
the rear door on the Clifton project, ~~with~~ Witch was  
paid by petitioner.

Per the records (DES) see Exhibit-D, pages-18 and 19.  
Are an invoice and check to Murphys Mobile Concrete,  
for a new floor work at the Clifton project and was  
paid by petitioner.

Per the records (DES) see Exhibit-D, pages-20 and 21.  
Are an proposal and invoice for main Glass and mirror,  
for the front door installed at the Clifton project,  
and was paid for by petitioner.

Per the records (DES) see Exhibit-D, pages-22 and 23.  
Are invoices for Tar scaffolding, which was used on  
the Clifton project, not only for petitioners workers,  
But also for petitioners sub contractors, Paid  
for by petitioner.

Per the record (DE5) see Exhibit-D, page-24.

It is for A Clean Portoco an invoice to supply a porta potce or portable toilet for my works and subs on the Clifton project. Paid for by ~~per~~ petitioner.

Per the record (DE5) see Exhibit-D, pages, 25, 26 and 27.

Are invoice for workers that worked on the Clifton project. that include an' notarized letter stating money paid to workers and what they were paid. All workers were paid in full by petitioner.

During my trial no one presented the proposals, invoices or letter to the jury, such as "Exhibit-D, pages-1, 4, 5, 8, 9, 16, 18, 20, 21, 25 and 27." new reliable evidence.

Petitioners own trial attorney Mr. Eastland did not present any of the evidence petitioner has stated was not presented at trial. Trial attorney did not put up an defence for petitioner, did not present any real evidence for petitioner at trial and caused great harm to petitioners defence at trial.

Strickland v. Washington, 104 S.Ct. 2052.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction, First, That the counsel's performance was deficient, and Second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id.

Petitioners attorney Britt Eastland filed an Affidavit with the trial court, after petitioner filed his first State writ. This Affidavit was a wake up call of why Mr. Eastland did

not put up an defence for petitioner at trial, after his client was not present at trial, do to the fact I was hospitalized with kidney failer. Mr. Eastland back stabed his client.

Per the record (OES) see Exhibit-A, pages-1 through 7. Which is the Affidavit from trial counsel Britt Eastland and states: Even though it became abvisious to me after throughly reviewing all of the evidence that Bruce was a con-artist and a thief. stop.

This is my own paid in full trial attorney making this statment. Mr. Eastland never even collected alot of the evidence petitioner has put forth and will put forth more in is document. Mr. Eastland was a paid attorney that was dishonesty, a liar and had bad faith toward petitioner and did not fight for his client during trial or for that matter even before trial, for this reason petitioners case should have been equitable tolled by the lower tribunal, because trial counsels action's constituted a violation of petitioners right to effective assestance of counsel! Strickland V. Washington, 104 S.Ct. 2052. "Please read Mr. Eastlands Affidavit, Exhibit-A as stated."

The key peace of evidence that ~~was~~ not persented at trial in the Clifton case and my trial counsel did not take the time to even look in to this peace of evidence, was the permit and building inspectors report for the Elifton Hair Salon.

Per the record (DE5) see Exhibit - E, pages - 1 through 16.

Exhibit - E, page - 1, Is a letter from the Schertz Development services, which is a government agency that inspects job sites for construction projects. The Clifton project was at 6032 FM 3009 #160, and petitioner did pull the permits for the Clifton project. Because petitioner was not present at his own trial he did not know what was presented at trial as evidence and after receiving the transcripts, it showed per the master index of evidence presented Exhibit - ~~A~~, pages - 1, 2, 3 and 4, master index, that the reports were not presented. Petitioner received Building inspectors report = March - 12, 2015.

Per the record (DE5) see Exhibit - E, page - 2 and 3.

Are project management view and was done on 3-27-08 fire plain review for cut N style - 6032 FM 3009 #160 Clifton project in strip mall Schertz, TX and was passed.

per the record (DE5) see Exhibit - E, page - 4.

Which was the plain check on prints for Cut-N-style done on 4-29-08 and passed inspection.

4-21-08 petitioner purchased steel studs for Clifton project and started the work on the Hair Salon project. Steel studs were purchased at Calply how supplies material for commercial projects.

Also rear door was installed around that same time by Texas cutting and coring, how cut the concrete wall for installation of rear door and Texdoor installed the rear door.

Per the record (DE5) see Exhibit - E, page - 5.



IS for concrete slab inspection done on 4-29-08  
Petitioner cut the floor at suit 160 hair salon and  
had to get some drain pipes put in and  
had to lay new concrete in. Murphy's mobile  
concrete supplied the concrete and petitioner did  
pass his inspection.

On 4-11-08 petitioner signed a proposal with main  
glass and mirror to install the front door and  
was installed on 4-18-08

On 4-21-08 and 4-22-08 petitioner purchased  
scaffolding from Tar scaffolding for work to be  
done on the Clifton project.

Per the record (DE5) Exhibit - E, page - 6. IS for  
a Drain waste and venting inspection for rough  
in plumbing done on Clifton project dated 5-13-08.

On 4-24-08 petitioner order portable restroom  
from H Clean Portico and was ship to the job site on  
4-24-08 for C.C.H. workers and subs.

On 5-2-08 petitioner purchased drywall on sheet  
rock for the Clifton project from McCoy's supplier.  
Per the record (DE5) Exhibit - E, page - 7, The fire  
Department reviewed the plans for Clifton project  
and petitioner passed his inspection.

Per the record (DE5) Exhibit - E, page - 8, IS an  
inspection of rough in mechanical or H/C and heating  
and was done on 5-30-08. Petitioner passed the  
inspection.

Petitioner during this time started to install drywall,  
more steel stud work and organize the Hair Salon

Project as General Contractor. Petitioner ordered and supplied all material for project and also ran his work crew. Petitioner wants to point out the fact that he paid two payment to HBC H/C and Heating for mechanical work, at \$3,500.00 and \$5,750.00. All subs, materials and workers were paid in fall on all construction projects.

Per the record (DES) see Exhibit - E, page - 9, IS  
inspection for rough in plumbing for drain and waste and petitioner did pass the inspection. Petitioner wants to point out the fact that he paid three payments to Great Dane plumbing work at \$1,000.00, \$2,056.00 and \$556.00 and was paid for all work he performed on the Clifton projects.

Per the record (DES) see Exhibit - E, page - 10, IS  
inspection for rough in electrical and petitioner did pass the inspection. Petitioner wants to point out the fact that he paid two payments to Carter Electric for work done at \$1,500.00 and \$2,500.00 and was paid in full for all work performed on the Clifton project. Just in the three subs written about petitioner paid \$16,862.00 for there labor as subs on the Clifton project. As General Contractor petitioner is responsible to run the project and all subs run under petitioners Building permits.  
Per the record (DES) see Exhibit - E, page - 11, IS  
for inspection done by Water Department for Hair Salon project dated 7-29-08. Needed missing information for inspection that day, but was fixed

On 8-1-08 and was not able to finish the project and did pull his building permit as stopped that date. For the Record (OES) see Exhibit - E, page - 12, IS Fire Prevention Bureau for fire permit and was issued 3-27-08.

For the record (OES) see Exhibit = E, pages - 14 and 15. Is the building permit for can N style and money paid for permit \$3,532.50 and an invoice for amount paid in fall.

Per the record (OES) see Exhibit = E, page - 16, IS a document for Building Plan Review Record, sheets Five and Rescue and states things that need to be done on hair salon project.

The evidence Exhibit = E, pages - 1 through 16 was Very important for petitioners defence and was not presented at trial. The Building Inspectors Report shows alot of work was performed as petitioner has stated and backs up the money was spent on the Clifton project, by petitioner. Petitioner did his job on the Clifton and did not commit the crimes he was convicted of. Petitioner believes the United States Court of Appeals, Fifth circuit and the lower tribunal decision to not allow petitioner claims to new evidence was erroneous, these tangible documents such as the invoices, receipts, Building inspectors report, proposals, letters from workers paid in fall and the accounting statement that shows the truth about how much money was spent on the Clifton Hair Salon project.

No C.P.A. was used to go over the bank records and the investigating officer McGuire did not even take the time to ask the subs what they were paid by petitioner, when the subs were the ones that completed the project. This is not just the investigator's fault, my own trial attorney should have spent the time to set up a profile showing: work performed, money spent, subs and workers that did work on the Clifton project and what they were paid, a list of materials, with receipts and invoices on money spent on the Clifton and show that the work performed was passed by the inspectors for the Clifton project. There was no crime committed.

Petitioner's trial attorney did nothing for a defence for trial. And did not bring one witness to testify on Petitioner's behalf. Strickland v. Washington, 466 U.S. 668 (1984)

It gets worse, Petitioner's trial attorney did not take the time to go over the states evidence before trial. Petitioner makes claim that the states photos of the Clifton project, show the work was performed, But trial attorney did not go over the photos with petitioner.

Per the record (DE 5) see Exhibit - E, pages - 17 through - 24. Jackson v. Virginia, 99 S.Ct 2781 (1979)  
Insufficient of evidence at trial.

Per the record (DE 5) see Exhibit - E, page - 17.

Is a photo taken at the Clifton project showing the only wall that was existing, when petitioner started

The hair Salon project.

Per the record (DE5) see Exhibit - E, page - 18 and 19.

Is photos taken of the Clifton project and shows steel studs and Drywall installed by petitioner and his workers And shows electric work done by Carter electric = Braker box, outlets and wiring installed by petitioners sub.

Per the record (DE5) see Exhibit = E, pages - 20. Is a photo of the Clifton project and shows bathroom and utility room walls installed by petitioner and his workers and shows A/C and heating, with duct work installed, done by ABC A/C and Heating petitioners sub on the Clifton project.

Per the record (DE5) see Exhibit = E, page - 21. Is a photo of the Clifton project, showing wall work done by petitioner and his works. And more duct work done by ABC sub. Note there is extra drywall supplied by petitioner left on the job site.

Per the record (DE5) see Exhibit = E, page - 22, Is a photo of the Clifton project showing wall work done by petitioner and his workers and shows electric and plumbing work done by Carter electric and Great Dane Plumbing petitioners subs on the Clifton project.

Per the record (DE5) see Exhibit = E, page - 23. Is a photo of the Clifton project showing more wall work done, including wood cripples installed by petitioner and his workers and more plumbing and electric work done by petitioners subs, on the Clifton project.

Per the record (OES) See Exhibit = E, page - 24.

Is a photo of the Clifton project and shows tools and some materials. Petitioner had to leave on the Clifton project, when they fired petitioner. Petitioner took a loss of tools and personal items at around \$2,000.00 as stated in accounting statement and said documents. Note, petitioner covered up the front door and window, to protect from break ins, to steal tools and other supplies.

Petitioner did his job as general contractor and the states evidence (photos) back up my claims. The photos don't show all the work petitioner did, but enough to back up petitioners claims, he did not commit the crime he was convicted of.

The Supreme Court has previously ruled in Jackson v. Virginia, 99 S.Ct. 2781, The reviewing for sufficiency of evidence must determine whether viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Id. Petitioner is in prison for theft and misapplication of fiduciary property.

"There is sufficient of evidence to sustain petitioners conviction."

In the Stephen Dodwell conviction, Per the record

transcripts. Volume - 4, page - 21, lines - 12 through 17.

Would it be fair to say Mr. Dodwell, that you and your wife paid him close to \$20,000.00 may be more? (H) I'm sure that's close. (Q) Do you feel

he put \$20,000.00 worth of work into your home?

(A) Yeah, I thank so. STOP.

Petitioner was paid \$20,000.00 by Mr. Dodwell and did \$20,000.00 worth of work on Mr. Dodwell's construction project, but was still convicted of Theft and Misapplication of fiduciary property.

Petitioner did the job required by the signed contract between petitioner and Mr. Dodwell, but was still convicted, Petitioner did not commit the crimes he was convicted of and in both cases, Dodwell and Clifton Petitioner is actually innocent of all convictions.

There was insufficiency of evidence to convict petitioner during trial. Jackson V. Virginia, 99 S.Ct. 2781.

In the petitioners conviction Dominic Costa, Per the transcripts, Volume - 4, page - 81, Lines - 13 through 25, and page - 82, Lines - 1 through 15. Which state:

(Q) I'm showing you what's state's Exhibit - 73 again.

(A) Okay. (Q) Again this is the original contract. And for doing mostly demo work, It was agreed that you'd pay \$9,180 and that change order that he brought to you, he said you owed him \$3,800. So that total would equal \$12,980 correct? Any reason to dispute that? (A) That's what I paid him right? Is that what you are saying? (Q)

You paid him \$12,162. (A) Okay (Q) Okay, But if you he feels like he did the work for \$9,180 and he did extra work that would cost \$3,800. that would be -- that would total more than what you actually paid him \$12,980. What he feels like you owe him.

So if a person feels like they are owed money, in their mind there is a breach of contract right? (A) Of course. Course. (Q) Okay. And if he feels like in his mind he's owed and he finds out that his workers are getting paid extra and he's still owed money, it's reasonable for him to feel upset, Right? (A) Of course. I would agree with you on that, for him to feel up set. stop.

As you can see per the testimony of Dominic he paid petitioner \$12,162.00 on the project, But owed me \$12,980.00 for all the work was done by petitioner and his workers. That would mean Dominic would still owe petitioner \$818.00, which I was never paid. Per the record (PE5) See Exhibit-6, pages-1, 2, and 3. Which are the contracts and lien documents which does show \$9,180.00 for removal of fire damage and re-build room, remove wall with new foundation and replace with 2 by 4 with headers, 4 door ways, remove wall that is 3 inches wide, not to code and replace with 2 by 4. Install new walls with trusses, do to fire damage. \$700.00 to frame out stairway with walls by hot water heater. Install O.S.B. on walls and roof, Frame in bath room, Labor and material. The work was done as stated and all material and labor was paid in full by petitioner. Dominick Costa, behind my back, pays my workers extra money, to do extra work. And used my materials and at the time, my workers were getting paid by petitioner for labor and at the same time, getting paid by Mr. Costa, And for that reason, petitioner did



do an change order for \$3,800.00, but Mr. Costa refused to pay it and I already paid the labor and material for the \$3,800.00 out of petitioners money. Petitioner stated to Mr. Costa, if you dont pay the money owed, I will walk off the project, because you owe petitioner money, and petitioner DOES not owe Mr. Costa money, for work per formed. There was no crime committed, but yet petitioner was convicted of theft and Missapplication of fiduciary property. Again, my trial attorney did not show petitioner the states evidence (Photos) which shows the work was done as stated.

Per the records (DE 5) see Exhibit - G, page - 4, which is a photo of the garage from the fire damage on Mr. Costa's project. Petitioner as stated, removed the garage and all fire damage and framed in a new living space.

Per the record (DE 5) see Exhibit - G, page - 5 and 6, more fire damage on Mr. Costa house, which was all repaired by petitioner, Labor and material paid in full.

Per the record (DE 5) see Exhibit - G, page - 7 and 8. Petitioner removed garge and built new living space, with new frame work using 2 by 4 and 2 by 6 and installed new O.S.B. Sheeting and all Labor and materials were paid in full by petitioner. No crime committed by petitioner.

Per the record (DE 5) see Exhibit - G, page - 9, more fire damage on Mr. Costa's house, look at next Exhibit B.

Per the record (DE 5) see Exhibit - G, page - 10, look, new 2 by 4 and 2 by 6, all fixed by petitioner's workers.

Per the record (DE 5) see Exhibit - G, page - 11, fire damage, look from inside Mr. Costa's house.

Per the record (OES) see Exhibit - G, pages - 12 and 13.  
fixed fire ~~dam~~ damage from page - 11, with new 2 by 6 and  
and O.S.B. plywood. As you can see from photos - 12 and 13  
petitioner and his workers rebuilt the fire damage  
garage, with a all new living space, per the Contract,  
and petitioner paid in full all Labor and materials. There  
was no crime commit by petitioner and is actually  
innocent of all conviction. And there was insufficient  
of evidence to sustain petitioners conviction, Jackson V.  
Virginia, 99 S. Ct 2781. Insufficient of evidence at trial.  
Schlap V. Delo, 513 U.S. 298, The court stated that the  
petitioner must show that the constitutional error  
probably resulted in the conviction of one who was  
actually innocent. Id.

In the petitioners conviction of Lois Morgodo case.

Per the record (OES) see Exhibit - F, page - 1, which  
is an E-mail, from Ms. Morgodo to petitioner dated  
May-5, 2009. In the E-mail Ms. Morgodo states  
she wants to get together on Wednesday morning at  
8:15am and make sure we are on the same page on all  
itams. Mr. Morgodo wants to insure were the windows  
are going to go, in her side of the house, Living room.  
At know point in the E-mail is she complaining about  
me not doing my job, or poor work man ship.

Ms. Morgodo does show up as stated and goes over  
the work performed and says she will be back in  
the next few days, to make a payment do, per are  
Contract.

A few days go by and Ms. Morgodo does show up

on the job site and states she cant make the payment owed to petitioner, Because the check she has is in ms. Morgodo's name and another contractors name. Petitioner asked her whats going on and ms. Morgodo states, she hired another contractor before petitioner and his name ended up on the check. Petitioner new nothing about the other contractor and new nothing about a loan in ms. Morgodo's name and some other contractor.

Per the record (DES) see Exhibit-2, It's is an E-mail that states ms. Morgodo was unable to solve the problem with U.S.A. Bank and she will let me know as soon as she can have money in hand for payment due. Per the record (DES) see Exhibit-F, page-3, Which is an invoice for a boat petitioner had rented for the ms. Morgodo project, Dated June-a, 2009, for #agz. 67. Per the record (DES) see Exhibit-F, pages-7 and 8. It is the contract between petitioner and ms. Morgodo and it states, Per the contract, If any payments are not made when due, contractor may suspend work on the job until such time as all payments due have been made. Petitioner did not get that payment due from ms. Morgodo and suspend all work on the project.

Per the record (DES) see Exhibit-F, page-4, It shows that petitioner was not paid by ms. Morgodo and had to hire attorney Israel Garcia to resolve the issues with ms. Morgodo and paid attorney \$500.00 up front for legal fees.

Per the record (DES) see Exhibit-F, pages-5 and 6. It states that Israel was hired to resolve the issues

of non payment in Ms. Morgodo project. Isreal tried his best to work out an agreement between petitioner and Ms. Morgodo, But in the end, Ms. Morgodo goes to the courts and states petitioner stole her money and did not do the work.

Per the record transcripts, Volume-3, page-202, Lines, 8 through 19 State as follows:

Q Okay. four more payments during work and one end payment at completion of project. How much work had he done between the first and the second payment?

A Almost, I would say like \$1,500.00 worth of work.

Q Okay. And why didn't you give him the third payment? A Because, First of all, there was a question -- he said he couldn't do any more work because, when I would ask him why aren't you doing more work, he said, well, I need permits, I can't do nothing without permits. Stop.

Lois Morgodo's testimony above never states there was an issue for nonpayment or anything about the other contractor and that the check came in both their names and it could not cash that check, without the other contractor's signature and never once talks about the fact petitioner had to hire attorney Isruel Garcia. Ms. Morgodo never told the truth at trial and because his trial attorney Mr. Eastland never submitted any evidence, such as petitioner's Exhibits-F, pages-1 through 8, petitioner was denied and defence by consoule. Mr. Eastland failed to do his duty as an attorney.

Strickland v. Washington, 104 S.Ct. 2052, The Sixth Amendment right to counsel is the right to the effective assistance of counsel, any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial can not be relied on as having produced a just result. *Id.* The conduct of petitioner's trial attorney was in bad faith toward petitioner and was very dishonest for his action and should warrant equitable tolling in petitioner's case and the lower tribunal should have not of Time barred his 2254 writ as they did. In petitioner's case a claim of actual innocence is not itself a constitutional claim, but instead a gate way through which his habeas must pass, to overcome the A.E.D.P.A. one year statute of limitation, Petitioner was denied his constitutional right to effective assistance of trial counsel and his constitutional right to be present at his own trial and for that reason, was not able to confront witness's against petitioner. Was not able to put up a defence on his own behalf and these errors were so erroneous and so serious as to deprive petitioner of a fair and just trial. Petitioner is actual innocent of all conviction and there was insuffutce of evidence at trial to sustain petitioner's convictions of Theft and Missapplication of fiduciary property. In petitioner's case, if all the evidence I have put forth in this writ was presented at trial,

no juror acting reasonably would have voted to find petitioner guilty beyond a reasonable doubt.

McQuiggen v. Perkins, 135 S.Ct. 1924, Quoting Schlup v. Delo, 513 U.S. 298 (1995).

Trial attorney has lied and cheated petitioner out of a fair and just trial and has even gone on beyond the trial, Per the record (DES) See Exhibit-A, pages-1 through 7, Trial attorneys Affidavit after trial was completed, which states per that Affidavit: It is surprising that He is just now complaining in His writ that he did not get a chance to tell His side of the story, when in fact, it was his fault that this happen, Because in the middle of trial he left the court house and drove out of town to never to return for the remainder of the trial, Again, it is my understanding that he was never Hospitalized like He now claims and He Has never provided any valid documentation from any Hospital to back this claim up. Stop.

Trial attorney new I was in the Hospital, Because I told him I was in the Hospital. On June-16, 2011 petitioner did not voluntarily absent my self from trial and the Hospital records back up this claim. The trial went on without petitioner present for almost two days and petitioner was Hospitalized on June-18, 2011, and was discharged from the Hospital on June-21, 2011. But I told trial attorney petitioner was just picked up by two officers from the Hospital on June-21, 2011. But trial attorney never said anything to the Court before sentencing of petitioner on June-24, 2011.

Faircy v. Tucker, 132 S. Ct. 2218 (2012) An accused's Right to be present at his own trial is among the most fundamental Rights our constitution secures. *Id.* Per the record during trial a lunch Break took place at 12:00 and was to last an hour and a half, petitioner must of Started to go home for lunch and lost my way because the E.M.S. report talk's about the fact that petitioners car was found abandoned at the side of I 35 and petitione was found lying under a tree just a short ways away. Petitioner could not recall any thing that to place the last two days prior to E.M.S. finding petitioner. The record by up the fact that his Renal failure was gradual in onset and to this day petitioner can't remember what took place the week of the trial. Petitioner had Altered mental medical condition's and did not voluntarily absent myself from my own trial. Petitioner at the time of trial lived at I 35 and O'connor Rd, in north San Antonio, Texas and was mental not able to under stand or disorizted to person, place, time and situation. The trial court should have not continued the trial with out petitioner present and allowed him a chance to confront the witnesses against him. Petitioner did not commit the crime's he was convicted of and did not get a chance to fight at trial to defend his innocence.

See Appindex - K, pages - 1 through 12, which are the hospital records backing up petitioners claims, he was very sick and was found unresponsive, confused and disoriented and did not voluntarily absent myself from the trial on June-16, 2011. Petitioner was admitted to I.C.U. The United State Constitution Sixth Amedment

States that everyone accused of a crime has a right to a trial by jury and that the accused has the right to be confronted with the witnesses against him, And to have the Assistance of Counsel for his defense. stop.

This did not take place in petitioners case! Because of petitioner not being at trial, his own attorney dishonesty and with bad faith toward petitioner, did not put up any defence on petitioners behalf and it shows it through out this pitition. The trial court should have never of proceeded with out petitioner present and the lower tribunal should have set aside petitioners convictions a long time ago.

Due Process Violation Fifth Amendment Right.

Petitioner has all ways argued he did not hold property as a Fiduciary in his convictions of Misapplication of Fiduciary property and was argued under his direct appeal, see Berry v. State, 424 S.W. 3d 579 (2014), Merryman v. State, 391 S.W. 3d 261

(2012) Under Schriro v. Summerlin, 124 S.Ct. 2519 at 2523 Such rules apple retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or facts a punishment that the law cannot impose upon him, Bousley Supra at 620, 118 S.Ct. 1604.

Dille v. State, 2015 WL 5626192 (Tex. App - Corpus Christi) The corpus christi Court of Appeals found no discernable distinctions between the sale of installation of shutters and blinds in Berry and the sale of construction services in "Merryman". See Berry; The court stated that to impose a fiduciary relationship in ordinary business dealings would run contrary to the principle that a fiduciary is obligated to act for the primary benefit of the other party. Id. In light of all the evidence presented



at trial, The appeals court stated there was insufficient of evidence to sustain the convictions of Berry and Olie, Based on their convictions of misapplication of fiduciary property, ruling based on Jackson v. Virginia, 443 U.S. 307 (1999). Petitioner's convictions of the same, however, were denied without written order by the Texas Court of Criminal Appeals. The U.S. Court of Appeals, Fifth Circuit Erved in their determination that Petitioner had not established a gate way claim of actual innocence, see Stinnett v. Colorado Interstate Gas Co., 227 F.3d 247 (5th Cir 2000) In Texas, A fiduciary Relationship is an extraordinary one and will not be lightly created, fiduciary duties do not abound in every or even most garden variety arms-length contractual relationships, Id.

## REASON FOR GRANTING PETITIONERS WRIT

A positive ruling by the Supreme Court would go a long way towards showing the lower tribunal that all accused of a crime are innocent until prove guilty, and as such, have the rights that are guaranteed under the U.S. Constitution and that federal laws will not be violated by the states tribunal. Petitioner wants Justice for all that have been denied their full rights under the U.S. Constitution, During their own trial, Rights to effective assistance of trial counsel, The accused rights in all criminal cases to be present at their own trial, as long as they have not voluntarily absent themselves from their own trial, and to have sufficient proof, in light of all evidence,

that know reasonable juror would have found the accused guilty beyond a reasonable doubt, of the crimes in which they have been convicted of. Petitioner does have new evidence that was not presented at trial, that shows he is actual innocent of the charges he was convicted of. There has been a miscarriage of justice in petitioner's case and because of all that has taken place at his own trial, he should be allowed a gateway claim to overcome the A.E.P.P.A. one year statute of limitation and set fourth that all person's constitutional rights will not be denied in the United States. Even the accused at trial.

## CONCLUSION

This court should grant this petition for a writ of certiorari. Thank you so much for reviewing this writ and or case.

Dated and Signed  
September-6, 2019

Respectfully Submitted  
Bruce R Merryman  
T.D.C.J. no. 1730381  
Pro Se

## CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been sent to: Jennifer Wessinger, Assistant Attorney General, P.O. Box 12548, Austin, Texas 78711 and was placed in the internal mail system at LeBlanc unit on this 6<sup>th</sup> day of September, 2019

CERTIFICATE OF COMPLIANCE

NO. \_\_\_\_\_

Bruce Randol Merryman  
Petitioner  
v.

Loric Davis, Director  
of T.D.C.J.  
Respondant

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As required by Supreme Court Rule 33.1(H), I certify that the petition for writ of certiorari contains 7960 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(D).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September-6, 2019

Bruce Merryman