No. 19-6733

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE M. DURHAM — PETITIONER
(Your Name)

vs.

ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

George M. Durham
(Your Name)
S.C.I. Fayette
48 Overlook Dr.
(Address)

LaBelle, PA 15450
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Petitioner submits that this Honorable Court;s decision in McQuiggin v. Perkins, 569 U.S. 383, 133 S.Ct. 1924, 185 L.Ed. 2d 1019 (2013) was a change in relevant decisional law and is an extraordinary circumstance to justify relief under Federal Rule of Civil Procedure 60(b)(6), in light of Petitioner's credible showing of "Actual Innocence" and "Ineffective Assistance of Counsel."

LIST OF PARTIES

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

[X] 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:

George M. Durham -- Petitioner
DOC No. HN-4374
S.C.I. Fayette
48 Overlook Dr.
LaBelle, PA 15450

Mark V. Capozza -- Respondent
Superintendent
State Correctional Institute at Fayette

Josh Shapiro -- Respondent
Attorney General
for the Commonwealth of Pennsylvania

David J. Lozier -- Respondent
District Attorney of Beaver County
810 Third St.
Beaver, PA 15009

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Room 5614
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950 Pennsylvania Ave
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Washington, D.C. 20530-0001

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at C.A. No. 19-1832; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B & C to the petition and is

[X] reported at No. 2:17-CV-662; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was October 8, 2019.

[X] No petition for rehearing was timely filed in my case.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment of the United States Constitution -- Constitutional Right to Effective Assistance of Counsel and a Fair Trial.

2. Fourteenth Amendment of the United States Constitution -- Right to Due Process of Law and a Fair Trial.

3. Federal Rule of Civil Procedure, Rule 60(b)(6).

4. 28 U.S.C § 2254 -- Writ of Habeas Corpus.

5. 28 U.S.C. § 2253 -- Certificate of Appealability.

STATEMENT OF THE CASE

¶1. Petitioner, George M. Durham, is presently serving a life sentence imposed following his conviction by a jury of First Degree Murder at No. 1860 of 2007 in the Court of Common Pleas of Beaver County Pennsylvania.

¶2. Petitioner originally filed a Petition for a Writ of Habeas Corpus at No. 2:11-CV-719 on June 2, 2011 and simultaneously moved said Petition to be held in Abeyance while Petitioner exhausted his State Court remedies. On March 9, 2015 Petitioner moved to reopen the proceedings and on March 12, 2015, Petitioner submitted an Amended Petition. On August 24, 2015 said Petition was dismissed and on May 5, 2016, the Court of Appeals denied a Certificate of Appealability.

¶3. On June 27, 2016 Petitioner filed his first Rule 60 (b) motion at No. 2:11-CV-719 which was denied on July 5, 2016 as a successive petition. A second Rule 60 (b) motion was filed by the Petitioner on July 15, 2016 and denied on August 5, 2016. A Certificate of Appealability was denied by the Court of Appeals on December 5, 2016 at Court of Appeals Docket No. 16-3453. Petitioner next filed for leave of the Court of Appeals to file a successive Habeas Corpus Petition at that Court's Docket No. 17-1466 which was denied on March 28, 2017.

¶4. On May 22, 2017, the Petitioner filed a second Writ of Habeas Corpus Petition with the District Court at No. 2:17-CV-

662, challenging his conviction on the grounds of "Actual Innocence Exception-Miscarriage of Justice-Alibi-Ineffective Assistance of Counsel." Said Writ of Habeas Corpus Petition was dismissed on September 6, 2017 as a successive Petition for which leave to proceed had not been granted by a Court of Appeals. Said Writ of Habeas Corpus Petition contained the following facts:

¶5. The Petitioner submits that the Prosecution in its case against the Petitioner argued that on August 17, 2007 at 8:30 P.M., the Petitioner murdered the Victim (Mary Ann Brown), and then fled to the Outkast Bar.

¶6. Commonwealth Witness, James Smith M.D., the Medical Examiner who performed the Autopsy on the Victim, did not give a time of death for the Victim in his Autopsy Report. And, did not give a time of death for the Victim in his trial testimony. (T.T. pages 609-636). However, the Commonwealth based the time of the murder on the **testimony of its main witness, Irving Smith;** who testified he DID NOT see, but heard the murder.

¶7. The time line of the murder and the Petitioner's Alibi was established at Trial through cross-examination of five (5) Commonwealth Witnesses. And, the direct testimony of one (1) Defense Witness and the direct testimony of the Petitioner.

¶8. **Commonwealth Witness Irvin Smith,** the Commonwealth's Main

Witness who testified he heard the Victim arguing with the Petitioner, at the time of the murder is alleged to have occurred on August 17, 2007, testified at Petitioner's Preliminary Hearing as follows:

i. He first saw Petitioner at his (Irvin Smith's) work-site with the Victim, at 8:00 P.M., and conversed with the Petitioner for a few minutes. (Prelim. Hearing Testimony pages 8-10, 18, 22).

ii. He further testified that he heard the Victim and Petitioner arguing on Jefferson Street, at some unknown time after 8:00 P.M., it was getting dark. (Prelim. Hearing Testimony pages 10-11).

¶9. Commonwealth Witness Irvin Smith testified at Petitioner's Trial as follows:

i. He testified that at 8:00 P.M. on August 17, 2007, he had a brief encounter with Petitioner and the Victim together at his (Irvin Smith's) work-site. (T.T. pages 231-233).

ii. He further testified that after Petitioner and the Victim left his work-site; he proceeded to clean up his work-site and his tools which took about one (1) **hour to complete.** (T.T. pages 235-236). **The time would have been 9:00 P.M.** Irvin Smith further testified that once he finished cleaning up his work-site and his tools, he walked to a friend's house. After arriving at his friend's house, he testified that twenty (20) minutes later he alleged he heard the Victim and the Petitioner arguing. (T.T. page 241). **The time was 9:20 P.M. when the murder occurred.**

¶10. **Commonwealth Witness Wanita Mooreland Hooks**, the Victim's Cousin, testified at Petitioner's trial that she saw Petitioner shortly before Petitioner went into the Outkast Bar at 8:30 P.M. on August 17, 2007. She saw Petitioner only a short distance from the Outkast Bar, which is several miles away from the alleged murder scene. (T.T. pages 311-312, 319, 326).

¶11. **Commonwealth Witness Annette West**, the Barmaid at the Outkast Bar, testified at Petitioner's trial that Petitioner arrived at the Outkast Bar on August 17, 2007 at 8:30 P.M., and that she called Petitioner's brother, Ernest Durham, to come pick up Petitioner at the Bar, and that Ernest Durham arrived at the bar about twenty-five (25) minutes later. (T.T. pages 359, 362, 367, 370).

¶12. **Commonwealth Witness David Gilbert**, the brother of Annette West, testified at Petitioner's trial that when he arrived at the Outkast bar on August 17, 2007, Petitioner was already at the Outkast Bar when he arrived and that the sun was still out. (T.T. pages 365, 376-377, 381).

¶13. **Defense Witness Ernest Durham** testified at Petitioner's trial that he received a telephone call from the female Barmaid at the Outkast Bar between 8:30 P.M. and 9:30 P.M. He further testified that he and his older brother, Dwayne, picked-up Petitioner at the Outkast Bar. He then testified that he drove

Petitioner to Petitioner's home; where Petitioner spent about ten (10) minutes. Then he drove Petitioner to Willie Martin's house where Petitioner went into Willie Martin's house. (T.T. pages 641-646, 650). It should be noted that Petitoner's car remained parked in the parking lot of the Outkast Bar with a flat tire from 8:15 P.M. on August 17, 2007 to 3:35 on August 18, 2007. (T.T. pages 363-366, 377-378, 644, 650-652, 673, 680, 262-265, 286, 291-293, 332-333).

¶14. **Commonwealth Witness Crystal Brown**, the Victim's daughter, testified at Petitioner's trial that from 7:30 P.M. to 8:45 P.M. on August 17, 2007, the Victim, Mary Ann Brown, was alive at Crystal Brown's home. (T.T. pages 257, 279). Crystal Brown further testified that between 7:30 P.M. and 8:45 P.M., after bathing, the Victim left Crystal Brown's house and was gone for about fifteen (15) minutes. Then, the Victim returned to Crystal Brown's house, (T.T. page 259), where the Victim remained until 8:45 P.M. (T.T. page 279). The Petitioner testified and the recorded evidence in this case verifies that around 8:00 P.M. Petitioner had a brief encounter with the Victim in the area of Irwin Smith's work-site. It was during this encounter that the Victim cut Petitioner on his left hand. (T.T. pages 230-233, 664-670). After this encounter, the Recorded Evidence verifies that the Victim returned to Crystal Brown's home (T.T. page 259) and petitioner proceeded to go have the tire on his car fixed but detoured to the Outkast Bar after realizing that the Tire Shop was closed. (T.T. 678).

¶15. Petitioner testified at Trial, that he last had contact with the Victim on August 17, 2007, between 7:30 P.M. and 8:00 P.M., but more like 8:00 P.M. (Implicitly after the Victim went to Crystal Brown's home to bathe and change clothes.) During said encounter, the Victim cut Petitioner on his left hand in the area of First Avenue and Jefferson Street, which is only three hundred and sixty-six (366) feet from Irwin Smith's work-site, after which, Petitioner went to the Outkast Bar. (T.T. Pages 666, 669, and 687).

¶16. Despite the Trial Testimony of five (5) Commonwealth Witnesses, One (1) Defense Witness and the Petitioner, which would have shown that the murder occurred between 9:00 P.M. and 9:30 P.M. on August 17, 2007, and that the Petitioner had a complete Alibi; Petitioner's Trial Counsel chose not to argue this Alibi Time Line Evidence to the Jury and instead argued to the Jury, during Closing Arguments, that the murder occurred between 7:30 P.M. and 8:30 P.M. on August 17, 2007, which made it possible for Petitioner to have committed the crime. Petitioner further avers that once the Petitioner's Trial Counsel opened the door to, and argued to the jury the time the murder occurred, Trial Counsel was obligated to argue to the Jury the correct time of the murder because the Prosecution's main witness, Irvin Smith, claimed to overhear Petitioner commit a murder. A murder that Petitioner has since learned occurred between 9:00 P.M. and 9:30 P.M. on August 17, 2007, and at a time where several of the

Prosecution's own witnesses placed the petitioner miles away from the alleged murder scene, and at a time when the Petitioner did not have the use of his car because said car had a flat tire. (T.T. page 678). Petitioner argued that Trial Counsel provided Ineffective Assistance of Counsel for failing to argue the correct time of the murder and failing to conduct any Pre-Trial Investigation in this regard.

¶17. On or about August 3, 2018, the Petitioner filed the instant Rule 60 (b) (6) motion in which Petitioner argued that he was seeking relief from the Judgment denying Habeas Corpus Petition at No. 2:17-CV-662 on procedural grounds and submitted that the United States Supreme Court's decision in McQuiggin V. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d. 1019 (2013), was a change in relevant decisional law and is an extraordinary circumstance to justify relief under Federal Rule of Civil Procedure 60 (b) (6) pursuant to Satterfield V. District Attorney Philadelphia, 872 F. 3d 152 (3d Cir. 2017).

REASONS FOR GRANTING THE PETITION

¶18. Petitioner's Trial Counsel told the jury, "**There has been some disparity, but hasn't been a gross disparity in terms of the time table. It appears that it happened somewhere between 7:30 and 8:30 P.M. on August 17, 2007.**" (T.T. pages 746-747). The jury never heard the Alibi Time Line that the murder occurred between 9:00 and 9:30 P.M. on August 17, 2007. Petitioner submits that there was no testimony during Trial by Irwin Smith that indicated that the murder occurred between 7:30 P.M. and 8:30 P.M. on August 17, 2007.

¶19. The Prosecution's main witness, Irwin Smith, claimed to overhear Petitioner commit a murder. A murder that Petitioner learned occurred between 9:00 P.M. and 9:30 P.M. on August 17, 2007 and at a time where several of Prosecution's own witnesses placed Petitioner miles away from the alleged murder scene and at a time Petitioner did not have the use of his car, thus the reason Petitioner had the Barmaid at the Outkast Bar, Annette West, call his brother, Ernest Durham, to come and pick Petitioner up because Petitioner's car had a flat tire.

¶20. In **Satterfield v. District Attorney Philadelphia**, 872 F.3d 152 (3d Cir. 2017), The Honorable Court held in part "**while the District Court must take the first pass at weighing the equitable factors involved in Satterfield's Rule 60 (b) (6) motion, we emphasize that the nature of the change in decisional law itself must be a factor in the analysis. The principles underlying the**

Supreme Court's Decision in McQuiggin are fundamental to our system of government and are important to the inquiry on remand." The Third Circuit further stated "McQuiggin allows a Petitioner who makes a credible showing of actual innocence to pursue his or her constitutional claims even in spite of AEDPA's statute of limitations by utilizing the fundament-miscarriage-of-justice exception grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." McQuiggin, 133 S. Ct. at 1931. Underlying the fundamental-miscarriage-of-justice exception is a "sensitivity to the injustice of incarcerating an innocent individual," and the doctrine aims "to balance societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Id. at 1932. For this reason, in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration. Murray v. Carrier, 477 U.S. 478, 495, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (quoting Engle v. Issac, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (alteration in the original). The Supreme Court has underscored the importance of these principles, explaining that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the fundamental value determination of our society that it is far worse to convict an innocent man than

to let a guilty man go free." Id. at 372 (quoting in Re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L. Ed. 2d. 368 (1970) (Harlan, J. concurring)."

¶21. The Honorable Court further stated in Satterfield, "The values encompassed by the fundamental-miscarriage-of-justice exception and which drive the Supreme Court's decision in McQuiggin cannot be divorced from Rule 60 (b) (6) inquiry. Cox requires a weighing of the equitable factors at play in a particular case, and the nature of the change in law itself is highly relevant to that analysis. McQuiggin illustrates that where a Petitioner makes an adequate showing of Actual Innocence, our interest in avoiding the wrongful conviction of an innocent person permits the Petitioner to pursue his constitutional claims in spit of the statute-of-limitations bar. This interest is so deeply embedded within our system of justice that we fail to see a set of circumstances under which this change in law, paired with a Petitioner's adequate showing of actual innocence, would not be sufficient to support Rule 60 (b) (6) relief in this context. Put another way, a proper demonstration of actual innocence by Satterfield should permit Rule 60 (b) (6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction. A contrary conclusion would leave open the possibility of preventing a Petitioner who can make a credible showing of actual innocence from utilizing the fundamental-miscarriage-of-justice exception simply because we had not yet accepted its applicability at the time his petition

was decided, an outcome that would plainly betray the principles upon which the exception was built. Such an outcome would also implicate two factors of the Rule 60 (b) analysis recently identified by the Supreme Court: "the risk of injustice to the parties "and" the risk of undermining the public's confidence in the judicial process." Buck v. Davis, 137 S. Ct. 759, 778, 197 L. Ed. 2d1 (2017). Thus, if a Petitioner can make a showing of actual innocence McQuiggin's change in law is almost certainly an exceptional circumstance."

¶22. The Honorable Court went on to state "Given this observation about the importance of change in law affected by McQuiggin and the weight it should carry equitable analysis, a court should focus its efforts primarily on determining whether Satterfield has made an adequate showing of actual innocence to justify relief. The change in law brought about by McQuiggin will only permit him to overcome his time-barred Petition if he can make a credible showing of actual innocence -- a burdensome task that requires a Petitioner to "persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." McQuiggin, 133 S. Ct. at 1928, 1935 (quoting Schlup, 513 U.S. at 329). Thus, the miscarriage-of-justice exception and McQuiggin's holding more broadly will not be applicable to Satterfield's case if he cannot make a proper showing of actual innocence, and the District Court must determine whether such a showing has been made as a threshold matter. We leave this inquiry entirely to

the District Court on remand, and recognize that the issue may require an evidentiary hearing during which other equitable factors may come into play."

¶23. The Court further stated "Among these additional equitable factors, the District Court may consider Satterfield's meritorious ineffective-assistance-of-counsel claim. The Supreme Court's recent decision in Buck v. Davis established that the severity of the underlying constitutional violation is an equitable factor that may support a finding of extraordinary circumstances under Rule 60 (b) (6). The appellant in Buck sought to vacate the Court's judgment so he could present an otherwise defaulted claim of (872 F. 3d 164) ineffective assistance of trial counsel. 137 S. Ct. 777-79."

¶24. The Court also stated "McQuiggin also makes relevant whether Satterfield raises a colorable claim of ineffective assistance of trial counsel, as the actual innocence exception only provides a gateway for courts to review a Petitioner's separate claim of constitutional error. See McQuiggin, 133 S. Ct. at 1931; See also Schulp, 513 U.S. at 316-17 (noting that Petitioner's seeking habeas relief carry less of a burden when their convictions are the result of unfair proceedings -- and the actual innocence threshold standard applies -- than when they have been convicted after a fair trial). Because Satterfield's claim of constitutional error -- counsel's unreasonable failure to investigate and present exculpatory eyewitness testimony is

the reason why the actual innocence exception could apply to his case, the gravity of that error bears on the weight of his McQuiggin claim."

¶25. Petitioner submits that based on McQuiggin v. Perkins, 566 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013), the District Court should have adjudicated Petitioner's claim of Actual Innocence and ineffective assistance of counsel in Petitioner's 2254 Writ of Habeas Corpus at No. 2:17-CV-662. Petitioner further submits that McQuiggin represents a change in relevant decisional law and is an extraordinary circumstance in Petitioner's case and justifies Relief under Federal Rule of Civil Procedure 60 (b) (6) given the facts of Petitioner's case and pursuant to Satterfield V. District Attorney Philadelphia, 872 F.3d 152 (3d Cir. 2017).

¶26. Moreover, Petitioner's Rule 60 (b) motion did not raise arguments concerning the constitutionality of his conviction but focuses on an incorrect procedural ruling in the Petitioner's case at No. 2:17-CV-662.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

George M. Durham

Date: November 14, 2019