

19-8206
No.

IN THE UNITED SUPREME COURT OF THE UNITED STATES

October Term, 2019

ZARYL G. BUSH,

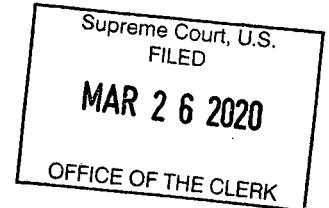
Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari To
The Ohio Court of Appeals Seventh Appellate District



PETITION FOR WRIT OF CERTIORARI

Zaryl G. Bush, respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the Ohio Supreme Court refusing to hear an appeal of the decision of the Ohio Court of Appeals, Seventh Appellate District, holding that the trial court did not violate Mr. Bush's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

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Petitioner, *pro se*

QUESTION PRESENTED

- I.** Should the State Courts be allowed to hide behind an alleged procedural bar when clearly the record of the case and the Petitioner's *prima facie* claim of Actual Innocence indicates that the accused was denied his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution.

LIST OF PARTIES

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

RELATED CASES

- *State v. Bush*, No. 13 CR 249, Mahoning County Common Pleas Court of Ohio. Judgment entered June 28, 2013.
- *State v. Bush*, 2014-Ohio-4434, No. 13 MA 110, Ohio Court of Appeals, Seventh Appellate District. Judgment entered September 22, 2014.
- *State v. Bush*, 2017-Ohio-4450, No. 16 MA 0016, Ohio Court of Appeals, Seventh Appellate District. Judgment entered June 21, 2017.
- *State v. Bush*, 2017-Ohio-8842, No. 2017-1003, Supreme Court of Ohio. Judgment entered on December 6, 2017.
- *State v. Bush*, 2019-Ohio-4082, No. 18 MA 105, Ohio Court of Appeals, Seventh Appellate District. Judgment entered September 26, 2019.
- *State v. Bush*, 2019-Ohio-5327, No. 2019-1509, Supreme Court of Ohio. Judgment entered on December 31, 2019.
- *Bush v. Sloan*, No. 4:18-CV-00864, U.S. District Court for the Northern District of Ohio. Judgment entered on December 6, 2019.

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Opinion of the Supreme Court of Ohio denying discretionary review entered on December 31, 2019

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Zaryl G. Bush (hereinafter the Petitioner and/or Bush), *pro se*, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the Ohio Court of Appeals, Seventh Appellate District, affirming Bush's post-conviction petition dismissal was entered on September 26, 2019. *State v. Bush*, No. 18 MA 105, 2019-Ohio-4082, (September 26, 2019); appears at Appendix A to this petition, it is not print published.

The decision of the Mahoning County Common Pleas Court of Ohio dismissing Bush's state post-conviction petition was entered on September 7, 2018; appears at Appendix B to this petition, it is not print published.

The Supreme Court of Ohio refused jurisdiction on December 31, 2019. *State v. Bush*, No. 2019-1509, 2019-Ohio-5327, (December 31, 2019); appears at Appendix C to this petition, it is not yet print published.

JURISDICTION

Petitioner seeks review from the December 31, 2019 decision of the Supreme Court of Ohio (Appendix C) refusing to accept jurisdiction to hear an appeal from the Ohio Court of Appeals, Seventh Appellate District, which affirmed the trial court's dismissal of Bush's petition for post-conviction relief on September 26, 2019 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Due to Bush's indigent (poor) financial status, Bush was forced to rely on court appointed counsel for the resolution of his criminal case. This, compounded by erratic and/or improper police investigation tactics by detectives with proven records of prior misconduct, as well as poor performance of retained counsel, sits incarcerated an innocent man serving thirty-three years to life for multiple egregious crimes that he did not commit.

There can be no doubt that there were many compounding errors throughout the pendency of Bush's case herein. There can also be no doubt that Bush has put forth his best efforts to bring to light the errors that occurred within his case both through retained counsel as well as *pro se*. Unfortunately for Bush, this was his first involvement with the criminal justice system and Bush relied heavily upon the advice of his court appointed counsel which was not working in Bush's best interests, concerned solely with a speedy resolution to his case with a negotiated plea; refusing to take Bush's case to trial despite his repeated efforts to instruct his attorneys that he wished to go to trial to prove his innocence. Due to coercion from his trial counsel as well as due to extreme mental strain resulting from the conditions he was forced to endure while in the County Jail due to extreme negative media coverage of the case, Bush reluctantly entered guilty pleas to the aforementioned counts.

Related to this case, following appointed appellate counsel filing an "Anders" brief finding no errors in Bush's case, Bush, through family, retained counsel to file a petition for post-conviction relief in the trial court based upon evidence that was *dehors* the trial court record. Again Bush was led astray by his counsel, who filed a legally deficient petition on Bush's behalf containing *no* evidence attached which the trial court dismissed without a hearing. It is important to note that Bush's attorney never informed Bush that the petition had been filed nor that it had been subsequently dismissed, in fact, avoiding all contact with Bush despite repeated attempts to contact the attorney.

Bush continued his fight for justice *pro se*, filing several motions in the courts and eventually with the help of inmate law clerks at the Lake Erie Correctional Institution in Conneaut, Ohio, filed a second petition for post-conviction relief *pro se* in the trial court on August 24, 2018, where he alleged two claims of ineffective assistance of counsel rendering his guilty plea not knowing, intelligent and voluntary, supported by affidavits and evidence that was *dehors* the trial court record. The trial court refused to address the merits of the claim, dismissing the petition with a procedural bar stating that Bush did not satisfy the requirements of *O.R.C. § 2953.23* despite Bush's evidence to the contrary and his Prima Facie showing of actual innocence of the crimes with affidavits from eyewitnesses and other evidence strongly supporting his claims.

STATEMENT OF THE CASE

Bush was indicted by the Mahoning County, Ohio Grand Jury on March 7, 2013, and charged in a multi-count indictment with Murder, in violation of *O.R.C. §§ 2903.02(A)(1)* and *2903.02(B)(1)(d)*; Felonious Assault, in violation of *R.C. § 2903.11(A)(1)(d)*; Endangering Children (6 Counts), in violation of *O.R.C. § 2921.04(B)(1)(d)*; Tampering With Evidence, in violation of *O.R.C. § 2921.12(A)(1)(b)*; additional counts of Endangering Children, Obstructing Justice, in violation of *O.R.C. § 2921.32*; and Manslaughter, in violation of *O.R.C. § 2903.04(A)*.

On June 6, 2013, after several pretrial hearings and motions, Bush pled guilty to Murder, Endangering Children (4 Counts), Intimidation (2 Counts), and Tampering with Evidence.

On June 28, 2013, Bush was sentenced as follows: Fifteen Years to Life in Count One, Murder, in violation of *O.R.C. § 2903.02(A)(D)*; Three Years in count Seven, Endangering Children, in violation of *O.R.C. § 2919.22(B)(4)(E)(3)*; Three Years in Count Eight, Endangering Children, in violation of *O.R.C. § 2919.22(A)(E)(2)(c)*; Three Years in Count Nine, Endangering Children, in violation of *O.R.C. § 2919.22(A)(E)(2)(c)*; Three Years in Count Ten, Intimidation, in violation of

O.R.C. § 2921.04(B)(D); Three Years in Count Eleven, Intimidation, in violation of O.R.C. § 2921.04(B)(D); and Three Years in Count Twelve, Tampering with Evidence, in violation of O.R.C. § 2921.12(A)(1)(B). Count Four merged with Count One for purposes of sentencing. The trial court ordered counts Seven through Twelve to run consecutive to Count One, for a total aggregated sentence of Thirty-three years to Life.

Bush, through court appointed appellate counsel did appeal from the judgment of the trial court to the Ohio Court of Appeals, Seventh Appellate District which affirmed the judgment of the trial court on September 22, 2014.

Bush, through counsel, filed a Petition for post-conviction relief pursuant to *O.R.C. § 2953.21* on May 5, 2014. On June 4, 2014, the trial court granted the State's motion for summary judgment and further dismissed Bush's petition for post-conviction relief.

Bush did not appeal from the trial court's judgment due to the fact that his post-conviction attorney Gary Levine never informed Bush that the petition had been filed and subsequently denied due to lack of credible evidence dehors the record, nor did Levine respond to numerous case update requests; thus the time to timely appeal had expired.

Bush filed several post-trial motions for relief including a Motion to Withdraw his Guilty Plea pursuant to Ohio Criminal Rule 32.1 due to ineffective assistance of counsel and allied offenses filed on December 8, 2015, which the trial court denied on January 12, 2016. Bush timely appealed to the Ohio Court of Appeals, Seventh Appellate District which affirmed the judgment of the trial court on June 21, 2017. Bush timely appealed that decision to the Supreme Court of Ohio which declined to accept jurisdiction on December 6, 2017.

Bush has timely submitted a federal habeas corpus petition pursuant to *28 U.S.C. § 2254* concerning the aforementioned issues that was denied by the U.S. District Court for the Northern District of Ohio following a request for reconsideration on December 6, 2019. Bush has timely filed

a motion for Certificate of Appealability that is presently pending with the U.S. Court of Appeals for the Sixth Circuit.

Pertinent to the case presently before this Honorable Supreme Court, on August 24, 2018, Bush filed a successive petition for post-conviction relief pursuant to *O.R.C. §§ 2953.21 and 2953.23*. in the trial court which the court dismissed on procedural grounds 14 days later, on September 7, 2018. (Appendix B attached hereto and incorporated by reference herein). Bush appealed to the Ohio Court of Appeals, Seventh Appellate District which affirmed the judgment of the trial court on September 26, 2019. (Appendix A attached hereto and incorporated by reference herein). Bush timely appealed to the Supreme Court of Ohio which declined to accept jurisdiction of the case on December 31, 2019. (Appendix C attached hereto and incorporated by reference herein).

Bush now timely submits this instant Petition for Writ of Certiorari to this Honorable Supreme Court to review the decisions below.

REASONS FOR GRANTING THE PETITION

Mr. Bush asks this Court to review one issue:

1. Whether a criminal defendant is denied his right to due process provided by the Fifth Amendment to the United States Constitution and conferred upon State Courts by the Fourteenth Amendment to the United States Constitution due to the State Court's application of a procedural bar to avoid addressing the merits of a defendant's petition where that defendant has a *prima facie* claim of actual innocence that has not been properly raised previously due to the ineffective assistance of prior counsel in violation of the Sixth Amendment to the United States Constitution.
- I. The State Court failed to acknowledge compelling state and federal case law that provides a gateway to bypass procedural bars in order to address a colorable claim of actual innocence.**

In the State of Ohio, Ohio Revised Code sections 2953.21 and 2953.23 govern petitions for post-conviction relief. Under *O.R.C. § 2953.21(A)*, a person convicted of a crime who claims "there was such a denial or infringement on the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States" may file a petition in the court that imposed sentence for the offense, "stating the grounds for relief relied upon, and asking the court to vacate or set aside judgment or sentence or to grant other appropriate relief."

There are strict time limits for seeking post-conviction relief under *O.R.C. § 2953.21*. Under the current version of *O.R.C. § 2953.21(A)(2)*, effective March 23 2015, a petition for post-conviction relief must be filed no later than 365 days after the date which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if no appeal is taken, no later than 365 days after the expiration of time for filing the appeal.

If a defendant's petition is untimely or a defendant files a "second petition or successive petition for similar relief," a court "may not entertain" the petition unless the petitioner satisfies the requirements of *O.R.C. § 2953.23(A)*. *State v. Long*, 1st Dist. Hamilton No. C-170529, 2018-Ohio-4194. Under *O.R.C. § 2953.23(A)(1)*, the trial court may not consider a delayed or successive petition for post-conviction relief unless the petitioner satisfies two requirements. First, the petitioner must

demonstrate that either (1) he was *unavoidably prevented* from discovering the facts upon which he relies in the petition, or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to the petitioner. *O.R.C. § 2953.23(A)(1)(a)*. Second, the petitioner must establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error at trial. *O.R.C. § 2953.23(A)(1)(b)*.

Bush did submit multiple deprivations of his constitutional rights therein with sufficient operative facts and supporting affidavits and evidence *dehors* the trial court to warrant a hearing. In this instant case, Bush was coerced into accepting the State's plea offer with misinformation of the length of sentence that would be imposed pursuant to the plea agreement, compounded with the fact that Bush's court appointed trial counsel completely failed to fulfill their adversarial role in their preparation and participation in the plea negotiation phase and the trial investigation and preparation phase, thereby rendering ineffective assistance based upon the prejudice that arises under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). When a trial counsel's deficient performance forced Bush into entering a guilty plea despite Bush's insistence that he desired to take his case to trial to prove his innocence; when trial counsel was not prepared to fulfill their adversarial role against the State's case, Bush was clearly prejudiced by trial counsel's ineffectiveness. It is important to note that yes, Bush did eventually plead guilty and recited the necessary words to have the judge accept his guilty plea, however it is vital to note that Bush was instructed by his counsel on what to say, he has averred to such in sworn affidavits, and being his first time in the criminal court system, relied heavily upon what his attorneys instructed him to do and say. The right to the effective assistance of counsel "extends to the plea bargaining process." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

United States District Court Judge Jeffrey J. Helmick ruled in the case of *Moon v. Robinson*, N.D. Ohio 1:12CV1396, 2013 U.S. Dist. LEXIS 108799 in footnote 2, page 5, the following:

“Respondent argues that the transcript of the plea proceedings demonstrate that Moon was advised of his rights and chose to plead guilty. Based on this record, Moon has failed to show that his trial counsel’s performance was deficient. Respondent’s conclusory arguments would nullify decades of Supreme Court precedent holding that *a guilty plea does not result in a waiver of a defendant’s constitutional right to the effective assistance of counsel* and therefore is unpersuasive. *McMann*, 397 U.S. 759; *Hill*, 474 U.S. 42; *Frye*, 132 S. Ct. 1399; *Lafler*, 132 S. Ct. 1376; see also *United States v. Wade*, 388 U.S. 218, 227. It is central to the principle of the right to counsel that in addition to counsel’s presence at trial, the accused is guaranteed that he not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” (emphasis added).

A defendant may attack the voluntary and intelligent character of a guilty plea by showing counsel’s advice “was not within the range of competence demanded of attorneys in cases.” *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

When Bush satisfied *O.R.C. § 2953.23(A)(1)*, then Bush’s petition for post-conviction relief is not time barred by *O.R.C. § 2953.21(A)(2)* where, although a defendant filed the petition beyond the time authorized by *O.R.C. § 2953.21(A)(2)*, it was to correct a *manifest injustice* concerning Bush’s constitutional and due process right violations, in this case by the ineffective assistance of trial counsel, post-conviction counsel and trial court error; thereby creating a manifest injustice which if not corrected, would cause a fundamental miscarriage of justice.

A trial court’s decision to deny a post-conviction petition without holding a hearing is reviewed for an abuse of discretion. *State v. Calhoun*, 86 Ohio St.3d 279, 284, 714 N.E. 2s 905 (1999). A trial court will be found to have abused its discretion when its decision is “unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E. 2d 1140 (1983).

Bush was unable to appeal his first petition for post-conviction relief filed through counsel (Gary Levine) due to the aforementioned fact that attorney Levine never provided any indication that the petition was filed (May 5, 2014) and subsequently dismissed by the trial court on June 4, 2014

without holding an evidentiary hearing for failure to attach any evidence *dehors* the record, and avoided repeated attempts by Bush and his family to contact Levine. Thus the time to appeal his initial petition had lapsed before Bush was even aware that it had been filed. Ohio does not provide for a delayed appeal of a petition for post-conviction relief, so Bush could not raise an ineffective assistance of counsel claim as it would have been a futile effort even though a review of the petition prepared by attorney Levine clearly demonstrates textbook ineffectiveness, lacking any evidence *dehors* the record; thereby creating a manifest injustice in this case and requiring Bush to file a successive petition once he was able to obtain the affidavits and exculpatory evidence from key eyewitnesses.

This Honorable Supreme Court held in *Maples v. Thomas*, 565 U.S. 266 (2012), that a lawyer's abandonment of a prisoner's case during state post-conviction proceedings constituted "cause" to excuse the procedural default of failing to file a timely notice of appeal from the denial of state post-conviction relief. This High Court invoked the reasoning of Justice Alito's concurring opinion in *Holland v. Florida*, 560 U.S. 631 (2010). Alito concluded in *Holland* that the prisoner's allegations, if true, would constitute an "extraordinary circumstance" justifying equitable tolling because "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Maples*, 565 U.S. at 282, quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring). This conclusion "hold[s] in both [the] contexts" of "tolling a federal time bar..." *Maples*, 565 U.S. at 282 n.7. See also, *Erwin v. Elo*, 130 F. Supp. 2d 887, 890 (E.D. Mich. 2001) that held equitable tolling for failure of counsel to notify petitioner of a court order with tolling consequences.

Clearly attorney Levine's failure to produce a viable petition and his complete abandonment of Bush and/or Karen Bush following his being retained which is corroborated by complaints filed by Karen Bush to the Cleveland Metropolitan Bar Association (ex. CMBA Case No. 150708-04) and the Ohio Supreme Court Disciplinary Counsel (File No. B8-2187A), constitutes ineffectiveness and

abandonment sufficient to allow equitable tolling of Bush’s State time bar herein. Other Circuit Courts are in agreement that egregious state post-conviction attorney conduct, as Levine in this case, is grounds for an extraordinary circumstance which affords equitable tolling to the petitioner. See *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007).

Attorney Levine’s deficient document aside, at the time of the filing of Bush’s initial state petition for post-conviction relief, Bush still would not have had the affidavit of a vital eyewitness, as bush was *unavoidably prevented* from obtaining the aforementioned affidavit from a vital eyewitness with firsthand knowledge of the incidents that have Bush presently incarcerated due to a restraining order that was in force from February 27, 2013 in Mahoning County Domestic Court Case Number 13 DV 56, Judge B. Smith, until it was modified on November 14, 2017. Submitting the petition without this vital evidence would have prejudicially affected the outcome of Bush’s petition for post-conviction relief.

This Honorable Court has held that a demonstration of *actual innocence* may also serve as a gateway to review of an otherwise barred claim, but the petitioner must present new evidence showing that “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.” See *McQuiggin v. Perkins*, 569 U.S. 383, 399, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). *Cradic v. Hutchinson*, 2019 U.S. App. LEXIS 7049 (6th Cir. Feb. 5, 2019).

In habeas cases much like the Ohio statute set forth previously, while equitable tolling is granted “sparingly,” the one-year limitation period may be overcome if a petitioner can “demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To show the danger of a fundamental miscarriage of justice, petitioner must make a “convincing showing” of actual innocence. *McQuiggin*, 569 U.S. at 386. This “requires petitioner to support his allegations of

constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, **trustworthy eyewitness accounts, or critical physical evidence** – that was not presented at trial.” *Schlup*, 513 U.S. at 324 (emphasis added).

Bush provided the State court with multiple eyewitness affidavits detailing the events surrounding the alleged crimes for which he was charged – that were not presented at trial, due to failures by both the investigators and Bush’s court appointed counsel, which clearly raise reasonable doubt that Bush was the person responsible for “striking the blow that caused the victim’s death” or physically endangering the victims in any way. Couple this affidavit testimony with the fact that nowhere in the medical reports are there any indications of any marks or abrasions on the victim from where Bush was alleged to have stomped on the victim with his boots on. Jurists of reason would debate that a 200+ pound grown man over 6 feet tall would not leave any marks on the victim if he brutally attacked him as he is accused of doing.

Additionally, Bush has provided the district court a transcript of an audio recording of his co-defendant’s best friend (Debbie Terry) stating that his co-defendant (Shain Widdersheim), the victim’s mother, told Ms. Terry on the day Bush was arrested that she (Widdersheim) knew that Bush did not kill her son (victim T.F.) and that in fact one of her twin sons did it. Again, none of this new evidence was presented to the court and “in light of the new evidence, no juror, acting reasonably would have voted to find [Bush] guilty beyond a reasonable doubt.” *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). It should be noted as well that some of this evidence was not presented at trial due to the detectives investigating the case failing to interview known eyewitnesses and these detectives have a history of criminal police misconduct that was not brought up during the prosecution of Bush’s case. In 2001 Jeffrey Lewis (lead detective working Bush’s case), then working for the Youngstown, Ohio police department was fired following an investigation into his handling of a 2000 investigation into an incident that happened at a bar that he owned. It was determined that

Lewis had **falsified police reports** and withheld a witness, **falsely accusing and arresting an innocent man**. After failing polygraph tests and being found at fault for these actions, Lewis was fired and the City was sued for \$1million. Lewis was branded a “Brady” or “Giglio” cop for the remainder of his career. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Shortly after the investigation into Bush, the other detective on Bush’s case, Raymond Greenwood, was fired from the Struthers, Ohio police department for untruthfulness and insubordination. Detective Jeffrey Lewis also no longer works for Struthers P.D., but as a patrol officer in another local municipality.

Bush’s innocence claims are plainly visible and asserted in no uncertain terms within his motion to withdraw his guilty plea as well as all appeals and petitions thereafter. He also repeatedly told his trial counsel and appellate counsel that he was innocent of all of the crimes for which he was charged even though he was coerced into pleading guilty by the ineffectiveness of his court appointed attorneys.

The United States Supreme Court holds that *actual innocence*, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup*, *supra*, and *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064 (2006), or, as in this case, alleged expiration of the statute of limitations set by AEDPA. “These decisions ‘see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.’ *Schlup*, 513 U.S. at 324, 115 S. Ct. 851. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA’s statute of limitations.” *McQuiggin v. Perkins*, *supra*. *Actual innocence* of a crime is the perfect example of “cause and prejudice” to allow a claim to be heard on collateral review avoiding a procedural default.

It is important to note that a guilty plea does not necessarily preclude an *actual innocence* claim. A petitioner may claim *actual innocence* for the purposes of bypassing a procedural bar, even if his conviction was the result of a plea. *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); See also *Waucaush v. United States*, 380 F. 3d 251, 258 (6th Cir. 2004) (finding petitioner actually innocent of charge to which he pled guilty). *Connolly v. Howes*, 304 F. Appx. 412, 417 (6th Cir. 2008).

The United States 6th Circuit Court of Appeals has held that in light of the “grave constitutional concerns” about the conviction of an innocent person, “we believe equitable tolling of the statute of limitations based on a credible showing of actual innocence is appropriate.” *Souter v. Jones*, 395 F. 3d 577, 602 (6th Cir. 2004). This Honorable Court agreed with the 6th Circuit stating “we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). “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 persons.” *Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 1931 (2013).

The precedents set by the federal courts, including this Honorable Supreme Court, clearly set forth gateways for circumventing a procedural bar where there is a colorable claim of *actual innocence*. Thereby, the Court of Appeals of Ohio for the Seventh Appellate District and the Supreme Court of Ohio’s dismissal of Bush’s constitutional claims without holding a hearing or addressing the merits of the issues therein constitutes a clear discrepancy between the rulings of the aforementioned State courts and clearly established federal precedents and case law.

Denying a man who may be innocent of the crimes that have him incarcerated the relief he seeks solely on a procedural default substantially undermines the fundamental principles of justice that are the foundation of faith in our justice system. The fundamental principles of our justice system require that every accused citizen of our great country be given his constitutional and due process rights insured by our founding fathers, that an individual receives a *fair, just, and impartial* legal proceeding. When the police do an inadequate job of investigating; the prosecutor, with the assistance or permission of the court, violates the constitutional rights of the accused, then we can have nothing but a manifest miscarriage of justice which is yet another condition set forth by this Court in *Murray v. Carrier*, supra, for bypassing a procedural bar that the State courts have ignored in Bush's pursuit for justice herein, leaving an innocent man wrongfully incarcerated.

The truth cries out for justice which will lead to the facts vindicating Bush of the heinous crimes for which he is incarcerated. As a famous justice of this Honorable Court once said, it is better to free a hundred guilty men than to incarcerate one innocent man. Bush asserts if due diligence was put forth in discovering the actual facts of this case, justice would have prevailed and Bush would not be presently incarcerated.

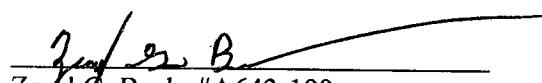
The review of this case by this Honorable Court is paramount to ensure that American Citizens wrongfully accused of a crime and incarcerated due to ineffective counsel or investigative and/or prosecutorial misconduct are given their fair and just opportunity to present their claims to the courts as required by the Fifth and Sixth Amendments and applied to the State Courts by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Bush is presently serving thirty-three (33) years to life in State prison for crimes that he did not commit. Considering the foregoing arguments, he has made a substantial showing of the denial of his constitutional right to due process of law under the Fifth and Fourteenth Amendments to the

United States Constitution, as well as the effective assistance of counsel guaranteed by the Sixth Amendment. In addition, Bush's *prima facie* claims of *actual innocence* resulting in a manifest miscarriage of justice provide ample grounds for circumventing any procedural bar that may be in place. The State Courts have denied Bush the opportunity to litigate the merits of his petition for post-conviction relief, in clear contradiction to the rulings and case law set forth above. This case, if left unaddressed by this Supreme Court, sets a dangerous precedent that will result in the continued abuse of State defendants' constitutional rights, especially those with a colorable claim of *actual innocence*. Therefore, this instant petition for a Writ of Certiorari should be Granted in the interest of law, justice, equity and good conscience and to prevent a manifest miscarriage of justice.

Respectfully submitted,


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