

No. _____

In The
Supreme Court of the United States

ROBERT BARNES,

Petitioner,

v.

BILL STANGE, Warden,
Southeast Correctional Center,

Respondent.

**On Petition For A Writ Of Certiorari To the
Supreme Court of Missouri**

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. SCHRIENER
COUNSEL OF RECORD FOR THE PETITIONER
LAW & SCHRIENER LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105
314-721-7095 – telephone
314-863-7096 – fax
kschriener@schrienerlaw.com

QUESTION PRESENTED FOR REVIEW

Petitioner Robert Barnes is serving a life sentence for crimes that he did not commit. The state's complaining witness was five-years old at the time of the alleged incident and did not testify against Petitioner until nine years later. Against this backdrop, the complaining witness's mother attempted to kill Petitioner and was convicted of first-degree assault and received a fifteen-year sentence. Both the complaining witness and his mother gave testimony that either conflicted with prior statements or could not have happened. The Circuit Court, Court of Appeals, and Missouri Supreme Court denied Petitioner habeas relief without conducting an evidentiary hearing or appointing a special master to review the case.

The question presented is:

Did the Missouri courts err in failing to find that Petitioner had established a gate-way claim of actual innocence so that his defaulted constitutional claim could be addressed violating his rights to due process, effective assistance of counsel, and to be free from cruel and unusual punishment?

LIST OF PARTIES

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

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In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Barnes respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court entered in this case.

OPINIONS BELOW

The final judgment and mandate by the Missouri Supreme Court on March 17, 2020, denying Petitioner's habeas petition is attached as Appendix A. The order of the Missouri Court of Appeals, Southern District, denying Petitioner's state habeas petition on December 13, 2019, is attached as Appendix B. The October 8, 2019, judgment of the Thirty-Third Judicial Circuit (Mississippi County, Missouri) denying Petitioner's petition for writ of habeas corpus is attached as Appendix C.

JURISDICTION

The Missouri Supreme Court issued its denial of Petitioner's petition for writ of habeas corpus on March 17, 2020, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition. This petition, postmarked August 14, 2020, is timely filed pursuant to SUP. CT. R.

13.3, and this Court's March 19, 2020, Order.

CONSTITUTIONAL PROVISIONS INVOLVED

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." U.S. Const. amend. VI, § 1.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII, § 1.

The Fourteenth Amendment to the United States Constitution provides: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The State of Missouri charged Petitioner with four counts of first-degree statutory sodomy and one count of child molestation. Petitioner maintained his innocence and proceeded to trial. *See State v. Barnes*, Cause No. 03CR48835-01 (Circuit Court of Scotland County, 1st Judicial Circuit).

Trial

At trial, the complaining witness's mother, RAM, testified that she had decided to kill Petitioner before DRM alleged that he (Petitioner) had molested him. Also, RAM testified that DRM told her several different versions of how Petitioner allegedly molested him. First, she testified that DRM told her that "Moose" had shown him how to masturbate and that Moose had shown him his penis. Also, she testified that DRM told her that he had walked in on "Moose" in the bathroom, that he showed him "magazines of girls," and was always making masturbation gestures. RAM shot Petitioner approximately a week later. On the night she shot Petitioner, DRM allegedly told her that "Moose" had put his pee in DRM's mouth. Also, RAM testified that she had taken DRM to the interviews with Tommy Capps, a State Technical Assistance Team member.

Tommy Capps, a State Technical Assistance Team member who does child abuse and neglect investigations, testified that DRM told him that "Moose"

touched his pee-pee with his hand and his own pee-pee, and DRM touched Moose's pee-pee. During his interview with DRM, DRM replied to questioning about what "Moose" touched his pee-pee with and what he touch "Moose" with, he replied it was his hands. Also, Capps testified that DRM first said that no one touched him on his pee-pee, then said his cousin Tyler had done so. At an interview three months later, DRM told Capps that in addition to touching each other's genitals with their hands, they each put the others genitals in their mouths but did not mention any genital-to-genital contact.

AK, DRM's aunt, testified that DRM told her that he had watched a "porno" with his babysitter and she observed DRM exhibit sexual behavior towards her son. She did not believe that she told RAM about any of this. On the day RAM was arrested for shooting Petitioner, DRM allegedly told AK that "Moose" had touched his pee-pee.

Dr. Bendt, who performed a SAFE examination on DRM, testified that DRM told her that no one had touched his genitals with their mouth, but he and the alleged perpetrator had masturbated each other. He also said that "Moose" took off his pants and touched his pee-pee and made him do the same to Moose, and that Moose also touched his penis to DRM's penis.

The complaining witness, DRM, who was five years old at the time of the allegations and fourteen years old at the time of trial, testified that “Moose” babysat him twice and that the incidents occurred on his (“Moose”) couch. He testified that he was pretty sure that “Moose” was his only babysitter in 2001. He could not remember what “Moose’s” apartment looked like and could not remember a sexual incident involving his cousin Tyler.

Child advocacy interviewer Dolly Lewis testified that she spoke with DRM in January 2009 - eight years after the molestation allegedly occurred. DRM told her over the course of five sessions that he performed oral sex on Moose and that Moose did the same to him.

Danielle O’Brien, a therapist, who worked with DRM after a referral some eight years after the alleged incident, testified that DRM wrote that he performed oral sex on Petitioner, and Petitioner did the same to him.

Petitioner denied that he touched DRM. He met RAM in mid-February 2001, when he gave his neighbor a ride to her house for the neighbor to buy marijuana. At the end of March on a Friday night, he saw RAM on a street corner and she was crying. She said she needed to go to Illinois and find her boyfriend but needed someone to watch DRM. She begged Petitioner to watch DRM. Petitioner testified that he did not want to do it but she offered to pay him and he

agreed. During the first time Petitioner babysat DRM, he wet the bed and later came into the bathroom as Petitioner was getting out of the shower. RAM was supposed to return on Sunday but did not come back until Sunday and did not pay Petitioner. Petitioner testified that RAM later confronted him about DRM seeing his penis and he explained what happened. She was satisfied with this answer. RAM returned on the Friday night of Easter weekend with DRM. She had to go to Illinois again and left DRM with Petitioner until Monday without clothes or food.

In June, RAM came to Petitioner's apartment and asked him if he would ride to Bethany with her new boyfriend Timothy Squires because she was dropping him off at work and did not want to ride alone. On the way, they stopped in the country by a bridge and they asked Petitioner to help them look for Squires's logbook in the weeds. Squires was a trucker and his truck had burned at this location. Squires went back to the vehicle to get a flashlight. At this time, something hit Petitioner's face and then he heard a second gun shot. Petitioner was shot in the arm and face. RAM and Squires left him and he walked two miles to a house for help covered in blood and mud.

Verdict/Sentencing

The jury found Petitioner guilty on all counts. The trial court sentenced Petitioner as a persistent offender to life sentences on the four statutory sodomy

charges and to a ten-year sentence on the child molestation charge. All sentences to run concurrently.

Evidence Of Gateway Innocence

1. *RAM - Motivation*

No evidence came out at trial as to RAM's motivation to kill Petitioner regarding her involvement in the drug trade and Petitioner's theft of marijuana from her. The Prosecuting Attorney for Clark County, Brenda Swedberg, did not believe that RAM shot Petitioner because he allegedly molested her son; but to keep him quiet regarding a drug conspiracy. Also, she believed RAM accused Petitioner of molestation to get Squires to help her shoot him. Petitioner believes RAM was motivated by his theft of marijuana from her and her belief that he was a snitch. Evidence of RAM's peripatetic lifestyle came out at trial. At trial, RAM testified that she decided to kill Petitioner even before she had learned that he had allegedly molested her son. Also, she had other boyfriends and associates who were involved in the drug trade. Her trial testimony was vague and impossible. Specifically, she testified that she had taken DRM to his interviews with Capps. This was impossible as she was incarcerated at that time.

2. *DRM's Testimony was Unbelievable*

DRM's statements to the police and others, and his trial testimony, were incredible and could have been easily disproved. Although there was testimony that DRM said he had watched pornography at Petitioner's apartment, he also contradictorily stated during interviews that the television had a shattered screen. The police, however, seized no laptop, computer, pornography videos or video playing devices from Petitioner's apartment. Also, there was no chair, water pipe, walk-in closet, condoms, telephone or operating television in the apartment as DRM had stated during interviews. Similarly, no marijuana was found in Petitioner's apartment as had been stated by DRM. In fact, the police seized marijuana from Petitioner's apartment almost two months before DRM's presence in the apartment. Moreover, DRM knew way too much about sex. Trial counsel cross-examined RAM as to whether she had ever performed sexual acts in front of DRM, and questioned her on the nickname of Jerry Yoder, who also went by the name "Moose."

3. *No Physical Evidence Connects Petitioner to This Crime*

At trial, the State presented no physical evidence that Petitioner had molested DRM. There was no testimony of sexual assault or that Petitioner's DNA had been found on DRM.

4. *Evidence Not Presented at Trial - Ineffective Assistance*

Dolly Lewis testified that DRM told her that “Moose” had gray public hair. Evidence existed as to Petitioner’s physical appearance, that he did not have gray chest or public hair. Also, Petitioner and his wife would have testified that he usually keeps his pubic area shaven. Petitioner would have testified that at the time of the allegations, his pubic hair had been shaved. Trial counsel was ineffective for failing to present this evidence at trial. *Strickland v. Washington*, 466 U.S. 668. 687-88 (1984). Given the state’s main witnesses’s (DRM, RAM) testimony, a reasonable competent lawyer in similar circumstances would have presented this evidence. *Id.* If trial counsel had presented such evidence, there is a reasonable probability that the outcome of Petitioner’s trial would have been different. As set out below, Petitioner has passed through the actual innocence gateway which allows review of his procedurally defaulted claim of ineffective assistance of trial counsel.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT TO STOP THE STATE OF MISSOURI FROM REFUSING TO COMPLY WITH ITS OBLIGATIONS UNDER *SCHLUP V. DELO*.

Missouri courts recognize this Court's actual innocence jurisprudence in reviewing habeas claims by state prisoners. *See Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000), A showing of actual innocence overcomes rules of procedural default that would otherwise bar consideration of claims and evidence. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Habeas corpus is available in Missouri to correct a fundamental miscarriage of justice, and "[t]he quintessential miscarriage of justice is the execution [or lengthy incarceration] of a person who is entirely innocent." *Schlup*, 513 U.S. at 325.

If Petitioner can show "a constitutional violation has probably resulted in the conviction of one who is actually innocent," a Missouri state court is free to reach the merits of Petitioner's constitutional claims, even if he has procedurally defaulted his claims by failing to assert them properly in prior proceedings. A prisoner is "actually innocent" within the meaning of this standard if in light of new evidence "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006), quoting *Schlup*, 513 U.S. at 327; see also *McQuiggin v. Perkins*, 569 U.S.

——, 133 S.Ct. 1924, 1935 (2013).

Because of RAM's motivation for alleging abuse and coaching DRM into accusing Petitioner was not presented at trial; DRM's incompetency at the time of the alleged incidents and the length of time before trial which affected his memory; the lack of physical evidence; and the evidence not presented at trial, the Missouri state courts should have either had a hearing or appointed a special master to review Petitioner's claim of actual innocence. After reviewing the above evidence, it is more likely than not that no juror would have found Petitioner guilty if trial counsel had presented evidence contradicting the complaining witness's prior statements or his mother's motivation to accuse Petitioner of the crimes for which he was committed. *Schlup*, 513 U.S. at 327.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari and issue a writ of certiorari to review the decision of the Missouri Supreme Court.

Respectfully submitted,

KEVIN L. SCHRIENER

Counsel of Record for Petitioner

LAW & SCHRIENER LLC

141 North Meramec Avenue, Suite 314

Clayton, Missouri 63105

314-721-7095 – telephone

314-863-7096 – fax

kschriener@schrienerlaw.com

August 14, 2020

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