

JUL 17 2020

OFFICE OF THE CLERK

No. 20-5179

IN THE  
SUPREME COURT OF THE UNITED STATES

ALBERTO GUILLEN — PETITIONER  
(Your Name)

vs.

TIMOTHY C. FOX  
(Attorney General) — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALBERTO GUILLEN #3008639  
(Your Name)

CCC-Crossroads Correctional Center  
50 Crossroads Drive

(Address)

Shelby, Montana 59474

(City, State, Zip Code)

N/A

(Phone Number)

**ORIGINAL**

## **QUESTION(S) PRESENTED**

- 1) Is the complete failure to investigate potentially corroborating witness (the victim Roberto Guillen) be considered and accepted as a tactical decision, and not ineffective assistance of counsel and actions (above) does not violate the petitioner's U.S. constitutional rights Amendments 5,6, and 14?
- 2) Was the defendant's plea unknowing, unintelligent, and involuntary, after considering that the attorney failed to investigate any of the witnesses which included alibi witness (the victim Roberto Guillen), who signed an affidavit stating, the incident was an accident, and testified that the incident was an accident?
- 3) Was it ineffective assistance of counsel when counsel failed to investigate witnesses (which includes the victim Roberto Guillen) before sentencing?
- 4) Did the United States court of appeals decide an important question of federal law in error and in a way that conflicts with relevant decisions of this court when deciding not to apply and overlook the Schlup actual innocence inquiry, and constitutional error in this case.

## **LIST OF PARTIES**

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

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:

TIMOTHY C. FOX (Attorney General)  
215 North Sanders  
P.O. Box 201401  
Helena, Montana 59620

Solicitor General of the United States  
Room 5616  
Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530-0001

## **RELATED CASES**

Guillen v. McTighe, 2019 U.S. Dist. LEXIS 225804

Guillen v. AG of Montana, 2020 U.S. Dist. LEXIS 14175

This is all I could find the legal research hear is inadequate and outdated with also out dated books for reserch.

And the equipment part broken I can't use functions, please excuse.

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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

reported at 2020 U.S. Dist. LEXIS 14175; 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 to the petition and is

reported at 2019 U.S. Dist. LEXIS 225804; 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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was APR 17 2020

No petition for rehearing was timely filed in my case.  
The Judge determined motions filed would be moot.

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**

United States Constitution:

Amendments....5,6, and 14

the right to a fair trial

the right to effective assistance of counsel

the right to equal protection of the law

the right to due process

## STATEMENT OF THE CASE

- 1) United State court of appeals has decided an important questions of federal law in a way that conflicts with other appellate courts and relevant decisions of this court on the same issue and legal questions, and should be settled by this court.

United States court of appeals has decided in this case that the petitioner's trial counsel's failure to investigate potentially corroborating witness (the victim Roberto Guillen) was a tactical decision, and not ineffective assistance of counsel and actions by counsel does not violate the petitioner's U.S. constitutional rights Amendments 5, 6, and 14, the right to effective assistance of counsel, the right to due process, and the right to equal protection of the law.

Which decisions (above) by U.S. court of appeals is in conflict with these court of appeals on the (above) decisions:

United States v. Debango, 780 F.2d 81,85(D.C. Cir. 1986)

(complete failure to investigate potentially corroborating witness can hardly be considered a tactical decision).

Bryant v. Scott, 28 f.3d 1411,1419 (5th Cir. 1994)

(duty to investigate includes obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence).

Towns v. Smith, 395 F. 3d 251,259, (6th Cir.2005)005)

(ineffective assistance where counsel "made absolutely no attempt" to communicate with crucial witness that would have testified that defendant did not commit crime).

Adams v. Bertrand, 453 F.3d 428,436 (7th Cir. 2006)

(ineffective assistance where counsel failed to investigate witness that could have swung the case in his client's favor").

Marcrum v. Luebbers, 509 F.3d 489,502 (8th Cir. 2007)

(it is not the "court's commission to invent strategic reasons or accept any strategy counsel could have followed without regard to what actually happened; when a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has

rebutted the presumption of strategy, even if the government offers a possible strategic reason that could, but did not, prompt counsel's course of action").

United States v. Gray, 878 F.2d 702, 712 (3rd Cir. 1989)

(attorney had a duty, at the very least, to apprise himself of victim's account of the incident, even if he would later have decided based on information he obtained not to use it).

Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972)

("When a defence counsel fails to investigate his client's only possible defense, although requested to do so by him; and fails to subpoena witnesses in support of the defense, it can hardly be said that the defendant has had the effective assistance of counsel.").

And decisions (above) by U.S. court of appeals, has decided an important question of federal law in a way that conflicts with relevant decisions of this court:

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See Williams, 529 U.S. at 390 (applying Strickland as the "clearly established federal law" that governed petitioner's ineffective assistance claim). In Strickland, the Supreme Court recognized that the right to counsel guaranteed by the Sixth Amendment includes "the right to effective assistance of counsel." 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

For the court's convinince the petitioner has attached the Petition for Habeas Corpus (which has attached transcripts of relevant court proceedings, Evidentiary Hearing). This will be Appendix F of this court filing.

#### EVIDENCE AND SUPPORTING FACTS:

Appendix F -Hebeas Corpus Petition, Attached Appendix A Transcript 1/19/16 Page 109, Petitioner's attorney (Edmund F. Sheehy Jr.) testified:

Q = Prosecutor

A = Attorney(ES)

Q. So the first thing I'd like to ask you about is his concern that you

had not interviewed his brother, Roberto, prior to the change of plea in this case. Tell us about your thinking there.

A. Well, the police had interviewed Roberto, and, Roberto, all he could tell them was that either his brother had hit him while he was riding his bike, or he ran over him.

I then also saw a newspaper interview in the Missoulian in the fall of 2011 where Roberto was recovering. I think, in a rehab center, and he told the Missoulian, "This is the guy that ran over me," talking about his brother, Alberto.

Q. Okay. Is there anything about--I--I guess, so based on that, why did you choose not to speak to him before the change of plea or sentencing?

A. Because I didn't think he would help his brother's case, help Alberto's case, because he was saying he ran over him.

And on Page 119 of this transcript (EH), Attorney (ES) also testified to:

A. Well, I had to rely on what was there from Roberto because it wouldn't have done us much good for me to have gone and interviewed him and got something saying this was an accident because then that makes it a trial issue.

United States court of appeals had decided in this case that because the attorney (ES) read a police report and a news paper and then decided not to interview (the victim Roberto Guillen), resulted in effective assistance of counsel.

Which decisions (above) by U.S. court of appeals is in conflict with these court of appeals on the (above) decisions:

Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003)

(Counsel's reliance on state's investigation was ineffective assistance where exculpatory eyewitnesses existed).

Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984)

(investigation consisting solely of reviewing prosecutor's file "fell short of what a reasonable competent attorney would have done").

And decisions (above) by U.S. court of appeals, has decided an important question of federal law in a way that conflicts with relevant decisions of this court:

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (the Supreme Court held that counsel's exclusive reliance on a psychological evaluation, a presentence investigation report, and social-service record was unreasonable when further investigation would have uncovered copious evidence).

2) United States court of appeals has decided an important questions of federal law in a way that conflicts with other appellate courts and relevant decisions of this court on the same issue and legal questions, and should be settled by this court.

United States court of appeals has decided in this case that it was not unreasonable for trial counsel to not investigate any of the witnesses (which includes the victim Roberto Guillen), and that the petitioner's plea was knowing, intelligent, and voluntary, and that the petitioner did not receive ineffective assistance of counsel.

Which decisions (above) by U.S. court of appeals is in conflict with these court of appeals on the (above) decisions:

Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990)

("When a lawyer advises his client to plea bargain to an offence which the attorney has not investigated, [s]uch conduct is always unreasonable.").

Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984)

(failure to investigate alibi witnesses and defendant's competency was ineffective assistance and rendered defendant's plea unknowing and involuntary).

And decisions (above) by U.S. court of appeals, has decided an important question of federal law in a way that conflicts with relevant decisions of this court.

Henderson, 411 U.S. at 267, 93 S. Ct. at 1608.

(A prisoner may show that a guilty plea was not voluntary and intelligently entered because his trial counsel rendered ineffective assistance).

Attorney(ES) failed to exercise the skill and diligence that a reasonable competent attorney would exercise under similar circumstances and that he (the petitioner) was prejudiced by his attorney's ineffectiveness. See, e.g., Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984); Hill v. Lockhart, 731 F.2d 568, 572(8th Cir. 1984).

Representation afforded to the petitioner(AG) by his appointed attorney (ES) was inadequate; consequently, Alberto's plea was not a "knowing and intelligent" act. McMann v. Richardson, 397 U.S. 759, 774, 25 L. Ed. 2d 763, 90 S. Ct. 1441(1970). There is a "reasonable probability" [\*\*6] that, but for [the various failures of the attorney], the result of the [plea proceedings] would have been different "See Strickland, 104 S. Ct. at 2068.

For the court's convenience the petitioner has attached the Petition for Habeas Corpus (which has attached Post-conviction Relief Petition and attached to that is the victim's Roberto Guillen Affidavit). This will be Appendix F of this court filings.

#### EVIDENCE AND SUPPORTING FACTS:

Appendix F -Habeas Corpus Petition, Attached Appendix C the victim's (Roberto Guillen) Affidavit, and it states:

Comes now Roberto Guillen brother of the defendant, Alberto Guillen, in the above named case, wish that the court accepts my truthfull statement. I previously completed a Victim Impact Statement before my brother's sentencing(December 29, 2011) and Submitted it to the Pre-sentence investigator and prosecutor. However, it is my understanding that the

Victim Impact Statement was never presented to the courts (THE FOURTH JUDICIAL DISTRICT COURT FOR THE DISTRICT OF MONTANA).

It is my understanding that Sherry Sleepingbear made false statements in the pre-sentence investigation report stating that, I, Roberto Guillen was unwilling to submit a Victim Impact Letter and "wants nothing to do with his brother." These statements made by Sherry Sleepingbear are false. She had no authority to speak for me. The Victim Impact Statement that I made had concerns, that I did not want my brother to receive a long prison sentence. My brother suffers from mental issues and is in need of psychiatric help. I do not have any ill feelings against my brother.

It is my understanding that Sherry Sleepingbear made false statements at my brother's sentencing (Dec. 29 2011). She made false statements that she had my consent to speak on my behalf, as well as making false statements of my medical condition and my mental frame of mind. She also made the false claim at my brother's sentencing and the pre-sentence investigation report that I was permanently paralyzed, which are false statements. I, Roberto Guillen am not permanently paralyzed. I ride a stationary bicycle, I stand up, and do squats. I'm strengthening my legs and can walk.

Since recovering from my injury from accident the memory of what occurred is now clear in my mind. As I jumped on my bike and entered the roadway in front of the van, I accidentally got in the way as the van was moving. My brother Alberto was accelerating the van and it struck me, running me over and my bike, this certainly was not intentional on his part, although after stopping the van and coming over to me, his panic was apparent to me. I recall him saying that help was on the way, a neighbor was on his cellphone calling 911. After confronting me he left the scene, but the accident should not have resulted in my brother being sent to prison. The incident was an accident.

Appendix F - Habeas Corpus Petition, Attached Appendix A Transcripts 12/15/15 Page 26-27 Roberto Guillen testified:

Q=Petitioner's Attorney

A=Roberto Guillen (victim)

Q. (By Mr. Sullivan) Okay. Roberto, as the judge just said, this is already a part of the file, and so I'm not going to ask you a lot of questions about it, but do you recognize this document?

A. Yes.

Q. And did you---

A. I didn't get a chance to actually read it all right now.

Q. No. But you read it before.

A. Uh-huh.

Q. And you signed it because everything in there is true and accurate statement?

A. Yeah. I'm----making sure. Yeah, Yes.

In the above court transcript Roberto Guillen(victim) testified to a two page Affidavit that was part of the petition for Post-conviction Releif. He signed this Affidavit and tesified that it was true and accurate statements of what he wanted to convey to the courts.

Appendix F -Habeas Corpus Petition, Attached Appendix A Transcripts 12/15/15 Pages 30-31

Q= Prosecutor

A= Roberto Guillen(victim)

Q. Okay. When did you remeber what you testified about in terms of your swerving the bike in front of your brother's van? When---when did that memory come back to you?

A. I guess pretty much when I left the hospital.

Q. And do you remember when you left the hospital?

A. A month after.

Q. And where did you go?

A. I believe to the Providence Center.

Q. Okay. And then where did you go?

A. To my apartment.

The above testimony from the victim Roberto Guillen is evidence that about a month after the incident and entering the rehab center(Providence Center),he remembered the accident and that he accidentally vered in front of the van.The Public Deffenders Office,which is about a five minute walk(Attorney(ES) was within walking distance).Then after the victim spent some time in the rehab center he went to his apartment which was seven blocks from the rehab(Providence Center).The petitioner's attorney had five months to investigate and interview the victim(Roberto Guillen),but it seems he spent that time reading news papers and the prosecutor's file.

All Evidence and Supporting Facts are in support of all four federal Questions Presented, and all information and questions are in support of each other.

3) United States court of appeals has decided an important questions of federal law in a way that conflicts with relevent decisions of this court on the same issues and legal questions, and should be settled by this court.

United States court of appeals has decided in this case that the petitioner's trial attorney did not perform ineffective assistance of counsel for failing to investigate and or interview the victim(Roberto Guillen), before sentencing, and actions (above) was strategic.

These decisions (above) conflict with these Supreme Court decisions:

The prevailing professional norms demanded that trial counsel conduct a thourgh investigation of a defendant's background in order to develope a strategy for the penalty phase of trial. See Williams v. Taylor, 529 U.S. 362(2000).

Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003), (the Supreme Court held that counsel's exclusive reliance on a psychological evaluation, a presentence report, and social-service records was unreasonable when further investigation would have uncovered copious evidence.

Evidence and Supporting Facts (above) displays the victim's (Roberto Guillen) Affidavit which shows Mitigating evidence of the petitioner's life history, medications, mental states, and innocence claim for the petitioner. Also the many falsehoods the (grilfreind) Sherry Sleepingbear testified to at the petitioner's sentencing, and falsehoods in the presentence report. Which would have made different outcome in the court proceedings. And the sentencing judge said, I'm sentencing you to the maximum of the sentence because of what Serry Sleepingbear said. See Appendix F - Habeas Corpus Petition, Appendix F Judgment Page 4. Which shows that the petitioner (AG) was prejudiced by his attorney's lack of performance.

- 4) United States court of appeals has decided an important questions of federal law in a way that conflicts with relevant decisions of this court. on the same issues and legal questions, and should be settled by this court.

United States court of appeals has decided in this case that there are no constitutional claims, and that the Schlup actual innocent inquiry and other innocence inquiries do not apply to this case.

These decisions (above) by U.S. appeals court conflict with these Supreme Court decisions:

Schlup analysis threshold for procedural claim of innocence is lower than Herrera and does not itself provide an independent basis for relief. Most importantly, a Schlup petitioner faces a lower threshold because he asserts constitutional error at trial, and his conviction is

accordingly not entitled to the same degree of respect as one concededly free of the taint of constitutional error. Schlup, 513 U.S. at 315-16, 115 S. Ct. at 861. Therefore, a petitioner asserting both actual innocence and constitutional error has less of a burden than a petitioner who claims only actual innocence. The Schlup actual innocence inquiry does not concern itself with the merits of the constitutional error, but is conducted from the perspective of whether, in light of the newly discovered evidence and if the constitutional error had not occurred, it is more likely than not, on juror, acting reasonable, would have voted to find the petitioner guilty beyond a reasonable doubt. Schlup, 513 U.S. at 327-29. 115 S. Ct. at 867-68; Pope, ¶ 58; Redcrow, ¶ 33. As in this case before the court today.

The petitioner attempts to demonstrate that "in light of new evidence; it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." citing House, 547 U.S. at 537 (quoting Schlup, 513 U.S. at 327); McQuiggin, 133 S. Ct. at 1930. Which must apply to this case before the courts today.

The issues and questions presented in this petition violated the petitioner's United States constitutional rights Amendments 5, 6, and 14, the right to a fair trial, the right to effective assistance of counsel, the right to equal protection of the law, and the right to due process. The (above) issues shows that the petitioner(AG) is a state prisoner who's detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.

#### EVIDENCE AND SUPPORTING FACTS

The petitioner(AG) attached a motion(Request for a Hearing) to the Habeas Corpus Petition that was filed on (Jan 28 2019) and in this motion (has an Exhibit A, which is a Supplement Affidavit from the victim(Roberto Guillen)) and it states:

I Roberto Guillen would like to address the court to clarify the

incident that lead to my accident dated about(7/31/2011).The District Court in Missoula and the Supreme Court in Helena are holding it against me in there determination in my brother's criminal case,that I had no memory of being struck by the van while at the hospital and after the accident. I would like the federal court to know,I was under the influence of Morphine medication and a lot of pain medications perscribed by the doctor.I had sustained head troma and fractured spine and a lot of surgeries were being performed on me.I would like for courts not to hold this against me. I testified at evidentiary hearing,that at this time at the hospital I was speaking with angels. But after about a month I could remember what happend that the incident was an accident because I swerved in front of my brother's van.In the District Court of Missoula and the Supreme Court of Helena they make conclusion that I testified at evidentiary hearing that I possibly swerved in front of my brother. I did not testify that it was a possibility I swerved in front of my brother.I stand by my original statement in the Affidavit I signed December 17,2014,since recovering from my injuries from accident the memory of what occurred is now clear from my injuries from accident the memory of what occurred is now clear in my mind.As I jummped on my bike and entered the roadway infront of the van,I accidentally got in the way as the van was moving I was involved in the accident I saw what happend.I had a good view of what happend,I looked everywhere,I saw everything,it was an accident my brother did not intentionaly hit me.I am sure.

I would hope this federal court excepts my truthful statements.

The court can find this document in the attachment to this petition as: Appendix F -Habeas Corpus Petition,Attached Appendix L Request for a Hearing,Exhibit A Supplement Affidavit(by the victim Roberto Guillen).

There is a miscarage of justic in this case,the petitioner(AG) did not know that his attorney did not investigate the victim and misslead him into beleiving he had done so,information by the victim shows with competemt advice,is a reasonable probability the plea process would have been different.citting Lafler v. Cooper,566 U.S. 156,163,132 S. Ct. 1376,182 L. Ed. 2d 398(2012).

## REASONS FOR GRANTING THE PETITION

For all people to have the right to go to a fair trial and effective assistance of counsel, and for people to receive due process rights, which will afford equal protection of the laws and United States Constitution. When you are a person with brown skin these laws and constitutions doesn't seem to apply to someone like me. Which is part of a reason why the petitioner(AG) would hope that this court would grant this petition for reasons contain in the petition. It would not just help me, but many in the future.

May the courts please excuse the petitioner(AG),he does not have higher learning,he just obtained a GED in prison.So when the petitioner makes claims the appellate courts decided,would mean they viewed the case and saw petitioner(AG) argument but ruled no constitutional claims,which makes them complices with lower court rulings.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alberto Guillen  
Date: 7/16/2020

This Petition was turned in to the prison legal mailing system on  
and pre-paid postage flat rate U.S. mail.

7/16/2020 Date Alberto Guillen

### **DECLARATION**

I certify the the information in this document is true and correct to  
the best of my knowledge.

7/16/2020  
Dated

Alberto Guillen  
Signature