20-5387

No. ____________

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ABRAHAM A. AUGUSTIN — PETITIONER
(Your Name)

vs.

STATE OF TENNESSEE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Abraham A. Augustin
(Your Name)

P.O. Box 1032
(Address)

Coleman, Florida 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether Statute of limitations bars a defendant from raising a claim of actual innocence?

2. Whether a defendant charged with accessory after the fact to a Crime of a principal can be found guilty if the principal was found not guilty?

LIST OF PARTIES

[X] 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:

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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

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

The opinion of the United States court of appeals 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[ ] is unpublished.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 United States district 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[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix __A__ 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[✓] is unpublished.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 __Criminal McMinn County__ court appears at Appendix __B__ 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[✓] is unpublished.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 ____________________.

[ ] 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 April 28, 2020. A copy of that decision appears at Appendix A.

[ ] 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, 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 th State and district wherein the crime shall have been Committed, which district shall have been previously ascertained by law, and to be informed of th nature and cause of th 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.

2. Fourteenth Amendment, United States Constitution provides:
No state . . . shall 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.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Abraham A. Augustin, Pro Se, submits this petition for a Writ of Certiorari to appeal. In support, Petitioner would show as follows:

1. Judgment Appealed From

Augustin seeks permission to appeal from the judgment entered by the **Court Of Criminal Appeals of Tennessee** on April 28, 2020. No petition for rehearing was filed. The Supreme Court of Tennessee denied review on July 17, 2020. A copy of the **April** 28, 2020 Judgment and Opinion of the Criminal Court of Appeals (Appendix A), Order of the Tennessee Supreme Court denying review on July 17, 2020 (Appendix C), and decision of the Trial Court (Appendix B) are provided in the Appendix.

2. Questions Presented for Review

There are two questions presented for review. As will become apparent, the two questions that are the subject of this petition touch upon all four (4) factors Augustin begs this Court to consider in deciding whether or not to grant the Writ of Certiorari.

The first question presented is, Whether Statute of Limitations bars a defendant from raising a claim of actual innocence? This question goes to the matter of the procedural bar claim used to deny Augustin relief. It is this Court's position that this issue is controlled by the actual and amount of evidence presented as proof of actual innocence. This question involves the interpretation and application of the rigorous standard of Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). In order to make a showing of actual innocence under Schlup, a petitioner must present new evidence showing that "'it is more than likely than not that no reasonable juror would have convicted (the petitioner).'" Schlup, 513 U.S. at 327.

It is controlling U.S. Supreme Court's decision, and Augustin's position, that actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling; therefore, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the reliability of the evidence of actual innocence. McQuiggin v. Perkins, 133 S. Ct 1924, 1936, 185 L. Ed. 2d 1019 (2013).

As a result of the decision of the Tennessee Court of Appeals contrasted with the clear language of the U.S. Supreme Court's instructions, a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. See Rule 10(c) of the Supreme Court of the United States.

The second question presented concerns whether a defendant charged with accessory after the fact to a crime of a principal can be found guilty if the principal was found not guilty. This raises the issue of miscarriage of justice.

By granting this Writ, the Court can answer two questions. The first appears to be an interpretation and application of U.S. Supreme Court authorities. The second question relates to the prevention of a miscarriage of justice when an accessory is charged solely based on the action of a principal, but then that principal is later found not guilty of the criminal offense charged and used to also charge the accessory. What happens then to the accessory that was charged with being an accessory to that principal and his not guilty offense? If the criminal link between the principal and accessory is severed (through a not guilty verdict of the principal), what link/evidence can then be used to sustain the conviction of that accessory.

3. Statement of the Case

The relevant facts necessary to frame the question for review were stated in the Court of Appeals opinion issued in Appendix A, however they are provided here for the convenience of the Court.

On March 1, 2019, Augustin filed for post conviction relief on a claim of actual innocence on the plead offenses due to Ineffective Assistance of Counsel. On March 7, 2019, the criminal court denied relief due to Statute of Limitations. See Appendix B.

On March 21, 2019, Augustin filed a Motion to Reconsider (Cert. Mail No.: 7015 1660 0000 2829 1286). The Clerk of Court did not file this motion nor included it in the Appellate Technical Record. However, it was refiled and attached to a later motion.

When the criminal court never answered the Motion to Reconsider, Augustin filed a Motion to Obtain Status on July 22, 2019. On August 7, 2019 the Criminal Court issued a Responsive Notification stating: it did "not recognize a motion to reconsider."

On September 4, 2019 Augustin filed a Notice of Appeal.

4. Statement of Facts

On August 27, 2005 Augustin and Marcus Bradford drove to Athens, Tennessee to attend a house party. Mr. Bradford was already intoxicated before he even left Cleveland, Tennessee, where Augustin picked him up.

Upon arriving in Athens, Augustin (driver) was asked by Bradford (passenger) to stop at a K-Mart parking lot so Bradford who had previously resided in Athens could ask for directions. This was Augustin's first time in Athens.

Mr. Bradford obtained the directions; but on the way out of the parking lot, he asked Augustin to stop the vehicle near a pick-up truck so he could speak to the three occupants (2 males and a female) who were sitting on the pick-up truck's bed. Bradford and Augustin did not know the identity of the three occupants.

Augustin stopped the vehicle and Bradford exited the vehicle, walked to the occupants (several feet from the vehicle), and began engaging them in a conversation alone. Augustin never exited the vehicle.

During this engagement with the occupants an altercation ensued. Bradford suddenly brandished a firearm and fired two shots at the two males: The first shot grazed one victim's neck, while the second struck the second victim's leg. Bradford then immediately ran back to the vehicle with weapon in hand and yelled at Augustin to leave. Augustin complied. The still-intoxicated Bradford demanded to be driven to the house party he had just obtained the directions to.

When Augustin arrived in the apartment complex (where the house party was), Athens police was waiting and arrested Bradford and Augustin.

Augustin and Bradford were both initially charged with three counts of Attempted First Degree Murder. However, later, as a result of the victims' preliminary hearing testimony that Bradford did not know the victims and the victims' admission that they never saw Augustin nor could they identify Augustin if he had not been arrested and in Court that day, Augustin's

Counts Were amended to Accessory after the Fact to Attempted First Degree Murder.

Augustin's Counsel advised him to plead guilty, even though it was apparent by evidence presented by preliminary hearing that Bradford did not know the Victims' identity and location before the shooting and therefore could not have the premeditation to meet the Attempted First Degree Murder elements (and Augustin, as a result, could not be found guilty of having been an accessory after the fact to Bradford's offenses).

As a result of his Counsel's advice, on September 11, 2006, Augustin pleaded guilty to the three counts of Accessory After the Fact in Violation of Tennessee Code Annotated Section 39-11-411. He was sentenced on September 14, 2006.

MeanWhile, upon his Counsel's advice, Bradford took his offenses to trial and Was found NOT GUILTY of the three Attempted First Degree Murder counts.

5. Background of the Issues on Appeal

The first question for consideration by this Court pertains to whether statute of limitations bars a defendant from raising a claim of actual innocence. This Court's ruling in McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) is instructive.

The facts between McQuiggin and instant case are similar. Both petitioners did not file for post-conviction relief, asserting actual innocence until more than 11 years after their convictions became final. And this Court ruled in such Circumstances, Where a petitioner is claiming actual innocence, the post-conviction Court must address the merits of the claims, excuse procedural bar of the statute of limitations under the miscarriage of justice exception, in order to prevent a Constitutional Violation's probability in resulting in the conviction of one who is actually innocent. The Court stated:

"We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of the statute of limitations." Id. at 1928

Furthermore, the Court instructed that a post-conviction court "faced with an actual-innocence gateway claim, should count unjustifiable delay on an habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." Id. See also Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) ("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.") The Court ruled "a credible showing of actual innocence may allow a prisoner to pursue his Constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. This rule, or fundamental miscarriage of justice exception, is grounded in the equitable discretion of habeas Court to see that federal Constitutional errors do not result in the incarceration of innocent persons." McQuiggin, 133 S Ct. at 1931.

Augustin asserted his Constitutional Violation was his Sixth Amendment right to effective assistance of counsel that led him to enter a plea of guilty (as an accessory after the fact) to a crime that the principal (that Augustin was accused of being an accessory after the fact to) was found not guilty of (the offenses) at trial. And the newly discovered evidence (discovered after Augustin's guilty plea and sentencing) establishing actual innocence is the NOT GUILTY verdict of the principal offense that Bradford was accused of having Committed, and Augustin was accused of having been an accessory after the fact to.

In McQuiggin v. Perkins, the Supreme Court held that a petitioner who can show actual innocence under the rigorous standard of Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage of justice exception. In order to make a showing of actual innocence under Schlup, a petitioner must present new evidence showing that "'it is more than likely than not that no reasonable juror would have convicted (the petitioner).'" McQuiggin, 133 S Ct. at 1935 (quoting Schlup, 513 U.S. at 329) (addressing actual innocence as an exception to procedural default). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the reliability of the evidence of actual innocence. Id at 1936.

The State of Tennessee in its brief pointed out that the U.S. Supreme Court in McQuiggin denied relief. (See Brief of the State of Tennessee, p. 9-10) However, it was after the Court weighed the newly discovered evidence and addressed the merits of Perkins' newly discovered evidence, i.e., the 3 affidavits. Simply put, the Court did not find the affidavits material and substantial enough to meet the rigerous Schlup standard to cast doubt on the guilty verdict. That is, the Court did not find the affidavits substantial enough and "more than likely than not that no reasonable juror would have convicted" Perkins. In addition and as a result of this conclusion, the Court then addressed Perkins' "nearly six years" waiting-period in bringing his claim Id. at 1931. Nevertheless, the Court did address the merits of the new evidence and its effect on Perkins' guilty verdict, first and foremost, then subsequently addressed his "delay fall[ing] far short of demonstrating... diligence." Id. Had Perkins' evidence met the Schlup standard, his nearly six years waiting period in bringing his claim would have been inconsequential. In instant case, Augustin was denied this examination.

The state trial court looked first and foremost at the statute of limitations. Finding Augustin was over the one-year period, it looked no further and found Augustin's claim procedurally barred. The court never weighed the new evidence, i.e., Bradford's Not Guilty Verdict, against the Schlup standard. This is a violation of Augustin's Fourteenth Amendment Right.

Augustin asserts his claim of actual innocence warrants "equitable exception," not "equitable tolling." McQuiggin, 133 S. Ct. at 1931. See Rivas v. Fisher, 687 F.3d 514, 547, n. 42 (CA2 2012) (distinguishing from "equitable tolling" a plea to override the statute of limitations when actual innocence is shown). Decisions of this Court support Augustin's view of the significance of a convincing actual-innocence claim. The state court was required to first weigh the evidence of actual innocence and if it met the Schlup standard, grant equitable exception. The error was evident in the appellate court's opinion when it sided with the state: "The state asserts that the post-conviction court did not err because the petition was untimely and does not satisfy a statutory exception or tolling for due process considerations. We agree with the State." See Appendix A, p. 2, and concluded, "the Petitioner has failed to establish a basis for tolling. The Petitioner provides no details regarding the verdict in Mr. Bradford's trial or when the verdict was rendered. We conclude that such a claim does not justify the filing of a post-conviction petition more than eleven years after the expiration of the statute of limitations," p. 4.

Even if Bradford may have been found guilty of lesser/other offenses, Augustin highlights he was not charged and convicted of accessory after the fact to lesser/other offenses. Augustin was charged with and convicted for three counts of Accessory After the Fact to Bradford's three counts of Attempted First Degree Murder — the very three counts of Attempted First Degree Murder Bradford was found Not Guilty at trial.

Moreover, taking the state's position to another scenario, if a defendant unlawfully convicted and sentenced for rape and murder presented newly discovered DNA evidence that another person was the assailant, instead of weighing the DNA evidence the state would want to know "when" and "details regarding" the discovery of the DNA showing actual innocence. And finding no claim for equitable tolling the state court would deny relief and keep the innocent man in prison or with the unlawful conviction.

Why does and should it matter how long a defendant waits. As long as the newly discovered evidence is not strategically delayed to prevent the cross-examination of an important witness or "lie in wait and use stale evidence to collaterally attack his conviction ... when an elderly witness has died and cannot appear at a hearing to rebut new evidence," McQuiggin, 133 S. Ct at 1936, the delay should not matter. This Court commented on this exact position when it stated: It would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar Section 2244(d)(1)(D) erects, yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition. See 670 F.3d, at 673 ("Requiring reasonable diligence effectively makes the concept of the actual innocence gateway redundant, since petitioners ... seek [an equitable exception only] when they were not reasonably diligent in complying with Section 2244(d)(1)(D)."). Id at 1935.

The state is mistaken. This court instructed, "time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].' " Id. at 1933.

In effect, due to Augustin's explicit "claim of actual-innocence" in his post-conviction petition, the trial court was required to use the Schlup standard. That is, had a jury been presented evidence that the principal (Bradford) — that Augustin was accused of being an accessory to — was found not guilty of the offenses at trial, could such an evidence "more likely than not" lead the jury to find Augustin also Not Guilty. Augustin was denied this due process.

The second issue presented for consideration concerns whether Augustin can still be found guilty of accessory after the fact to Bradford's Attempted First Degree Murder counts if Bradford was later found not guilty of said offenses at trial. Augustin argues in light of Bradford's not guilty verdict, it is impossible that he could be found guilty. Under the Schlup standard, if Augustin proceeded to trial and presented to the jury the fact that Bradford (he is accused of being an accessory after the fact to) was found Not Guilty of Attempted First Degree Murder, it is impossible that any jury would have convicted him still of the accessory after the fact.

Augustin made no tolling claim in his post-conviction petition because his new evidence of actual innocence actually met the Schlup standard and therefore became an exception to procedural default and statute of limitations.

6. Reasons Supporting the Grant of Writ of Certiorari

A. The Need to Secure Uniformity of Decision

The post-conviction court declined to address the newly discovered evidence and merits of Augustin's actual innocence claim, stating "Petitioner makes no tolling claim in this Petition, and the Statute of limitation bar prevents consideration of his claims on the merits." Appendix B - P. 7. The state in its Response on appeal made the same argument. And the Tennessee Criminal Court of Appeals denied Augustin's claim without addressing its merits, based on the argument that Augustin "has failed to establish a basis for tolling." Appendix A - P. 4.

This decision to ascertain equitable tolling first, before addressing the merits of a claim of actual innocence, similar to placing the Cart before the horse, is contrary to this Court's ruling and directions in McQuiggin. The U.S. Supreme Court ruled because an actual innocence provide an exception to the Statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim. Augustin highlights he is not presenting affidavits from random individuals who's honesty and reliance are unknown to the Courts. Unlike the (hear say) affidavits presented by Perkins in McQuiggin, Bradford's not guilty verdict is material to finding Augustin guilty.

This Court directed post-conviction Courts to weigh and address the newly discovered evidence first, and if the new evidence meet the rigorous Schlup standard then petitioner need not demonstrate reasonable diligence since his actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling. But the post-conviction and appellate courts decided to seek first a claim of tolling, and finding none in the post-conviction petition only, the Courts did not address the merits and ignored the new evidence of actual innocence.

The second issue being directly tied to the first involves irrefutable and material evidence of innocence: Augustin cannot be found guilty of accessory after the fact if Bradford was found not guilty of the crime that Augustin was accused of being an accessory after the fact to. These two considerations need the U.S. Supreme Court to secure uniformity with the State Court.

B. The Need to Secure Settlement of Important Questions of Law

Considering the second factor, the need to secure the settlement of important questions of law, both questions implicate this factor as well. Beginning with the first question of Whether a claim of actual innocence is barred by statute of limitations, and the Way this Court has determined courts are to first address the Weight and merits of a newly discovered evidence of actual innocence "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), this Court's guidance is needed. While the U.S. Supreme Court seems to provide the answer to the question of law posed by this petition, the fact that this petition is being made, demonstrate that it is unanswered. That presents a rather direct question to this Court. Do the controlling U.S. Supreme Court precedents embracing this issue control, or can trial and appellate courts adjudicate these cases in contravention of the U.S. Supreme Court precedents? By providing an answer to this question this Court can settle this question of law by announcing What the law actually is.

The second question also embraces the second factor. As discussed in the preceding Section, Augustin's guilty conviction is directly tied to and solely relies on Bradford's guilty conviction of the offense charged. If Bradford Was later found not guilty, What link or evidence can be used to sustain Augustin's conviction? The important question of law pertains to What evidence can be used to sustain such a conviction.

C. The Need to Secure Settlement of Questions of Public Interest

This first question also touches on the third factor as to important questions of public interest. The U.S. Supreme Court directs a particular procedure for claims of actual innocence. In contrast, the Tennessee Criminal Appeals Court Opinion permits post-conviction courts to follow a different procedure prescribed by the U.S. Supreme Court. Based on this conflict, this question is ripe for response. This case provides the opportunity for this Court to answer a question of public concern as to what the law actually is.

As to the second question, and questions of public interest, the public needs to know what standard can be used to sustain the conviction of an accessory to a crime if the principal is found not guilty

D. The Need for the Exercise of the Supreme Court's Supervisory Authority

Finally, this petition implicates the fourth factor, the need for the U.S. Supreme Court to exercise its supervisory authority as to both questions presented. Based on the preceding, this Court has the authority to instruct the lower courts as to what the law is. By addressing the first question, this Court may direct lower courts to follow the U.S. Supreme Court (Schlup, Herrera, McQuiggin, etc.) procedure as to claims of actual innocence, i.e, weighing the evidence of innocence and, if sufficient, excuse the statute of limitations, or the Court may choose to allow the trial and appellate courts to do as they have but at least it will be clear what the procedure is. Either way, taking up this petition and exercising the Court's supervisory authority, the Court will provide a basis for uniform decisions, answer questions of law and questions of public interest.

The same is true as to the second issue. In granting this petition, the Court may also secure uniformity in decisions, answer questions of law and public interest by setting a standard that an accessory has to meet in order to sustain a conviction. Through the exercise of its authority, the U.S. Supreme Court can direct the lower courts as to what amount of evidence can be used to convict an accessory after the fact to a crime if the principal has been found not guilty.

CONCLUSION

In Conclusion, the factors addressed in this petition weigh in favor of granting the petition, primarily because this case presents an opportunity to answer questions which touch upon all four factors so considered. This case involves the interpretation and application of the standard a post-conviction court is to follow when facing a claim of actual innocence and what comes first: The evidence proving innocence or the claim of tolling. The obvious conflict between the U.S. Supreme Court precedents and the holding of the Court of Criminal Appeals of Tennessee argue for an answer and direction from this Court.

Additionally, the second question gives the Court the opportunity to announce whether an accessory's conviction can be sustained without the principal's conviction and set a standard how a Court should address the issue. In short, there are important and unresolved questions of law which distinguish this case and necessitate permissive review by this Court to settle the same.

Therefore, based on the following, Augustin respectfully requests that the petition for writ of Certiorari be granted.

Dated this 2nd day of August, 2020.

Respectfully Submitted,

Abraham A. Augustin