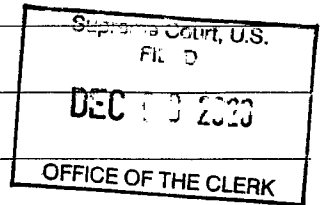


No. 20-5735

RKB

In The
Supreme Court of the United States



Michael Dean Perry, Petitioner-prose

vs.

Bobby Lumpkin, Director, TDCJ-Respondent

Ken Paxton, Attorney General of Texas

Susan Sam Miguel, Assistant Attorney General

Edward L. Marshall, Chief, Criminal Appeals, et al;

On Petition for A Writ of Certiorari to

Fifth Circuit Court of Appeals, New Orleans, La.

(Texas Court of Criminal Appeals, Austin, Tx. et al;)

Petition for Rehearing Rule 44
Certification

To the Honorable Judge of Said Court;

Comes now Mr. Michael Dean Perry, Petitioner in the above
entitled and numbered cause herein, proceeding prose and in Forman
papers and files this Certification pursuant to rule 44 of The
Supreme Court Rules whereas, the rules require Perry to file a

1. Petition For rehearing of any judgment or decision of the Court on the [Merits] shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.

The petition shall be presented together with certification of Counsel (or of a party unrepresented by Counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of Counsel (or of a party unrepresented by Counsel); A copy of the certificate shall follow and be attached to each copy of the petition.

Wherein, Petitioner avers that this Appeal, and Motion For a Rehearing is presented in good faith and not for delay, or to harass the respondents, only that justice may be served!

Whereas, there never has been an adjudication on the Merits of this Appeal/Case! Nor has Perry ever been granted a full, live, and fair Evidentiary Hearing, NOT in State Court OR Federal Court!

In fact, this honorable Court Denied the Writ of Certiorari without an opinion or ruling based on the Merits! Nor did the clerk return Perry's documents in order for him to prepare the Motion For Rehearing! All of the aforesaid is in violation of Perry's Fifth and Fourteenth Amendments due process of Law Rights!

Respectfully Submitted

Michael Dean Perry

Unsworn Declaration

I, Michael Dean Perry Docket # 1838822 being presently incarcerated in the Texas Department of Criminal Justice at the Mc Connell Unit, 3001 S. Emily Drive, Beeville, TX 78602 Declare Under the penalty of perjury that the above and foregoing is true and correct.

Executed on this the 8 day of December 2020

By the Petitioner Michael Dean Perry

Certificate of Service

I, Michael Dean Perry Docket # 1838822 do hereby certify that a true and correct copy of the above and foregoing certificate of good faith and not for delay, unsworn declaration, and certificate of service have been served by placing same in the U.S. Mail, first class postage prepaid on this the 8 day of December 2020

By the Petitioner Michael Dean Perry

No 20-5735

In The
Supreme Court of The United States

Michael Dean Perry - Petitioner-pro se

vs.

Bobby Lumpkin - Director, TDCJ - Respondent

Ken Paxton, Attorney General of Texas

Susan San Miguel, Assistant Attorney General

Edward L. Marshall, Chief, Criminal Appeals, et al;

On Petition for A Writ of Certiorari to;

Fifth Circuit Court of Appeals, New Orleans, La.
(Texas Court of Criminal Appeals, Austin, Tx et al;)

Petition for Rehearing Rule 44

To The Honorable Judge of Said Court;

Comes now the Petitioner Michael Dean Perry, proceeding pro se and in forma pauperis, in the above entitled and numbered cause herein and files his Motion for rehearing pursuant to Supreme Court rule 44, and for good cause Perry would show this honorable Court the following;

Petitioner avers vociferously that he has been denied his substantial due process rights-right to be heard, rights to discovery and to be free from illegal search and seizure and cruel and unusual punishment since his initial arrest. Notwithstanding his fundamental right to the Great writ of Habeas Corpus, Alvario Flight that shall never be suggested.

Perry avers that he was never granted discovery in the state court or federal court. See Exhibit A, a motion filed by Perry in the US District Court, Eastern District of Texas, Tyler Division No. 6:16-cv-008. Nor has Perry ever been granted a full, fair, and live Evidentiary Hearing. See Exhibits B, C, Exhibit D was a motion for Evidentiary Hearing that was filed on July 27, 2016 in the US District Court, Southern District of Texas, Galveston Division No. 3:16-cv-00162. This motion explains in pungent detail why Perry is wrongfully imprisoned and entitled to relief, if not an acquittal, at least a new and back to the District Court for a fair, full, and live Evidentiary Hearing and an adjudication on Perry's merits and actual innocence claims. And/or grant Perry permission to refile his 28 USC § 2254 Habeas Corpus and the Evidentiary Hearing. So that Perry can submit the newly discovered evidence of the illegal search and seizure of his home and the recent Affidavits from the alleged victim.

Now see United States v. Butler, 955 F.3d 1052 (D.C. Cir. 2020) D.C. Circuit Reverses Nearly 50-year-old Murder Conviction

over Faulty Hair Evidence! Recanted testimony as well!
Alie fueled by fear! Indeed, Alanna McKinney did in fact
have pending Felony charges before Perry's erroneous trial,
charges that she received Probation for after trial, and of
which was never disclosed!

Notwithstanding the demonstrative knife use at Perry's trial!
There was an illegal Search and Seizure at Perry's Home and
not just his back pack! "Fruit of the Poisonous Tree Doctrine!"
A Fourth Amendment Violation, Right? So called Brady Viol-
ation See Brady vs Maryland, 83 S. Ct. 2892 (1963) Cited in Exhibit
A page 5. See also page 4. of Exhibit C. There is an epidemic of
Brady violations abroad in the land!

Perry avers that Police lacked Probable Cause and a Valid
Search Warrant to Search either his back pack or Home! All
evidence used against Perry at his trial was inadmissible as
Fruit of the Poisonous Tree and was barred by the exclusionary
rule of the Fourth Amendment of the United States Constitution!
And that would include the Demonstrative knife as well!
See the Grandmother, Wilma McKinney's Sworn Affidavit
in which she avers that Police barged into our home without
permission or a Search Warrant, took a bunch of pictures of
the bedroom door and picked up the actual innocuous paring knife
Perry dropped and took it with them! The Police and D.A. never
disclosed any of this to Perry! Perry avers that the affidavits
submitted by Wilma McKinney and Alanna McKinney are
Newly Discovered Evidence and are Material! Perry was entitled

to time tolling and an adjudication on the actual merits of all of Perry's grounds in his habeas corpus Application. See exhibit C, pages 10-13.

The state misapplied established Federal law and thus, Perry was entitled to relief pursuant to 28 USC § 2254 (d)(1) see also *Rompilla v. Beard*, 545 U.S. 374 (2005); *Artuz v. Bennett*, 531 U.S. 4 (2000); *Leonard v. Deville*, 960 F.3d 164 (5th Cir. 2020) Fifth Circuit Clarifies AEDPA Time Limit.

Again, on the illegal search and seizure issue, Perry avers that there have been several more recent rulings clarifying what constitutes a violation of the Fourth Amendment, see *Ryan Austin Collins, Petitioner v. Virginia, Supreme Court of the United States*, 138 S.Ct. 1663; 201 L.Ed.2d 9; 2018 U.S. Lexis 3210/124 Argued January 9, 2018; Decided May 29, 2018; Case Summary: Partially enclosed section of a driveway where a motorcycle was parked was curtilage protected by the Fourth Amendment, and the automobile exception did not permit an officer to enter the curtilage without a warrant to search the motorcycle; the automobile exception did not justify an intrusion upon the separate interest in the home and curtilage.

For Fourth Amendment purposes, the conception defining the curtilage is familiar enough that it is easily understood from one's daily experience. Just like the front porch, side garden, or area outside the front porch or window, a driveway enclosure that constitutes an area adjacent to the home and to which the activity of home life extends is properly considered curtilage.

Perry avers that Surely the use of the pictures of the inside of his home were illegal! The State conceded that the search of Perry's back pack in his driveway was illegal, but never disclosed the illegal search of his home. Hence, the demonstrative knife v/c at Perry's erroneous trial! The Police picked up the actual innocuous paring knife Perry dropped on the floor in his home and took it with them! "Brady Violation!"

See, the Motion to Suppress Evidence Supposedly Filed in the 188th District Court on February 25, 2013, by Perry's Court Appointed Attorney, Tim Cone. Apparently the Motion was never ruled on by the Court right? Hence, the demonstrative knife v/c and the use of the pictures from the inside of Perry's Home! The use of the demonstrative knife was just as illegal, anyway, go look at it! Appendix (10) Motion to Suppress!

As an aside: Perry just received back the Motion to Suppress Evidence from the Thurgood Marshall School of Law Innocence Project (RE: ECI # 2016-03017-Perry, Michael April 3, 2019) on or about December 3, 2020 that document and others were finally returned by their Para legal Tabitha Porter. And Perry avers that most of the Courts in the case at bar have not returned the documents submitted by Perry and that would include this honorable Court as well!

For another example of illegal search and seizure that was also recently ruled on see; United States Vs. Neugin, 958 F.3d 924 (10th Cir. 2020) Reversed!

Notwithstanding the fact that Perry's Habeas Corpus Appeal has never been adjudicated on the merits due to alleged procedural

errors made by Perry! Perry avers that he was entitled to time tolling due to newly discovered evidence, new rule of law or precedence, and/or Actual Innocence. And/or Brady Violations.

Again, Perry was entitled to a (COA) Certificate of Appealability to appeal the district court's denial of his 60(b) motion and appointment of counsel. And an adjudication on the merits of his wrongful conviction and imprisonment.

See the Fifth Circuit's denial of COA No. 18-41126 in part:

Although Perry claimed that his Rule 60(b) motion was based on a mistake, newly discovered evidence, fraud, or other reasons justifying relief, he has not identified anything that qualifies for those bases. Perry's arguments are primarily directed at the district court's dismissal of his underlying 28 USC § 2254 application, which is not currently before this court. His argument that his Rule 60(b) motion should have been granted based on his showing of actual innocence relies on the same claims that were raised and rejected by the district court in his § 2254 application.

And Perry avers that he did in fact identify specific bases of facts that would entitle him to relief. The District Court denied Perry relief (COA), by first adjudicating some of his grounds, like his actual innocence, without first conducting an evidentiary hearing or an adjudication on the merits in state court, and without jurisdiction, remember Budek v. Wainwright? Perry avers that the § 2254 was not a second or

Successive application and he never really got the chance to amend the 3354 in order to correct any procedural errors. The district court erroneously claimed that the pleading he filed for an extension of time to pay the \$5.00 filing fee was his amended complaint, when it was not. Perry asserts that he filed a myriad objections to the facts and conclusions in what he disagreed see Douglas V. United Services Auto Assn. 79 F.3d 1415 (5th Cir. 1996) All to no avail. The district court ignored all of Perry's objections. And likewise, the Fifth Circuit Court of Appeals. Perry raised 49 grounds each on both A.R.T. 11.07 Habeas Corpus applications that he incorporated into the 38 USC; 3354 federal Habeas Corpus. Perry also explained in pungent detail all of the defects in the integrity of both the state and federal habeas proceedings, of which the aforesaid was outlined in Perry's Rule 60(b) motion and in the writ of Certiorari. Perry further asserts that, at least, any jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that any jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack V. The District of Columbia, 529 U.S. 473, 484 (2000) And Perry asserts that any jurists of reason would first have to review all of the exculpatory and impeachable evidence in order to make an informed decision. That the state destroyed 800 plus pages of the exculpatory and impeachable evidence Perry submitted with his A.R.T. 11.07

Writ of habeas corpus applications, but there also never has been a finding of facts and conclusions of law, no affidavit submitted by any of King's dubious court appointed attorneys, no evidentiary hearings in state court or federal court. The only adjudication on any of King's grounds, merits there of, was done without jurisdiction and plenary powers. Again, see Bucks v. Wainwright, 504 U.S. 222 (1992). In re Davis, 119 F.3d 245, 248 (3rd Cir. 1997) (where another avenue of judicial review available for a party who claims he/she is factually or legally innocent for both). would be faced with a flawed constitutional situation. Miller, 141 F.3d at 978 (noting that while a petitioner claims actual innocence, as King does, the limitations period raises the serious constitutional ques. Thus, which possibly renders the habeas remedy inadequate and ineffective). Holloway v. Jones, 166 F.3d 21185 at 1190 (holding that the use of AEDPA one year limitations period to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause, as well as the Eighth Amendment's ban on cruel and unusual punishment. In deed, concern about the injustice that results from the conviction of an innocent person has have been at the core (395 F.3d 602) of our criminal justice system. That concern is reflected in the Fundamentals (2005) U.S. App. Lexis 58) Value determination of our society that it is far wiser to convict an innocent than to let a guilty

'Man go Free.' See *Schlup*, 513 U.S. at 325 (quoting *In re Whinniship*, 397 U.S. 358, 372, 25 L.E.2d 368, 905 Ct. 1068 (1970) (Harlan J. Concurring)). In light of these grave Constitutional concerns, we believe equitable tolling of the Statute of Limitations based on a credible showing of actual innocence is appropriate!

In sum, we hold that where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him/her guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying Constitutional claims.

Prayer

Wherefore, premises considered, Perry respectfully prays that the honorable Court grant him the relief he request herein, reverse and demand this case to the District Court for a full, fair, and live Evidentiary Hearing, with a proper finding of facts and conclusions of law and an actual adjudication of All of Perry's grounds on the merits and a little due process of law, and such other and further relief to which he may be justly entitled, at law and in Equity, or Just Cause Be shown.

Respectfully Submitted

Michael Dean Perry pro se

Date filed: 12/8/2020

Unsworn Declaration

I, Michael Dean Perry, No. 1838822 being presently incarcerated in the Texas Department of Criminal Justice at McCombs Unit, 3001 S. Emily Drive, Beeville, TX 78102. Declare under penalty of perjury that the above and foregoing is true and correct.

Executed on this the 8 day of December 2020

By The Appellant Michael Dean Perry

Certificate of Service

I, Michael Dean Perry, No. 1838822 hereby certify that a true and correct copy of the above and foregoing Motion for Rehearing, Unsworn Declaration, and Certificate of Service have been served by placing same in the U.S. Mail, first class postage prepaid on this the 8 day of December 2020

By The Appellant Michael Dean Perry

Return Service Requested.

**Additional material
from this filing is
available in the
Clerk's Office.**