No. 20-7690

ORIGINAL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JON TERRANCE WINZER, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES SUPREME COURT

5th CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE

PETITION FOR WRIT OF CERTIORARI

JON TERRANCE WINZER
(Your Name)

17544 Tunica Trace, Louisiana State Penitentiary
(Address)

Angola, La. 70712
City, State, Zip Code)

N/A
(Phone Number)

QUESTION PRESENTED FOR REVIEW

Mr. Winzer alleges that he was properly before the 5th Circuit Court of Appeal with his Application for a Certificate of Appealability, thus denying review of his 14th amendment claim of actual innocence.

QUESTION 1.

Did the Fifth Circuit Court of Appeal err in allowing the Western District Court to deny his 28U.S.C. Sec. 2254 petition as being improperly filed?

QUESTION 2.

Did the Fifth Circuit Court of Appeal err in allowing the Western District Court to deny his 28 U.S.C. Sec. 2254 petition as being improperly filed without considering the compelling evidence of Mr. Winzer's innocence?

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:

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

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 appear at Appendix "A" to the petition and is

[X] reported at; or, **19-30716**
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

[ ] reported at **Civil Action 19-0658**; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix "C" to the petition and is

[X] reported at *State v Winzer 2014-2373 (La. 4/22/16)* ; or, **Louisiana Supreme Court do not have**
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Second Circuit Court of Appeals appears at Appendix "D" to the petition and is

[X] reported at, *State v. Jon Terranc Winzer* 151 So 3d 135 or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 12/22/2020.

[x] No petition for rehearing was timely filed in my case.

[N/A] 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 _____.

[N/A] An extension of time to file the petition for 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 court:

[N/A] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[N/A] An extension of time to file the petition for 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 FEDERAL PROVISIONS INVOLVED

U.S. CONT., AMEND. XIV

Section 1. 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.

28 U.S.C. §2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to he judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such a process ineffective to protect the rights of applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirements or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim I State court proceedings, the

court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce the part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing

such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel fro an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254. (It is Mr. Winzer understanding that this law has been changed pursuant to the holdings of **Martinez v. Ryan,** 132 S.Ct 1309.)

STATEMENT OF THE CASE

On July 12, 2017, Mr. Winzer filed his post conviction application into the District Court. The 3rd Judicial District Court denied Mr. Winzer's application On July 31, 2017. On August 30, 2017. Mr. Winzer filed his writ application into the Louisiana Court of Appeals, Second Circuit. Mr. Winzer's writ application was subsequently denied on November 15, 2017 *State v. Wizner*, **2018-0203**(La. 1/28/19), 262 So. 3D 891 by the Louisiana Court of Appeals, Second Circuit. Following this denial, Mr. Winzer, on December 12, 2017, filed his Supervisory writ into the Louisiana Supreme Court. The Louisiana Supreme Court denied certiorari on January 28, 2019.

On January 30, 2019, Mr. Winzer filed a shell petition into the Western District Court of Louisiana, requesting an extension of time/stay on a 28 U.S. C. Sec. 2254 application.

It must be explicitly stated that the denial in the above cases were never considered on their merits but rather were denied on the procedural grounds of being untimely. Mr. Winzer has provided the relevant courts with dated and signed Offender Indigent/Legal Mail forms proving his timeliness in the State court proceedings.

Mr. Winzer also provided the Western District Court and Fifth Circuit Court of Appeals with compelling newly discovered evidence of his actual innocence to the crimes for which he was charged. Newly discovered evidence which was presented well within statutory limitations.

REASONS FOR GRANTING THE WRIT

I. THE WESTERN DISTRICT OF LOUISIANA AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLICATION OF 28 U.S.C. 2254(d)(1) & (d)(2), WARRANTS THIS COURT'S ATTENTION

The Federal Western District Court of Louisiana and subsequently the United States Fifth Circuit Court of Appeal, failed to properly apply the text of 28 U.S.C Sec. 2244(d)(1) to Mr. Winzer's pleadings. Mr. Winzer's conviction became final July 21, 2016. Mr. Winzer then timely filed a post-conviction application on July 12, 2017. Thus providing 9 days to properly file his Habeas Corpus under 28 U.S.C. Sec. 2244 (d)(1) after the Louisiana Supreme Court denied Petitioner's Supervisory Writ on January 28, 2019. Mr. Winzer then on his own, without assistance from offender counsel, filled out a 28 U.S.C. Sec. 2254 application on January 30, 2019, addressed to the Western District Court alleging claims and asking this petition be stayed until he filed a Memorandum of Law. (Mr. Winzer termed this application a "shell petition)

The Supreme Court held in *Artuz v. Bennet,* 531 U.S. 4 that "An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. See, e.g., *United States v. Lombardo,* **241 US 73, 76 (1916)..." and "that an application is "properly filed" when its delivery and acceptance are completed in compliance with the applicable laws and rules governing filings.** "Mr. Winzer followed these applicable laws and rules albeit with the legal understanding of the typical pro-se litigant in a form which the Court may deem irregular but still considered proper under prevailing case law and statutory regulations. Mr. Winzer is a pro-se litigant. Therefore his pleadings to the various courts are considered filed the day he delivers them to the prison

authorities for mailing. *Spotville v. Cain*, **149 F.3d 374, 378 (5th Cir. 1998) (*per curiam*)**. The Fifth Circuit held that "the habeas corpus petition of a *pro se* prisoner litigant is filed for purposes of determining the applicability of the AEDPA at the time the petitioner tenders the petition to prison officials for mailing," and not, as the district court erroneously concluded, on the date the petitioner pays the filing fee following denial of a request to proceed *in forma pauperis*. The Federal Western District Court and the Fifth Circuit Court of Appeals nevertheless failed to consider petitioner's 2254 application as properly filed.

The Supreme Court has further held: "A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408. The Report and Recommendation of Magistrate Judge Karen L. Hayes, (See Appendix B, page 8) in a seemingly non chalant manner gives Mr. Winzer's standing to assert that the doctrine of equitable tolling be applied to the facts of his case. Upon inspection of the facts of this case by the Magistrate Judge, she concluded that either three unusual/extraordinary instances occurred. One of those unusual/extraordinary circumstances, Judge Hays delineated was that Mr. Winzer mailed the "shell petition but the motion/petition was misplaced. Mr. Winzer presented evidence of his pleadings being misplaced and resent while in state court. So as an act of diligence in the Western District Court, Mr. Winzer sent a letter requesting a status check on the 28 U.S.C. Sec. 2254 application requesting an extension of time to file his Memorandum of Law(shell petition) on April 25, 2019-less than 90 days after filing.

In support of Mr. Winzer's assertion that he did in fact mail his 2254 application/shell petition to the district court on January 30, 2019, Mr. Winzer presented to the Western District

Court a copy of an "Offender Withdrawal Request" stating that 1.00 was withdrawn from his prison account on January 25, 2019(Actual date was January 28, 2019, the 25 is a typographical error.) ostensibly to mail off the 2254 application/shell petition. This is the proper procedure put in place by prison officials concerning the mailing of legal mail. It should also be noted that there is practically no other reason a prisoner will find it necessary to request a withdrawal form in the amount of a dollar from his prison account except for postage. Thus from the Magistrate Judge's Report and Recommendation alone, Mr. Winzer can establish he indeed meets the requirements set forth in *Pace* as well as *Spotville*.

The case at hand practically mirrors an over 20 year old holding of the Fifth Circuit Court of Appeals. In *Smith v. Ward*, **209 F.3d 383, 385 (5th Cir. 2000), the Fifth Circuit panel reversed the district** court's dismissal of petitioner's §2254 petition as untimely, finding that petitioner's state post-conviction application, though dismissed as untimely under state law, was nevertheless "properly filed' within the meaning of §2244(d)(2). Relying on its decision in *Villegas v. Johnson*, 184 F.3d467 (5th Cir. 1999), the court reasoned that although the Louisiana law under which the state St. of Lims -- "Properly filed" 323 – CTA application was dismissed appears "[o]n its face" to be "a time-based procedural filing requirement,"that law, "like the Texas successive writ statute at issue in *Villegas*, does not impose an absolute bar to filing; instead, it limits the state court's ability to grant relief." Under the Louisiana law, "courts will accept a prisoner's application for filing and review it to determine whether any of the statutory exceptions to untimely filing are applicable." Finding this procedure "virtually identical" to the successive application procedure at issue in *Villegas*, the court concluded that petitioner's "state application, although ultimately determined by the state court to be time-barred, nevertheless was

'properly filed' within the meaning of §2244(d)(2)."

Although the mirror somewhat blurs when delving into the details of *Smith*, the essence as well as the actual holdings are applicable to Mr. Winzer's case. Mr. Winzer's claims should not be denied for procedural reasons and denied a review on the merits even if as the Courts assert he was time-barred in the state court-an assertion which Mr. Winzer categorically denies.

The determination by multiple state and federal courts concerning the type of review and or reading a pro-se petitioner's brief should receive are numerous. At no time should it be considered Mr. Wizner abandoned the issue of timeliness. For in each pleading presented to the courts at question, Mr. Winzer approached the issue of timeliness. Therefore the Court of Appeals assertion that Mr. Winzer somehow abandoned his issue regarding the timeliness of his petition is erroneous.

This Honorable Court should grant certiorari and remand Mr. Wizner's Application for Certificate of Appealability back to the 5th Circuit Court of Appeals for a *de novo* review of the merits in his case.

II. THE WESTERN DISTRICT OF LOUISIANA AND THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLICATION OF 28 U.S.C. 2254(d)(1) & (d)(2) IN LIGHT OF THE COMPELLING EVIDENCE OF MR. WINZER'S INNOCENCE WARRANTS THIS COURT ATTENTION

"The societal interests in finality, comity, and conservation of scarce judicial resources dictate that a habeas court may not ordinarily reach the merits of successive or abusive claims, absent a showing of cause and prejudice. However, since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even successive claims when required to do so by the ends of justice. Thus in a trio of cases, this Court firmly established an exception for fundamental miscarriages of justice. *Carrier,* 477 US, at 495, 91 L Ed 2d 397, 106, S. Ct. 2639; *Kuhlman v Wilson*, 477 US 436, 91 L Ed 2d 364, 106 S. Ct. 2616; *Smith v. Murray,* 477 US 527, 91 L Ed 2d 434, 106 S. Ct. 2661. To ensure that the fundamental miscarriage of justice exception would remain "rare" and be applied only in the "extraordinary case," while at the same time ensuring that relief would be extended to those who are truly deserving, the Court has explicitly tied the exception to the petitioner's innocence. *Carrier* and *Kuhlman* also expressed the standard of proof that should govern consideration of such claims: The petitioner must show that the constitutional error "**probably**" resulted in the conviction of one who was actually innocent." *Schlup v. Delo,* 513 U.S. 298

In a few, short and concise words, *Schlup,* eloquently gives voice to the pleas of justice emitting from Mr. Winzer's 2254 habeas application from the Western District Court and ensuing application for a certificate of appealability from the Fifth Circuit Court of Appeals. Mr. Winzer's case presents this Court with an opportunity to address its declination to resolve the status of the

hypothetical freestanding innocence claim put forth in *Herrera v. Collins*, 506 US 390. As well as to now explicitly define what exactly constitutes "new reliable evidence" under *Schlup* and on the 5th Circuit Court of Appeals' reluctance to weigh in on the circuit split concerning whether the new evidence must be newly discovered, previously unavailable evidence, or, instead evidence that was available but not presented at trial. *Hancock v. Davis* 906 f.3d 387, 389.

Mr. Winzer presented not one but two affidavits from the professed shooter in this case; his at the time 16 year old younger brother, Lonnie Shelton. Mr. Winzer's younger brother not only accepted full responsibility for the crime Mr. Winzer was accused of but also included a statement depicting whose influence he as a juvenile was under when he shot Mr. Johnson-the victim in this case. See p.17 of the Magistrate Judge's Report and Recommendation.

In arguendo, beginning with the possibility Mr. Wizner's 2254 application/shell petition was filed untimely, this Court must take into consideration the confession of Mr. Wizner's brother which was presented in accordance with statutory provisions concerning newly discovered evidence. And further, in *Carrier*, the Court stated that procedural default would be excused, **"even in the absence of cause when 'a constitutional violation has probably resulted in the conviction of one who is actually innocence."** *See also McQuiggins v. Perkins*, 133 S.Ct. 1924, 1935 (To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." (quoting *Schlup v. Delo*, 513 U.S. 298.

Probably, more likely than not, these are terms that apply if even an inkling of a doubt exists as to the innocence of a defendant. These standards are not meant to be insurmountable obstacles. Or even obstacles that can be ignored on wrongly or rightly applied procedural bars.

"A federal habeas court faced with an actual-innocence **gateway claim**, should count unjustifiable[as well as justifiable] delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown" *McQuiggins*. A **gateway claim**. Information that when presented unlocks what was once viewed as a barrier but that is now instead the beginning of a path that points into a direction which was before unknown to the fact-finder. The affidavits from the confessed shooter, presented by Mr. Winzer, are the quintessential example of the requisite information a reasonable juror would desire in order to aid him/her with their determination of what constitutes reasonable doubt as to a person they are tasked with in determining their guilt or innocence to offenses as serious as the ones Mr. Winzer is accused of. Mr. Winzer, unlike countless others similarly situated has the information necessary to prove his innocence.

Mr. Winzer's brother stated clearly that Mr. Winzer "**didn't know what was going to happen**". That **"I Lonnele Jamal Shelton did shoot and kill Ramon Johnson...I Lonnelle Jamal Shelton, stated Johnson is still moving and shot him[Ramon Johnson] two more times in the face.** Mr. Winzer's brother even stated that Mr. Winzer took no part in the robbery of Mr. Johnson either. In fact the only "crime" Mr. Shelton implicates Mr. Wizner in is being a "big brother". A big brother who instinctively is inclined to, above all things, protect his younger siblings from others and at times their own selves.

Although some fault may be attributed to Mr. Winzer, that fault by no means rises to the level of murder in any degree or iteration. This court must, in the light of this information act to rectify this manifest injustice.

III. THE DECISION OF THE 5th CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

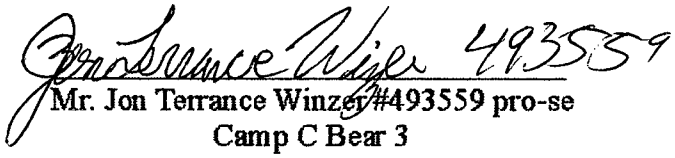
The United States Supreme Court has consistently clarified rulings concerning the tolling of time for Section 2254 habeas petitions under the textual language delineated in 28 U.S.C Section 2244(d)(1) and (d)(2). The United States Supreme Court has also consistently clarified when and under what circumstances these rules are to be rigidly upheld or even in certain instances disregarded.

The facts of this case show that the United States 5th Circuit Court of Appeals and the Federal District courts of Louisiana are still not entirely clear on these Supreme Court holdings. Evidence of these inaccurate interpretations of clearly established constitutional law have been presented throughout this Writ of Certiorari for this court to review and once and for all bring the Louisiana judiciary into compliance with the Federal regulations, laws and statutes they are tasked with upholding. To avoid redundancy and ensure Mr. Wizner's petition is read, he re-directs the court attention to the facts presented above.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully Submitted



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