No. 20-8309 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROBIN RENEE MELCHIOR
— PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR, TDCJ-CID
—

RESPONDENT(S)ON PETITION FOR A WRIT OF

CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBIN RENEE MELCHIOR, #1731030
(Your Name)

(Address)
Carole Young Medical Facility
5509 Attwater Ave.

(City, State, Zip Code)
Dickinson, Texas 77539

409-948-0001
(Phone Number)

QUESTIONS PRESENTED

Whether the United States District Court and the United States Court of Appeals below erred by failing to grant Petitioner a 'certificate of appealability' for her habeas corpus appeal, under 28 U.S.C. 2253(c) and the "modest showing" required by *Slack v. McDaniel*, 529 U.S. 473 (2000)?

What standard of review is a United States District Court to utilize when determining whether to dismiss a state prisoner's habeas petition pursuant to Rule 4 of the Rules Governing Section 2254 cases in the United States District Courts?

Whether a United States District Court may dismiss a state prisoner's habeas petition on the face of the petition without reviewing the state court records when the prisoner pleads newly presented evidence since the time of the original state trial proceedings?

PARTIES TO THE PROCEEDING

Robin Renee Melchior, #1731030
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(Petitioner)

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APPENDICES

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

RELATED PROCEEDINGS

Trial cause number 11-04-03600-CR, in the 435th District Court of Montgomery County, Texas. Date of proceeding: June 21, 2011. Convicted, upon Petitioner's plea of guilty, of the offense of driving while intoxicated, third or more, with finding of deadly weapon being the vehicle Petitioner was driving.

Ex Parte Robin Renee Melchior, trial cause number 11-04-03600-CR, and writ number WR-89,925-02. Post-conviction writ application under state law, filed November 15, 2018. Relief denied by the Court of Criminal Appeals of Texas on August 21, 2019.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robin Renee Melchior respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

On March 3, 2021 the United States Court of Appeals for the Fifth Circuit issued its Order. Appendix A.

On January 30, 2021 the United States District Court for the Southern District of Texas, Houston Division, issued its memorandum opinion and order of dismissal, and Final Judgment, denying Petitioner habeas corpus relief and denying Petitioner a "Certificate of Appealability." Appendix B.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its order on March 3, 2021. In accordance with Rule 13.1 of the Rules of the Supreme Court of the United States, this Petition has been timely filed. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The United States District Court below had jurisdiction under 28 U.S.C. 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

28 U.S.C. Code 2253(c), provides in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant makes a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rule 4 of the Rules Governing Section 2254 Cases and Section 2255 Proceedings provides, in pertinent part, that if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk of notify the petitioner.

STATEMENT OF THE CASE

Petitioner was convicted in a Montgomery County, Texas state district court of the offense of "driving while intoxicated." The state trial judge imposed an unusually harsh sentence of thirty (30) years imprisonment. A "DWI' offense in Texas is normally a class B misdemeanor. Section 49.04, Texas Penal Code. Because the prosecution alleged that Appellant used a 'deadly weapon' (the automobile Appellant was driving) when committing the DWI offense Petitioner must serve at least 50% of the thirty years sentence before becoming eligible for release on parole. In Petitioner's case sentencing was enhanced by showing that Petitioner had two prior "DWI" offenses. Prior to filing a federal petition for habeas corpus relief in the federal District Court

Petitioner filed a state writ application under Article 11.07 of the Texas Code of Criminal of criminal Procedure. The state writ application was denied by the Texas Court of Criminal Appeals. Petitioner raised in her state application for a writ of habeas the constitutional claims raised in in her federal application for a writ of habeas corpus.

On September 13, 2019 Petitioner filed her federal habeas petition in the District Court, challenging a state conviction under 28 U.S.C. §2254. Appendix E. On October 15, 2019, without issuing a show cause order to the Respondent or causing state records to be produced, the District Court ordered Petitioner to show cause why her federal petition should not be dismissed as time-barred. Appendix C.

Petitioner objected to the Court's October 15, 2019 order by filing a response, on November 14, 2019. Appendix D. Petitioner argued how she was being prejudice in responding to the District Court's show cause order, and could not properly comply without the state records before the court, as well as Petitioner's newly presented evidence that would allow her to proceed under the exception set out by the Supreme Court in *McQuiggin v. Perkins,* 569 U.S. 383 (2013). Nor could the District Court make a reasonable assessment of Petitioner's newly presented evidence and its impact on evidence produced at the original trial. Petitioner is also claiming actual innocence. Petitioner did the best should could in responding the court's order, without the benefit of the state trial proceedings and state habeas corpus proceedings before the United States District Court..

On January 30, 2020 the District Court issued a memorandum and opinion, ruling that Petitioner's federal petition was time-barred, and entered final judgment. Appendix B. Petitioner timely gave notice of appeal. The District Court denied a "COA," sua sponte, and denied Petitioner leave to proceed in forma pauperis. Appendix B.

On March 3, 2021 the United States Court of Appeals issued a brief order, holding that Petitioner had not made the necessary showing for issuance of a certificate of Appealability. Appendix A. The court of appeals erred in its order.

REASONS FOR GRANTING THE PETITION

> The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CERTIFICATE OF APPEALABILITY

The United States District Court below dismissed Petitioner's federal habeas petition as being time-barred, and denied Petitioner a certificate of appealability under 28 U.S.C. 2253(c) for an appeal to the United States Court of Appeals for the Fifth Circuit. Appendix B. The United States Court of Appeals then also denied Petitioner a certificate of appealability for her habeas corpus appeal. Appendix A. It is Petitioner's position that the federal courts below abused their discretion, or erred, in denying Petitioner a certificate of appealability for an appeal.

In order to appeal the denial or dismissal of a state prisoner's federal habeas corpus petition, the prisoner must obtain a certificate of appealability. To obtain the "COA" a petitioner must make "a substantial showing of the denial of a Constitutional right. 28 U.S.C. 2253(c)(2). In determining whether to grant a "COA" this Court looks to the district court's and federal court of appeals' application of AEDPA to Petitioner's constitutional claims and asks whether that resolution was debatable among jurists of reason. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003). However, where a procedural ruling is involved, as in Petitioner's case, this Court asks whether jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that those jurists would find it debatable whether

the District Court was correct in its procedural ruling. *Slack v. McDaniel*, 429 U.S. 473, 484 (2000). In Petitioner's case a 'procedural ruling' was controlling, as the federal District Court held that Petitioner's instant federal habeas petition is time-barred, under the AEDPA. Appendix B.

In *Slack,* at 483, the Supreme Court recognized that Congress codified the prior judicial certificate of probable cause ("CPC") standard, announced in *Barefoot v. Estelle*, 463 U.S. 880 1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must show that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'. 529 U.S. at 484. A petitioner seeking a "COA" must prove something more than the absence of frivolity, or the existence of mere 'good faith' on his or her part. *Barefoot*, at 893. But it is not required that a petitioner prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that a petitioner will not prevail.

It is Petitioner's position, however, that an exception to the normal time limitations under 28 U.S.C. §2244(d) should allow consideration of the merits of Petitioner's underlying Constitutional claims challenging her state conviction in light of this Court's ruling in *McQuiggin v. Perkins*, 569 U.S. 383 (2013). In *McQuiggin* this Court held that a state prisoner whose federal habeas petition may ordinarily time-barred under 28 U.S.C. §2244(d) may have her Constitutional claims considered by a federal district court if that petitioner demonstrates that 'new evidence' shows that is more likely than not that no reasonable juror would have convicted the petitioner. It is an actual innocence showing, which if proved can remedy a continued imprisonment due to a manifestly unjust conviction. In *McQuiggin*, for example, the Petitioner in that case filed his federal petition

eleven years after his conviction became final, which the Supreme Court found not to be controlling if new evidence demonstrated actual innocence.

The Supreme Court's decision in *McQuiggin* is not based on a finding of 'extraordinary circumstances' to justify the late filing of a federal habeas petition, as is the case in *Holland v. Florida*, 130 S.Ct. 2549 (2010). The *McQuiggin* decision is based on an equitable exception of actual innocence, manifest injustice due to a wrongful conviction. Under *McQuiggin* federal courts do not count unjustifiable in filing a federal petition as a barrier to relief, which requires the showing of an exceptional circumstance. Courts may consider such delays as a factor in determining whether actual innocence has been shown. The Supreme Court in *McQuiggin* rejected the state's argument in that case, that a habeas petitioner who asserts actual innocence must prove diligence to cross a federal court's threshold. Indeed, a state prisoner likely has no control over when new evidence may be discovered or developed.

NEWLY PRESENTED EVIDENCE

Petitioner supports her claim of actual innocence, under the McQuiggin exception to the normal operation of the AEDPA time bar, with newly presented evidence. Petitioner presents new evidence demonstrating a prima facie case for actual innocence, and which should allow her to proceed with her present federal habeas petition under this court's decision in *McQuiggin v. Perkins,* supra.

Under 28 U.S.C. §2253, and Rule 4 of the Rules Governing Section 2254 proceedings, when a state prisoner files a federal writ of habeas corpus the District Court shall issue an order directing the respondent, the State of Texas in this case, to show cause why the writ should not be granted

unless it appears from the application/petition that the petitioner detained is not entitled to relief. See Rule 4 of the Rules Governing Section 2254 proceedings in United States District Courts.

WHAT IS THE STANDARD OF REVIEW?

Although this Court has mentioned Rule 4 of the Rules Governing Section 2254 petitions over the years Petitioner has found no case from this Court that sets forth a standard of review that a federal district court should apply when deciding whether to dismiss a state prisoner's federal habeas petition, sua sponte, as frivolous under Rule 4. See *McQuiggin v. Perkins,* 569 U.S. 383 (2013)(mentioning Rule 4); *Day v. McDonough,* 547 U.S. 198 (2006)(same); *Granberry v. Greer,* 481 U.S. 129 (1987)(same);

The United States Court of Appeals for the Fifth Circuit has mentioned the applicability of Rule 4, but has not, that Petitioner can determine, set forth a standard of review to be employed by federal district courts. See *Kiser v. Johnson,* 163 F.3d 326 (5th Cir. 1999). In *Alexander v. Grimes,* 2010 US Dist. LEXIS 42547 (W.D. Wis. April 29, 2010) a United States District Court held that a petition must cross some threshold of plausibility, under Rule 4, before the state will required to answer. Id., citing *Harris v. McAdory,* 334 F.3d 665, 669 (7th Cir. 2003). See also *Small v. Endicott,* 998 F.3d 411 (7th Cir. 1993).

In light of the development of AEDPA jurisprudence this Honorable Court should set a standard of review for United States District Courts to apply when deciding whether to dismiss a state prisoner's federal habeas petition, sua sponte, without service on the state, and without reviewing the state record as in Petitioner's case.

The federal 'petition' filed by Appellant under 28 U.S.C. §2254 does not show on its face that Petitioner is absolutely not entitled to relief. Appendix E. Petitioner filed a late federal habeas petition, her first, and presented new evidence in support of her habeas claims and claim of actual

innocence. When new evidence is presented a District Court must assess the probable impact of the newly available evidence upon the persuasiveness of the state's case as a whole, adduced at the original trial. *Ex Parte Franklin,* 72 S.W. 3d 671, 677-78 (Tex. Crim. App. 2002). A District Court must assess whether it is more likely than not that the newly available evidence would have changed the original trial verdict of guilt. *McQuiggin; Schlup v. Delo*, 513 U.S. 298 (1995); *Fratta v. Davis,* 889 F.3d 225 (5th Cir. 2015).

A District Court cannot assess the impact of newly obtained or presented evidence on the evidence presented at an original trial unless the District Court has before it the original trial records and evidence. Thus, it was not that the face of Appellant's federal petition did not show entitlement to relief, or an exception under *McQuiggin* to allow the late filing of her Section 2254 habeas petition. It was the District Court's failure to issue a show cause to the state respondent and have before it the state trial records and newly presented evidence so the District Court could make an intelligent analysis of the newly presented evidence as it impacted the original trial and Appellant's claim of actual innocence. The District Court acted arbitrarily by prematurely reaching a disposition of Appellant's habeas petition.

In denying Petitioner a certificate of appealability the United States Court of Appeals made a cursory denial of Petitioner's request for a certificate of appealability with no factual support or foundation from the state record, and no analysis of Petitioner's newly presented evidence in conjunction with the totality of evidence adduced at Petitioner's original trial. Appendix A. Neither the District Court nor the Court of Appeals below could have assessed whether it is more likely than not that Petitioner's newly available evidence would have changed the original trial verdict of guilty because those courts failed to consider the state trial record and the evidence presented at the original trial, as well as in the state habeas record.

Under *Slack v. McDaniel,* 429 U.S. 473, 484 (2000), jurists of reason would find it debatable whether Petitioner pleads the denial of a Constitutional right in her federal habeas petition. In ground for relief number one of her petition, Appendix E, Petitioner states facts demonstrating that she entered an unknowing, unintelligent, involuntary plea of guilty due to the ineffective assistance of trial counsel. Appendix E, at pp. 6, 6-A, 6-B. Petitioner has pleaded a cognizable claim under the Sixth and Fourteenth Amendments to the United States Constitution. See *Strickland v. Washington,* 466 U.S. 668 (1984); *Hill v. Lockhart,* 474 U.S. 52 (1985). Petitioner pleads that she is factually innocent of the charged offense of driving while intoxicated and using a deadly weapon, the vehicle she was operating, and she pleads facts in support of her innocence based on newly presented evidence. Petitioner was sentenced to thirty years imprisonment for a DWI offense in which no injury to anyone occurred, and based on false information from a law enforcement officer, who filed no accident report, and where there was no damage to the vehicle being operated by Petitioner. The conviction is a miscarriage of justice.

Consequently, under *Slack v. McDaniel,* supra. It is debatable among jurists of reason whether Petitioner states a cognizable Constitutional claim for relief in her federal habeas petition and it is debatable as to whether the procedural ruling by the federal district court was correct. It is also debatable as to whether Petitioner's newly presented evidence going to innocence is sufficient to satisfy the standard set forth in *McQuiggin v. Perkins,* supra, and *Schlup v. Delo,* supra.

CONCLUSION

The Petition for a Writ of Certiorari should be Granted.

Respectfully submitted,

Robin Melchior

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CERTIFICATION OF WORD COUNT

I certify that this petition for a writ of certiorari is less than forty pages, and within the page limitations imposed by 33.2 of the rules of the Supreme Court of the United States.

I certify that the foregoing certiorari document contains 2,961 words, on computer count, as recorded by computer, Windows 10, Microsoft, Word.

Robin Melchior

ROBIN RENEE MELCHIOR

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2020

ROBIN RENEE MELCHIOR,

PETITIONER

Vs. NO._____

BOBBY LUMPKIN, DIRECTOR

RESPONDENT

PROOF OF SERVICE

I, Robin Renee Melchior do declare that on this date, April 20, 2021, as required by Supreme Court Rule 29 I have served the enclosed Motion For Leave To Proceed In Forma Pauperis and Petition For A Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly addressed to each of them and with first-class postage prepaid, or by delivering to a third-party commercial carrier for delivery within three calendar days. The name and address of those served are as follows:

Edward Larry Marshall
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

Robin Melchior
ROBIN RENEE MELCHIOR

APPENDIX A