

No. 21-7671

IN THE
SUPREME COURT OF THE UNITED STATES
ALAN EUGENE STRICKLAND -PETITIONER
Vs.
SCOTT CROW, DIRECTOR -RESPONDENT

FILED
APR 07 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

ON PETITION FOR WRIT OF CERTORARI TO
THE UNITED STATES SUPREME COURT
FOR THE TENTH CIRCUIT
PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

- I. How does the U.S. Court of Appeals for the 10th Circuit justify affirming the decision of the District Court in denying petitioner's petition for COA, basing their denial, in part, on the Petitioner's lack of demonstrating any exceptional circumstance to warrant equitable tolling in accordance with §2244 (d)(1), thus rejecting his timeliness arguments?
- II. How can the U.S. Court of Appeals for the 10th Cir., at pg. 10 of it's Denial Order, claim petitioner did not present an actual innocence argument to the Magistrate Judge as an exception for his un- timely §2254, in response to Respondent's Motion to Dismiss, as well as claiming petitioner did not present the actual innocence argument with supporting evidence from the ineffective assistance of counsels claim to the District Court in his objection to the Magistrate Judge's R & R, when all one needs to do is look at both documents to see that petitioner did actually present his actual innocence argument in both, (albeit perhaps in a not-so-professional, *pro se* manner), thus clearly, arbitrarily ignoring the merits?

LIST OF PARTIES

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

RELATED CASES

NONE

TABLE OF CONTENTS

OPINIONS BELOW.....	2,3,4
JURISDICTION.....	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	5,6
REASONS FOR GRANTING THE WRIT.....	6-11
CONCLUSION.....	12

INDEX OF APPENDICES

- APPENDIX A - Order of the United States Court of Appeals- Tenth Circuit.
- APPENDIX B - Order of the U.S. District Court-Western District of Oklahoma
- APPENDIX C - Summary Opinion and Denial Order of the Oklahoma Court of Criminal Appeals
- APPENDIX D - Order of the Oklahoma County District Court
- APPENDIX E – Order of the Oklahoma Court of Criminal Appeals

TABLE OF AUTHORITIES CITED

CASES

Reed v. Ross, 468 U.S.1, 82 L. Ed. 2d 1, 104 S. Ct. 2901, (1984).....	pg. 7
Murray v. Carrier, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639.....	pg. 8
Harris v. Nelson, 394 U.S. 286, 290-291, 22 L. Ed. 2d 281, 89 S. Ct. 1082, (1969).....	pg. 8
Eizember v. Trammell, 803 F. 3d 1129, 1141,(10 th Cir. 2015).....	pg. 10

McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019.....pg. 11

Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).....pg. 11

STATUTES AND RULES

U.S. Constitution, 14th Amendment.....pg. 5,6

U.S. Constitution, 5th Amendment.....pg. 4

U.S. Constitution, 6th Amendment.....pg. 4

OTHER

NONE

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully pray 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 A to the petition
and is

☒ reported at U.S. Court of Appeals, 10th Circuit; 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 U.S. District Court, Western District of Oklahoma; 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 C to the petition and is

☒ reported at Oklahoma Court of Criminal Appeals; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

The opinion of the Oklahoma County District Court appears at Appendix D to the petition and is

☒ reported at Oklahoma County District Court; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

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

☒ reported at Oklahoma Court of Criminal Appeals; 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 of the 10th Circuit decided my case was January 27, 2022.

A copy of that decision appears at Appendix 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 December 22, 2020.

A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION
THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

On May 1, 2017, petitioner was sentenced to life in prison for his 1st deg. murder conviction by jury. The Oklahoma Court of Criminal Appeals affirmed this decision and upheld the conviction on July 12, 2018.

As the courts have made it a point, several times throughout the proceedings in petitioner's case, to state that most of petitioner's arguments are, "unsupported by any factual allegations beyond his own retelling of events," (see 10th Cir. Order Denying COA, @ pg.11, ¶2, and footnote #5), and, "petitioner's unsupported allegations are merely self-serving," which has been used by both the District Court and the O.C.C.A., in order to avoid the "retelling," or "self-serving," petitioner requests this Honorable Court review all appendices and documents he has enclosed for any other background information concerning the proceedings, particularly pgs. 1-5 of the 10th Circuit's Denial Order, and requests this Court transfer all records in this matter. Further, petitioner requests this Court see Ex. AA, S. Ct., and specifically the sections labeled Ex. 1, S. Ct. through Ex. 5A, S. Ct., Ex. 6, S.Ct., Ex. 7, S.Ct., pgs. 26-39, and pgs. 41, 42. This document is the petitioner's first Application for Post-Conviction Relief, which was rejected due to failure to comply with the Rule 37(B), pertaining to page limits on briefs. Petitioner submitted it as an exhibit with his second Motion to Exceed Page Limit, to insure it was a part of the records, even though it was still denied. Petitioner ventures to guess it was never read, or the

merits would have been clear, even at that early stage of the proceedings. And, as is shown, petitioner filed his actual innocence claim within this document, as it was based upon newly discovered evidence that had not been revealed at trial, thus making the §2244(d)(1)(A) rule, which the U.S. Dist. Court has utilized to deny petitioner's claims, a misapplication of the habeas rule. In fact, the proper applicable rule should have been §2244(d)(1)(D).

Ironically, in order to adhere to the instructions petitioner has been given at each step of the proceedings, he must "retell the events" in what has obviously been considered "a merely self-serving manner," as is the case again here.

REASONS FOR GRANTING THE PETITION

Petitioner asserts that his 14th Amendment right to due process has been denied due to the U.S. Dist. Court completely ignoring the merits of the claims raised by petitioner in his §2254 Habeas petition, and denying petitioner's COA.

In doing this, the Dist. Court denied petitioner of his valuable right to one full round of habeas review and final judgment under the 14th Amendment due process clause.

The Dist. Court never thought to review the petitioner's habeas petition under rule §2244(d)(1)(D). They applied §2244(d)(1)(A), based upon the fact that the O.C.C.A. denied petitioner's direct appeal on July 12, 2018, and applied that date as the date on which the judgment became final, thereby beginning the time period for limitations to file habeas.

Petitioner's filing of the actual innocence claim in his post-conviction made it the factual predicate, which means that the date on which the judgment became final was the date which the

O.C.C.A. denied petitioner's appeal of his post-conviction application. At §2244(d)(1)(A), the limitation period begins on "the date on which the judgment became final by the conclusion of direct review, or the expiration of the time for seeking such review." But, as the actual innocence claim could not have been raised until the post-conviction, petitioner contends that his conviction cannot be considered final on the date which the Dist. Court is applying. Petitioner also contends that the limitations period should not have begun until, (in applying the factual predicate clause of §2244(d)(1)(D), the O.C.C.A. denied the *appeal* of his application for post-conviction, thus making the effective limitations **starting** date December 22, 2020, thereby triggering the one year tolling period in which to file habeas, (including the 90 day period for applying for certiorari), thus changing the end date to approx. March 22, 2022. Petitioner asserts that the actual innocence could not have been a factual predicate until it was presented as a claim in his post-conviction, thus making §2244(d)(1)(D) the applicable rule in this petitioner's case.

"Any procedural default on appeal renders the petitioner's convictions to remain in question until **all constitutional issues** related to that conviction are addressed by the state's highest court." *Reed v. Ross*, 468 U.S. 1, 82 L. Ed. 2d 1, 104 S. Ct. 2901, (1984). In this instant case, petitioner contends that the O.C.C.A. rendered it's procedural defaults on direct appeal without knowledge of the factual predicate, which petitioner couldn't claim until post-conviction, therefore **all constitutional issues** related to his conviction were not addressed by the O.C.C.A. until it's denial of petitioner's **appeal** of post-conviction.

While these references to factual predicate could be subjectively interpreted, numerous court rulings indicate that a factual predicate is not left to subjective interpretation and have actually provided conflicting rulings on what and when factual predicates could have been discovered.

In light of the claims petitioner raised in his habeas, it is clear that the Dist. Court only applied the §2244(d)(1)(A) rule, thus arbitrarily ignoring the merits of the claims, which thus led to the misapplication of the rule.

As Justice Stevens opined in *Murray v. Carrier*, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639, @ 500, "The Writ of Habeas Corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Also see *Harris v. Nelson*, 394 U.S. 286, 290-291, 22 L. Ed 2d 281, 89 S. Ct. 1082, (1969).

In 1867, Congress provided the Writ of Habeas Corpus for state prisoners. The Act gave federal courts, "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." The Court ...shall dispose of the matter as law and justice require. 28 U.S.C. § 2243.

In this petitioner's case, the arbitrary ruling of the Dist. Court led the 10th Cir. Court to follow their recommendation of denial, thus denying petitioner of his constitutional right to due process under the 14th Amendment.

This misapplication of the AEDPA's finality determination rules violated "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights..."

In addressing petitioner's second question, the denial of petitioner's request for COA to the 10th Cir. Court, in which that Court stated that petitioner failed to present an actual innocence argument to the Magistrate Judge as an exception for his untimely filing of his §2254 habeas petition, in response to the Respondent's Motion To Dismiss, as well as claiming petitioner did

not present the actual innocence argument to the Dist. Court in his objection to the Magistrate Judge's Report & Recommendation.

In the enclosed Objection To Magistrate's Recommendation, @ pg.3, ¶ 4, and onto pg.4, petitioner did make the argument that he had raised the claims in all of his previous petitions, but that the magistrate ignored the arguments then, as well as in the habeas, and petitioner had already been informed in numerous statements from the courts that his arguments are "unsupported beyond his own retelling of events" or his "unsupported allegations are merely self-serving." So, petitioner raised the argument in a manner which he believed would be more acceptable to the court, and got told that it was just a passing reference, when the whole time, petitioner simply requested the court to refer to the previous arguments, for the sake of brevity.

The on-going arbitrary arguments from the courts have been an abuse of discretion and a means for them to avoid the fact that they are not even considering the merits of the claims. And, when petitioner has tried to explain, at length, how his actual innocence claim is supported by the errors and omissions alleged in the ineffective assistance of counsel claims, which are clearly 5th and 6th Amendment violations, all have been met with arbitrary procedural decisions from the courts.

Factually, petitioner has presented substantial, newly discovered evidence which was not submitted at trial, to support the fact that he cannot be the shooter in the case for which he has been convicted, but it is petitioner's belief that the courts have deliberately refused to see the evidence that he, his very person, is the proof contradictive to the witness's gross misidentification, which clearly shows that petitioner could not have committed the crime for which he has been convicted. Coupled with the state's severely weak case, which could only have been considered circumstantial at best, and all the evidence which refutes the entire state's

case, which petitioner submitted in Ex. AA, (enclosed), it is factually evident that petitioner is actually innocent, but the state has found nothing but circular arguments with which to apply procedural rulings rather than view the facts, which in this instant case, completely exculpate the petitioner.

In further support of his actual innocence claim, petitioner encloses a copy of a Physical Identification Form, (Labeled Ex. BB, S. Ct.), which was administered by Okla. Dept. of Corrections, upon admission to D.O.C. on 4/9/2013, and is initialed by the staff member who did it. This took place 2½ years before the murder in this instant case. It shows the complete physical description of the petitioner, including height, weight, and all the tattoos on his body. This document, combined with the evidence of the ineffective assistance of trial and appellate counsels, refutes the state's, the 10th Cir. Court's, and the Dist. Court's allegations that petitioner failed to present an actual innocence argument. The 10th Cir. Court stated petitioner only made passing reference to the claim, but he simply referred them to the previous filings which contained all the argument and evidence. Petitioner did this, in good faith, so as not to file a 40 lb. response to the magistrate, especially in light of the fact that petitioner has been told by the previous courts about his "re-telling of events" and "providing self-serving statements."

Had petitioner argued all this again in the Objection To Magistrate's Recommendation, it surely would have met, again, with the accusation that it was merely " unsupported, self-serving allegations." So, as petitioner is pro se, he proceeded in the manner in which he believed the court expected. In reply, the 10th Cir. Court cited, "This court has repeatedly instructed that stray sentences are insufficient to present an argument...in a way that might fairly inform opposing counsel or a court of it's presence in the case." *Eizember v. Trammell*, 803 F. 3d 1129, 1141, (10th Cir. 2015).

Petitioner submits that, if he had ever been shown to the jury, with his shirt off, and in a manner that the jury could have seen his physical attributes, there is no doubt that reasonable jurors would have found the petitioner not guilty, and the result at trial would have been different. For this reason, it is petitioner's contention that the courts know this and refuse to acknowledge that a fundamental miscarriage of justice is being perpetrated.

This Court has opined that sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019, @ Pp. 1931-1932. Also, in *McQuiggin*, *supra*, citing 6th Cir., "Is reasonable diligence a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits?" And, "we have noted that the miscarriage of justice exception applies to state procedural rules, including filing deadlines." *McQuiggin, supra*, and *Coleman*, 501 U.S., @ 750, 111 S. Ct. 2546.

Petitioner did submit requests for evidentiary hearings in each filing thus far in an attempt to be allowed to show the courts that he could not have been the shooter in this case, but has been denied those as well, which petitioner contends clearly shows that the Dist. Court and the 10th Cir. Court have elected to stand on procedure alone, completely disregarding merits.

As for relief, I would like the opportunity to submit a brief on the merits of my claims to this Honorable Court. In the alternative, I ask an order issued remanding to the U.S. 10th Cir. Court of Appeals, with instruction to grant my Certificate of Appealability.

CONCLUSION

Had the U.S. District Court – Western District of Oklahoma followed the procedures outlined in *McQuiggin v. Perkins*, the Petition for Writ of Habeas Corpus would have been resolved on the

merits, and the case would not have been continued to the 10th Cir., and then to this Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

Alan E. Strickland

Alan Eugene Strickland,

Petitioner pro se

Date: 4-7-22