No. 21-7871

IN THE

SUPREME COURT OF THE UNITED STATES

CLIFTON DEWAYNE HARVIN — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN-DIRECTOR TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CLIFTON DEWAYNE HARVIN
(Your Name)

2101 FM 369 N.
(Address)

IOWA PARK,TX 76367
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

1). Did the the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability standard that contravens Supreme Court precedent and the AEDPA itself when it denied this state prisoner a Certificate of Appealability on his motion to reopen the judgement denying federal relief and obtain merits review of his claims that his trial counsel was ineffective, the Court's bias and the State's failure to correct knowingly perjured testimony by the ineffective attorney at the plea hearing in this case when counsel-after schooling-his client to just answer yes- stated.."[I]sn't it true that the District Attorney's office has provided us with the grand jury transcripts"when it was proven at the state evidentiary hearing on habeas that no such transcripts ever existed to be illegally provided in discovery in direct violation of federal and state law that prohibits provision of the grand jury transcripts in discovery where innocence was the central issue at the plea?

2). Does the law of the case doctrine legally and constitutionally trump the AEDPA when a clear cut error was proven on 60(b) to have taken place at the federal district court level where it was proven-and admitted by the Respondent-that the prisoner's Actual Innocence McGuiggin v Perkin exception to the AEDPA's one year statute of limitations was "overlooked" by the district court, who denied relief, and then the Court of Appeals then denied a COA based clearly on the wrong prong of Slack v McDaniel's encouragement to proceed further framework when the only issue before them jurisdictionally was whether a reasonable jurist could debate the correctness of the district court's procedural ruling that wasn't made and then that Court of Appeals decision was the basis for the law of the case denial of a COA in the second instance pertaining to the 60(b)?

3). Does the Federal Court of Appeals have the authority-or jurisdiction-under the AEDPA, to decide an issue that a federal district court has overlooked or ignored by failing to address an actual innocence exception to the AEDPA one year statute of limitations and then rely on their own unauthorized decision as the law of the case doctrine in order to then deny COA on Certificate of Appealability?

## 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:

## RELATED CASES

U.S.DC.2254 Harvin V Davis Civil Action No.7:17-cv-00003-M-BP

May 14, 2018

Motion for Certificate of Appealablity No.18-10697, March 4,2019

U.S.Supreme court Writ of Certiorari No.18-9540 December 16, 2019.

U.S.DC. Federal Rule of Civil Procedure 60(b)(6) Civil Action No.7:17-cv-00003-M-BP.

Motion for Certificate of Appealability (Rehearing) COA No.21-10391 January 26, 2022.

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OTHER

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 A to the petition and is

[ ] reported at _____; or,
[ ] 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

The opinion of the highest state court to review the merits 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 _____ 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.

## JURISDICTION

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

The date on which the United States Court of Appeals decided my case was December 13, 2021.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 26, 2022, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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

THE SIXTH AMENDMENT OF THE UNITED STATE CONSTITUTION:

In all 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 against him; to be confronted with the witnesses against him, to have compulsory proceee for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S.C. 2253 CERTIFICATE OF APPEALABILITY

## STATEMENT OF THE CASE

This is an extraordinary case. Petitioner is actually innocent of sexually assualting his daughter who was six years old at the time November 25, 1994. Applicant,at a plea hearing where he made clear to everyone he would not sign anything admitting guilt and professed his innocence adamantly, according to the State prosecutor at the first of three evidentiary hearing held on state habeas, refused to plead guilty in any way and maintained his innocence at all times, was coerced by an attorney who was disbarred shortly after this case, to plead no lo contendere in exchange for the opportunity to prove innocence while on deferred adjudication probation. The first indication of something being amiss is the fact that a nolo plea and a guilty plea are the same except for the civil aspects arising out of the plea. Both are legally the same-a guilty plea-a guilty plea that the State Prosecuting Attorney, Tim Cole, readily admits petitioner refused to make. The Texas Court of Criminal Appeals Judge Meyers in his dissenting opinion joined by Judge Johnson berated the entire court for refusing to follow through with the original opinion written by Judge Meyers granting habeas relief. That opinion is Appx.D to this petition. Dissenting Judge Meyers had his dissent,and as EXHIBIT-A attached the original opinion granting habeas relief, published. That opinion will provide the reader a much better statement than Petitioner can provide here in this understood needed brevity context.

During that hearing, the soon to be disbarred attorney, Patrick Morris, knowing there was a recantation at the grand jury based on Petitioner showing him a newly acquired letter from Tim Cole to Petitioner's wife Barbara Harvin urging her to provide him a letter of non-prosecution,

non-prosecution based on the recantation at the grand jury giving him grave doubts about winning at trial, told Petitioner this was not a guilty plea and that it would allow him the opportunity to prove his inncence while on deferred probation and never admitting guilt. The main concern for Petitioner at the time was that his young daughter would not have to endure the public trial DA Cole spoke of in his letter to Barbara Harvin. This was especially so since both of Petitioner's children were still living at the residence of Risa Ford who had made the outcry after her sister Janice was found to have been abusing the children at Risa's Daycare in October 1994 from the time they moved in there full time daycare in August 1994. The outcry from Risa came in November just after Janice Ford was required to move out of Risa's Daycare. Attorney Morris schooled Petitioner to just answer yes to his questions and he could walk out of court today and fight his case while on deferred probation. Once petitioner agreed, Morris put Petitioner on the stand and instantly asked-by making a perjured statement, "Isn't it true that the District Attorney has provided us in discovery the grand jury transcripts." The response, the schooled yes answer in order to walk out of court and fight the case on deferred probation while maintaining innocence beyond cavil. Grand Jury Transcripts are never leaglly provided in discovery. It is well settled as state and federal law that in order to obtain the generally secret transcripts a complete motion sequence is always needed that requires the court's and the state's involvement. Morris never filed a single motion in this case. What's more probatiove in showing the constitutional error that Petitioner seeks to re-open to have the merits properly reviewed is the fact that on the initial State habeas in evidentiary hearing one, the State stipulated to there

never being any such grand jury transcripts. Judge Meyers took note of the law prohibiting the disclosure as well as noting the non-existence of transcript making it impossible to provide and pointed out that both the state and judge should have known this was perjured testimony when Morris made the statement meant to suborn perjured testimony from Petitioner. Appendix-D will support every statement Petitioner presents here. At that same evidentiary hearing and the third evidentiary hearing on actual innocence, the complainant-Noelle Harvin-Petitioner then 22 year old daughter testified Petitioner is actually innocent in line with he recantation in 1994. Appx.-D p.22.

For the purpose of this writ of certiorari being granted as to the Fifth Circuit relying on their own law of the case doctrine to deny COA on 60(b), the question of the AEDPA's importance in brought directly into a constitutional question. Why is this so? Because it is the original denial of COA on 2254 where the Fifth Circuit decided that Petitioner's innocence claim doesn't deserve encouragement to proceed further, See Appx.B p.2, that usurps the AEDPA which is the exact statute that procedurally time bars petitioner from having his time-barred claims heard on their merits. Merit of which both federal and state law,concerning discovery of non-existant grand jury transcripts, must be held to state a claim of ineffective assistance of counsel, failure to correct knowingly false testimony and judicial bias because the law is so well settled as to the secrecy of provision of them that no reasonable person who knows that law can deny, just as Judge Meyers and Johnson at the State's highest Court held in granting habeas relief, constitutional error plagued the plea proceding in this case.

The Fifth Circuit used the wrong prong of Slack 484 to determine Petitioner's innocence claim doesn't deserve encouragement to pro-

ceed further,when under Slack at 484 in the procedural bar-time bar-context, the question becomes whether reasonable jurists could debated the correctness of the district court's procedural ruling. In this instance, the District Court only conducted equitable and statuatory tolling reviews and completely "overlooked" ignored or what ever term that can be coined respectfully, Petitioner's actual innocence exception to the one year statute of limitation imposed by the AEDPA announced in McQuiggin V Perkins. When challenged on 60(b)(6) as the ground relied upon as a defect in the federal proceedings, they agreed with the District Court and the Respondent who readily admits the Perkins claim was "overlooked by the district court",that the law of the case doctrine would result in an abuse of discretion if they were to revisit. The District Court's, because of "overlooking," procedural ruling as to the time barred claims under Perkins was never even made by the District Court. Therefore, under Slack, this Court's own precedent, the Fifth Circuit by deciding Petiitoner's innocence claim didn't deserve encouragement to proceed further,when it hadn't even been properly considered by the District Court, not only employed the wrong prong of Slack, they completely usurped the AEDPA in so doing and now rely on that as the law of the case doctrine to deny 60(b) COA relief. The correctness of the District Court's overlooked and non-existant procedural ruling under Perkins cannot be said to have been properly conducted because it was never made to decide the correctness of by the Fifth Circuit. The correctness of the District Court's equitable tolling and statutory tolling may have been debatable among reasonable jurist. Petitioner is not arguing that at all. But the correctness of a decision that was never made by the district court cannot reasonably be judged for correctness un-

less it is explicitedly understood that the AEDPA doesn't matter and the Fifth Circuit is allowed to then make a completely wrong Slack prong finding concerning encouragement. The implication is we are agreeing that a federal district court can now ignore or overlook a innocent person' invocation of Supreme Court law and precedent-in this instance McQuiggin v Perkins-to overcome the AEDPA one year statute of limitations as a gateway exception, and the Fifth Circuit may then decide the issue as one of first impression and deny COA based clearly not on the correctness of a procedural ruling that was never made.

The statement of this case is that innocence has always been the core issue, from start to finish, this cannot be denied by any fair minded jurist of reason who takes the time to review this record. Therefore, even the Fifth Circuit's erroneous finding that the innocent claims do not deserve encouragement to proceed further, when the record is clear that the only reason a plea of no lo contendere was even entered was to prove innocence while on deferred probation while protecting his daughter from a public trial while in the full time custody of abusing baby sitters, all of which is documented in this record, is completely unreasonable. It is more so now due to the law of the case doctrine resting the 60(b)denial of COA on it.

What is at stake in this writ for certiorari is an innocent man being in prison for now over 18 years on a probation violation and sentenced to the same as a life sentence in Texas with the recantation from the alleged victim having fully recanted her original outcry that she professed was caused by Risa' Ford making her say it and that her daddy is innocent. If that is not enough to proceed further and have his innocence properly considered as a gate way

exception to the AEDPA one year statute of limitations in this particular case, then the term justice must be taken out of the greatest country in the world's "criminal justice system." Justice requires, in exceptional circumstances, and innocence is certainly an extraordinary circumstance, that the issue of innocence be of utmost importance in any criminal proceeding-it is the maxim of law. In this case, innocence has been ignored at the federal level and this flies in the face of the entire Court's holding in McQuiggin v Perkins 133 S.Ct.1924,1931. Not only has innocence been overlooked, it has been judged at the Fifth Circuit as not worthy to even be encouraged to proceed further in an erroneous Slack v McDaniel 529 U.S. 484. review. The question! Was the district court's procedural ruling correct?? It cannot possibly be correct if it was never made in accordance with the Supreme Court's holding in McQuiggin. This is not justice. This is reaching an unjust finality knowing full well the likelihood of this Honorable Court exercising it's discretionary certiorari powers for an indigent inmate are very very small. This is what makes the issues raised here of national importance. The innocent prisoner who has no ability to defend himself other than to rely on the AEDPA and this Court's ruling to use his innocence for the purpose of having his otherwise barred claims heard on the merits. The importance is heightened when the merit of the claims is clear. There is not a reasonable jurist on earth that doesn't know that the secrecy of the grand jury proceeding make it impossible for the transcripts from those proceedings to be simply provided in discoery. Furthermore, justice and common sense dictate that if it has been proven that they never existed-and Petitioner has proven that as fact-then they could not possibly have ever been provided. The judge at

the plea hearing knew, The District Attorney, Tim Cole, knew he had not transcribed them knew it just as he knew it was a violation of Texas law to provide tham had he even had them to provide, and most of all this lying unethical and soon to be disbarred appointed attorney Pat Morris knew it when he stated on the record for this Honorable Court to one day-please this day-to read and see the underlying constitutional error that lead to the incarceration of one who is actually innocent.

The district court abused its discretion in denying Petitioner's 60(b) motion because: (a)it relied on the law of the case doctrine that itself relied on an error of law; failed to take into account key circumstances supporting relief; (c0 failed to adhere to the purpose of Rule 60(b). The error of law, the use of the wrong prong in a Slack review in the procedural time bar context. The correctness of the district court's procedural ruling was the only issue to be decided, not whether the issue deserved encouragment to proceed further. The Fifth Circuit and the federal district court both failed to take into account Appx.-D where two of the state's highest tenored Judges, Judge Meyers and Johnson staunchly disagreed and wrote an opinion actually granting habeas relief on the very issue Petitioner relies upon in showing reasonable jurist could and have disagreed-past debating- the underlying constitutional violations raised. And finally, the whole purpose of the filing of this 60(b)motion was to correct the District Court's ignoring of the McQuiggins v Perkins claim as an actual innocent gateway exception to the one year statute of limitations. The Respondent admitted kindly that it was "overlooked." Proving the defect at the federal level, the purpose of a 60(b) resulted only in reliance on the Fifth Circuit's erroneous or at least

debatably wrong rule of law under the law of the case doctrine that has resulted in a miscarriage of justice in the actual innocence context. As an extraordinary matter, Petitioner's guilt has never been proven in a court of law and he and the complainant have both always staunchly claimed innocence. A probation violation is what this conviction rests upon that resulted in the same judge who allowed this lying attorney to state a perfectly perjurous fact in his court room in order to coerce a involuntary plea, in direct violation of the United States Constitution, is the same judge who sentenced Petitioner to the equivalent of a life sentence with three motions to terminate the deferred probation based on actual innocence before him at the time. Those motions were based on taking and passing three different State, Judge and psychotherpist polygraph test they ordered in this actual innocence inquiry. These facts are circumstances all contained in this record that prove and abuse of the Fifth Circuit's, even erroneous, reasonable jurist could not debate the innocence claim deserves encouragement to proceed further finding this law of the case doctrine denial of 60(b) relief rests upon.

## REASONS FOR GRANTING THE PETITION

Clifton D. Harvin's aggravated 60 year sentence in Texas raises a pressing issue of national importance:whether and to what extent the criminal justice system tolerates the incarceration of one who actually innocent-then allows a high court to ignore a Supreme Court created and announced gateway exception to the AEDPA statute of limitations,that is proven on the vehicle born to do so-60(b)-used for no other reason than to have his otherwise constitutional violations at trial considered on their merits .Then, have a federal Court of Appeals deny a COA on its own faulty and non-jurisdictional review supposedly of his innocence claim that the federal Court "overlooked" and decide the claim doesn't deserve encouragement to proceed further in a case where two of Texas's highest and well tenored judges have already wrote an opinion granting relief and staunchly dissented to the Majority's denial in a published opinion. The underlying constitutional violations are so well understood and are clearly on the face of this record,where innocence is the central issue according to the alleged victim and the actually innocent litigant, that no reasonable jurist could debate they are substantial. Appx.-D

Upholding a court's decision where the terms **innocence and overlooked** are key elements that cannot at this point be contested, if known to the public, would so undermined the confidence in the criminal justice system that the harm would never be assuaged. This is so especially when the relief being sought is not release from prison on the finding of actual innocence but only to have the merit of his claims reviewed. Clearly the Supreme Court understood the same in McQuiggin v Perkins supra at 1931-1932,1934 Fn.1. Overlooking innocence is not what the public or the criminal justice system would

consider anything but repugnant to any logical understanding of the system and confidence we have in this system.. This is certainly why the supreme court ruled in the fashion they did in McQuiggins v Perkins. The Supreme Court certainly did not envision that District Court's would ignore such a claim and then it be perfectly alright, despite the AEDPA, to have a federal court of appeals make a decision on the merit of an actual inncence claim not deserving encouragement to proceed further being worthy of the law of the case doctrine all for the purpose of denying an innocent person having his clearly substantial constitutional violations considered on the merits.There has to be a system of checks and balances to avoid the miscarriage of justice all in the name of finality. Honorable Supreme Court Justice Roberts, joined by Kennedy, Ginsburg, Breyer and Sotomayor in Buck v Davis 137 S.Ct.759 wrote and agreed upon the principle that..."[T]hat the whole purpose of Fed.R.Civ.P.60(b) is to make an exception to finality."(emphasis added). The whole purpose of the Supreme Court's holding in McQuiggin was to creat an exception to the AEDPA one year statute of limitations to avoid miscarriages of justice. These are exceptions carved out in the interest of justice in an evolving standard of decency and under no circumstances should they be ignored or overlooked. The issue on COA was not whether Petitioner had presented an extraordinary case for actual innocence , but whether reasonable jurist could debate the District Court's complete failure to even consider the Gateway exception to the AEDPA statute of limitations and the correctness of that decision that was never made. Could a reasonable jurist debate the correctness of a decision that was never made? The answer is a reasonable jurist MUST debate and not go a step further according

to the rules that apply on COA. Its over at the point the Fifth Circuit realized there was nothing to judge the correctness of in this time bar context. They had no jurisdiction to judge the merit of the actual innocence claim which is exactly what they did by deciding it wasn't deserving of encouragement to proceed further. Was there a defect at the federal level? The Respondent admits innocence was overlooked. Petitioner, based on his pleading, would aver that no reasonable jurist could do anything but agree that it was ignored. Not only his actual innocence exception to the time bar, was ignored but this Court's precedent announced in McQuiggin was ignored as well. What would the public think of that? What would the Criminal Justice system think of that? Well certainly the argument can ~~XX~~ reasonably be made that they would take full advantage in knowing that it is just fine if your not concerned with the incarceration of innocent people but only convicting them. This is a dangerous but real problem. Should Federal Judges be allowed to ignore viable claims of innocence that are supported by the Supreme Court's own precedent and take comfort in knowing the Fifth Circuit will fully see the claim and go outside of their boundries to cover for the "overlooking" of the same. Or should federal judges and the courts of appeals today be shown by this Court's exercise of jurisdiction, in granting this lay-man's but innocent man's writ, that its own precedent should not be ignored and it will not allow the law of the case doctrine to prevail in instances where innocence and justice are the core issues. Otherwise, it can be said the Court today sanctioned disbarred attorney Pat Morris's lying in front of a judge who knew he was lying and in front of a District Attorney who knew he hadn't transcribed the grand jury transcripts to even be able to provided them in direct opposition of the law to go uncorrected.

In closing, Petitioner fully understands the indicting claims made in this passionate last ditch effort to stop this runaway train whose engineer, conductor and caboose attendant present in the Courtroom that day in 1996 knew full well they were committing atrocious constitutional violations when they placed a completely unwilling to plead guilty defendant on deferred probation on a nolo contendere plea with him understanding it wasn't a guilty plea. The reason for the plea from the State's point of view knowing the recantation at the grand jury would make it hard for any jury to convict, Petitioner's adamant deniel of guilt and refusal to plead guilty. It is in the transcripts Honorable Court right from the state's procsecuting attorney in this case on habeas corpus evidentiary hearing one. His adamant deniel of guilt and profession of innocence resulted in his passing three pology tests all order after being placed on deferred probation with an agreement he could come back and prove his innocence. Even that process the trial court, district attorney and hired attorney to fight for my innocence, has since been proven to be a farce because it wasn't even a legal process-but it was conducted by the very actors in this case who allowed a soon to be disbarred attorney to say the grand jury transcripts were provided in discovery on the record when it is illegal to do so and since proven they never existed!

Innocence is what the plea was based upon and protection of an innocent little girl caught in a tough of war between a man trying to protect her and an ex-wife's babysitter who it has been proven abused his kids at the daycare where their mother abandoned them. If one honorable reader of this can sleep tonight knowing an attorney in an American courtroom stated on the record, in a plea based on innocence not guilt, non-existant grand jury transcripts were provided in discovery,

directly against the law, knowing that this Court's McQuiggin v Perkins execption was ignored at the federal level, in an attempt only to have that ground heard on the merits-then Petitioner is with out hope of obtaining justice from the criminal justice system he placed his faith in that day so long ago to vindicate himself of this false claim. Petitioner has fought everyday of his life since, including before he was incarcerated on a probation violation and given the eqvialaent of a life sentence-of which he has now served over 18 years-to regain his freedom and most importantly his fatherhood. My daughter and I are together because the truth was told that no one so far but Judge Meyers and Johnson at the Court of Criminal Appeals failed to overlook. If overlooking is the maxim of law so be it, but innocence will prevail!

Today is the day that this Honorable Court grants rare certiorari relief to an indigent but innocent prisoner to send that message that it is not okay to overlook this Court's precedent and rule eroneously at the next level and then rely on the law of the doctrine to cover a multitude of sins and errors. Thank you for being allowed to be heard.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Clifton D Harris

Date: April 13th 2022