

24-6513

No. _____

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

TAVON J. MAGEE

— PETITIONER

(Your Name)

vs.

STATE OF MICHIGAN

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

STATE OF MICHIGAN COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

TAVON J. MAGEE #810580

(Your Name)

LAKELAND CORRECTIONAL FACILITY

141 FIRST STREET

(Address)

COLDWATER, MICHIGAN 49036

(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

I. HAS PETITIONER MAGEE MADE A PROPER SHOWING OF ACTUAL INNOCENCE TO HAVE HIS CONSTITUTIONAL CLAIMS ADDRESSED ON THE MERITS?

II. WHETHER THE SUPREME COURT SHOULD ESTABLISH A FEDERAL STANDARD FOR ENTITLEMENT TO RELIEF ON A FREESTANDING CLAIM OF ACTUAL INNOCENCE?

III. WAS PETITIONER MAGEE DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE?

LIST OF PARTIES

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

People v. Magee, No. 16-261120-FH, Sixth Judicial Circuit Court for the County of Oakland. Judgment entered on May 4, 2023.

People v. Magee, No. 367077, Court of Appeals, State of Michigan. Judgment entered on January 23, 2024.

People v. Magee, No. 166716, Michigan Supreme Court. Judgment entered on September 30, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tavon J. Magee, respectfully ask the Court to issue a writ of certiorari to review the order of the Michigan Court of Appeals entered on January 23, 2024.

OPINIONS BELOW

The Michigan Court of Appeals ordered issued (January 23, 2024) is attached as Appendix A. The Sixth Judicial Circuit Court for the County of Oakland opinion denying Petitioner's motion for relief from judgment is attached as Appendix B. The Michigan Supreme Court decision denying review is attached as Appendix C.

JURISDICTION

The Michigan Supreme Court entered its order denying review on September 30, 2024. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence..... 6

Section 1 of the Fourteenth Amendment to the United States Constitution provides: 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..... 18

SUMMARY OF ARGUMENT

Petitioner Tavon J. Magee (hereinafter "Petitioner"), filed by and through counsel a motion for new trial in the Sixth Judicial Circuit Court for the County of Oakland, Michigan. Petitioner through counsel argued in the motion for new trial that newly discovered evidence, pursuant to recently obtained sworn affidavits that Petitioner was innocent of the crimes he was convicted of and denied effective assistance of counsel during his criminal proceedings. Despite the fact that the motion was based on newly discovered evidence which supports Petitioner's innocence, the motion was denied without a hearing on May 4, 2023. Petitioner did timely appeal the trial court's erroneous ruling to the Michigan Court of Appeals who affirmed the trial court's decision. The Michigan Supreme Court denied discretionary review. Petitioner contends a State has no authority to continue the unlawful imprisonment of an innocent person in violation of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted in Oakland County Circuit Court of two counts of possession with intent to deliver 50 to 449 grams of a controlled substance, Michigan Compiled Laws ("MCL") 333.7401(2)(a)(iii), one count of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession of ammunition by felon, MCL 750.224f(6), and maintaining a drug house, MCL 333.7405(1)(d). Petitioner was sentenced as a third habitual offender to concurrent prison terms of 18 to 40 years for the controlled substances convictions, 6 to 10 years for possession of ammunition by a felon, and 2 to 4 years for maintaining a drug house.

Petitioner through counsel appealed by right, and on June 27, 2019, the Michigan Court of Appeals affirmed the convictions (People v. Magee, 2019 Mich.App. LEXIS 3532, COA No. 340421). The court of appeals panel stated the following as the statement of facts:

These cases arise out of an investigation by the Oakland County Sheriff's Department of suspected drug trafficking at a house located at 26 Gingell Street in Pontiac, Michigan. Over a six-month period of surveillance, detectives observed activity consistent with hand-to-hand drug transactions. The house was owned by Magee's mother. The lead investigator, Detective Daniel Main, testified that Magee was the person he saw most frequently at the house. Main observed Magee engaging in activity consistent with drug trafficking.

On the basis of the investigation, officers obtained and executed a search warrant at 26 Gingell. Detective Jason Teelander was the first officer to enter the house. He testified that he made eye contact with Erkins who was seated at a dining table; Erkins yelled "police" and ran to the kitchen. Teelander found Erkins lying on the steps to the basement. Magee was in the kitchen near the basement stairs; two other people were also in the home.

At the bottom of the stairs, officers found various bags containing crack cocaine, fentanyl, and fentanyl-heroin mixture. They also found drug trafficking and packaging paraphernalia including plastic bags and digital scales. Teelander testified that it looked like someone had thrown the items found at the bottom of the basement stairs in haste. Magee had \$3400 in his possession, which according to testimony was the approximate wholesale value of the fentanyl and fentanyl-heroin mixture found in the basement. Officers also found crack cocaine along with packaging paraphernalia on the dining table. The jury convicted both defendants of two counts of possession with intent to distribute with respect to the fentanyl and cocaine found in the home.

Officers also found bags containing heroin in a vehicle at the house that Detective Main had previously observed Magee driving. The jury found Magee guilty of possession with intent to distribute regarding the heroin found in the vehicle, but acquitted Erkins of that charge.

A number of items bearing the last name "Magee" were found in the home, including a piece of mail addressed to defendant Magee at 26 Gingell. However, it did not appear to the officers that anyone actually lived in the house. Officers also found three boxes of ammunition. As stated, the jury found Magee guilty of maintaining a drug house and the crime of being a felon in possession of ammunition. But the jury acquitted Magee of possession of marijuana, and possession of oxycodone, both of which were found in the home. (People v. Magee, supra, at pp 2-3) (footnotes omitted).

REASONS FOR GRANTING THE WRIT

ARGUMENT I

PETITIONER MAGEE HAS MADE THE NECESSARY SHOWING OF ACTUAL INNOCENCE AND IN LIGHT OF HIS NEW EVIDENCE, IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND HIM GUILTY BEYOND A REASONABLE DOUBT.

This case was built around Petitioner's alleged constructive possession of the drugs. Several years after the convictions, Steven Erkins came forward and acknowledged that the heroin and fentanyl-heroin mixture recovered from the basement of the house and the Dodge Challenger parked outside the house belonged to him and Petitioner played no part in possessing these amounts of heroin and fentanyl-heroin mixture. Sherrod Magee provided Petitioner with an affidavit, stating that he was the person who possessed the ammunition that was used to convict Petitioner. See Argument II, *infra*. After Petitioner's criminal trial and appeal, he sought assistance from family and friends to prove his innocence, which led to these new witnesses coming forward. Hence, this new evidence was newly discovered after his convictions and appeals.

Petitioner could not have, with reasonable diligence, produced Mr. Erkins evidence at trial. The existence of Mr. Erkins' information was nonexistent to Petitioner at the time of his own trial. He was not listed on either of the parties'

witness list, and he was prosecuted in his own case as well, making it impossible to produce this witness at trial. The existence of Mr. Erkins' information was discovered only after trial and appeals, and only after Mr. Erkins contacted Petitioner.

Although the state trial court speculated Petitioner "had to have known" of Mr. Erkins' claims when he was being prosecuted (Opinion and Order denying motion for new trial, p 6, Appendix B), there was no evidence presented that Petitioner knew of Erkins' claims before 2020. The affidavit constitutes new evidence and there is no evidence in the state court record to suggest otherwise. Further, there is no evidence Petitioner could have obtained this information before his trial through reasonable diligence, as he purportedly only learned of Mr. Erkins' involvement after he became incarcerated following his trial. This Court has clearly established what constitutes as "new reliable evidence". In *Schlup v. Delo*, 513 U.S. 298, 324 (1995) the Court stated "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial." See *Souter v. Jones*, 395 F.3d 577, 593 n. 8, (6th Cir. 2005)(noting Schlup states "the newly presented evidence may indeed call into question the credibility of the

witnesses presented at trial"); 595 n. 9 (noting Michigan confused its standards for new trial with Schlup standards).

The evidence at trial was far from overwhelming. The evidence to implicate Petitioner in these crimes consisted of his presence in the house where the drugs and ammunition were located, and certain items of "identification" purportedly tying him to the contents of the house. The ruling by the state trial court requires a remand because it was rendered without the benefit of a proper testimonial hearing. The state trial judge failed to carefully consider the newly discovered evidence in light of the evidence presented at trial, which conflicted with Michigan's own binding precedent. *People v. Johnson*, 502 Mich 541 (2018).

The prosecution's case hinged on the theory of constructive possession. Beyond police officers testimony, there was no other evidence linking Petitioner to this case. Petitioner's family retained the services of Private Investigator (PI) Patrick Ong who submitted several requests under the Freedom of Information Act (FOIA) for specific information omitted from Deputy Main's affidavit in support of the request for a search warrant. See First Request in Appendix F. The Oakland County Sheriff's Office responded to the request by primarily relying on exemptions for certain requested records or information. Appendix F. The exemption statutes precludes information from being disclosed which "identifies,

or provides a means of identifying an informant, law enforcement officer, or agent." Additionally, the Sheriff's Office stated "there are no records differentiating "a black male" in the affidavit from Deputy Main's testimony that Petitioner was the seller. PI Ong found the first response a denial of the FOIA rights and submitted an appeal requesting specific records and/or information. PI Ong found the Oakland County Sheriff's Office reliance on the exemption statutes to be contrary to his request. As PI Ong stated on page 1 and 2 of his request "to redact anything that may compromise the informant, however, please provide evidence that indicates any controlled purchases were attempted and why Deputy Main's affidavit is inconsistent with his testimony." PI Ong did provide Petitioner with the above requests and responses and concluded the Oakland County Sheriff's Office case against Petitioner was a sham. PI Ong stated, "they admitted they have absolutely no real evidence."

Petitioner's new evidence is so strong that one cannot have confidence in the outcome of his trial and it is shown herein that the trial was not free of constitutional error. See Argument II, infra. In *Herrera v. Collins*, 506 U.S. 390, 404-405 (1993), the Court recognized that a person may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.

In this case, the affidavits in question indicates that Petitioner's convictions were based on lies, falsehoods and omissions. Under the unusual circumstances of this case, it cannot be said with confidence where the truth lies at this point. There is a real likelihood that the jury would have discounted the police testimony, knowing that they falsely made statements concerning the investigation of this case. As shown in the police response to the private investigator's request, no detailed record or information exists showing Petitioner as the individual making controlled buys from any informant, officer or agent. Which said surveillance allegedly took place over a six-month period. Here, in this case, the evidence is clear and an evidentiary hearing is warranted to further the record to make a determination on the facts to see whether a new trial is appropriate based on all the above mentioned reasons. As quoted by the Herrera court, Chief Justice Warren made clear in *Townsend v. Sain*, 234 US. 293, 317 (1978):

"Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts; the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention, the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Herrera*, supra, 506 U.S. at 400.

As stated by the Herrera court "[T]his is not say that our... 'habeas jurisprudence casts a blind eye toward innocence.' " 506 U.S. at 404. Petitioner's new reliable evidence has probative value. Had Erkins and Sherrod Magee testified at Petitioner's trial, it could have been weighed by the jury, along with the evidence offered. As stated in *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991), "a defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him.' " Mr. Erkins and Mr. Sherrod Magee's confessions to committing the crimes Petitioner has been convicted of should show Petitioner has made a proper showing of actual innocence.

In more recent times the Supreme Court has stated "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Petitioner respectfully request of the Supreme Court to grant certiorari and answer this long undecided federal question.

ARGUMENT II

PETITIONER MAGEE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENCE WHERE A RECENT SWORN AFFIDAVIT ESTABLISHES THAT TRIAL COUNSEL FAILED TO CALL A CRUCIAL DEFENSE WITNESS, DESPITE HAVING NOTICE THAT THIS WITNESS COULD TESTIFIED THAT PETITIONER HAD NO POSSESSORY INTEREST IN THE AMMUNITION FOUND IN THE HOUSE DURING THE SEARCH. DEFENSE COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO CONDUCT REASONABLE INVESTIGATIONS INTO MR. ERKINS INVOLVEMENT IN THIS CASE.

The purpose of the Sixth Amendment guarantee of the effective assistance of counsel is to ensure a criminal defendant receives a fair trial. The test is whether the attorney's performance fell below an objective standard of reasonableness and the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

The *Strickland* court also listed certain basic duties that an attorney owes his or her client. For instance, the attorney has an "overarching duty to advocate the defendant's cause" and "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 394. The *Strickland* court went on to say "[C]ounsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance.'" *Id.*

As for the second *Strickland* standard for determining whether prejudice is

found in a particular case, requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different." *Id.*

In this case, Sherrod Magee signed a notarized affidavit, attesting and affirming that he was the person who possessed the ammunition that was used to convict Petitioner, that he informed Petitioner's lawyer, Jim Amberg, that he was available to so testify in support of Petitioner. However, the state trial court denied relief on this issue and held that, "the record is devoid of any evidence to reflect that Sherrod alerted trial counsel regarding his proposed testimony or that Petitioner advised his appellate counsel about the alleged failure so that it could be raised on appeal." (Opinion and Order denying motion for new trial, Appendix B, at pp 6-7). While Petitioner agrees that the current record does not contain evidence that Sherrod Magee alerted trial counsel about his proposed testimony - this claim is supported by Sherrod Magee's newly discovered executed affidavit, -which-required-a-hearing-before-the-state-trial-court-dismissed-the-issue-as-meritless. According to Sherrod Magee, defense counsel refused to utilize him as a witness, stating that "he could beat the case without [Sherrod Magee's testimony]." (Affidavit of Sherrod Magee, Appendix E, at p 2). As a result, the state trial court clearly erred in rejecting the issue without a hearing, which would have

allowed this evidence to become a part of the record, and would have permitted the state trial court the opportunity to determine the credibility of Sherrod Magee's statements contained in his affidavit.

Mr. Amberg's failure to present Sherrod Magee as a defense witness fell below an objective standard of reasonableness. Assessing defense counsel performance under the prevailing professional norms during Petitioner's trial, no objectively reasonable attorney would have foregone the testimony of an available witness that directly supports Petitioner's claim that he did not possess the ammunition in question. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). This is especially true given that Petitioner's only real hope of an acquittal rested on convincing the jury that someone else actually possessed the ammunition. It has been consistently held that counsel's failure to take the proper and evident steps to protect his or her client's constitutional rights during criminal prosecution constitutes ineffective assistance, and/or denies the defendant a fair trial. It is the duty of counsel under the Sixth Amendment either to make a reasonable investigation of law and facts relevant to plausible options or to make reasonable decisions not to investigate. On the other hand, the reasonableness of strategic choices made after incomplete investigations are subjected to heightened scrutiny. *Strickland*, 466 U.S. at 690-691; *Nagy v. United States*, 90 F.3d 130 (1996).

In this case, it is clear that defense counsel did not make an informed strategic choice not to call Sherrod Magee. Defense counsel failed to investigate and interview him as a potential witness, failed to obtain a statement and proper contact information from him, and failed to recognize that Sherrod should have been served with a subpoena to assure his presence at trial. In this regard, defense counsel's inaction constitutes negligence, not trial strategy. *Strickland*, *supra*; *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir. 1992). By not pursuing a substantial and critical lead, prima-facie evidence of innocence went unabated. Without investigating further, defense counsel simply proceeded to trial without critical evidence that could have proven that Petitioner was actually innocent of one of the charges alleged. Evidence necessary to prove Petitioner's defense was readily available if his attorney had investigated the matter properly. Instead, defense counsel allowed the prosecution to obtain a conviction based on false or mistaken testimony.

~~The question next presented is whether Petitioner sustained prejudice.~~
Strickland's second prong focuses on whether the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The failure on defense counsel's part to present Sherrod Magee's testimony prejudiced Petitioner. This was a close case that rose or fell on whether the jury believed the testimony of the police concerning Petitioner's "possession" of the ammunition. It was reasonably likely that Sherrod Magee's testimony would have tipped the scales in favor of reasonable doubt, and any potential inconsistency in Sherrod Magee's testimony was, fundamentally, a jury question. In any event, much of the prosecutor's evidence would have been discredited, and Sherrod Magee's testimony would have served as the tie breaker witness.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this court explained that Strickland's second prong is shown where an attorney deprived a defendant of any "substantive or procedural right to which the law entitled him." *id.* 529 U.S. at 392-393, n. 17. Clearly Petitioner's trial attorney deprived him of the right to have the jury hear Sherrod Magee's testimony and decide a verdict consistent with evidence in an adversarial proceeding.

In-regards-to-defense-counsel's-failure-to-investigate-Mr.-Erkins-in-this-case-is quite disturbing. Had defense counsel taken notice of the location of the drugs found in the basement, he reasonably should have known to speak with Mr. Erkins and simply asked him whether he threw the drugs located in the basement. The State's evidence corroborates what Mr. Erkins attest to as he was the only person

found in the basement. Defense counsel's failure to investigate and secure Mr. Erkins presence to testify on his client's behalf, constitutes negligence, not reasonable sound trial strategy. Strickland, *supra*.

This is the "prejudice" which Petitioner suffered, because if the true facts had been properly developed, as trial counsel could have, it would have been immediately apparent to the jury that acquittal was appropriate. Taken as a whole, it is apparent counsel's representation did not meaningfully test the prosecution's case. The Sixth Amendment and this Court's binding precedents requires the Court to grant Petitioner a new trial, or in the alternative, remand back to the state trial court for an evidentiary hearing to establish a factual record in regards to whether defense counsel was aware of Sherrod Magee's willingness to testify in support of Petitioner's defense and ascertain why defense counsel failed to investigate Mr. Erkins and secure his presence at Petitioner's trial. The state trial court reached its credibility determination without taking the opportunity to listen to Sherrod Magee and Mr. Erkins, test their story, and gauge their demeanor. See *Blackledge v. Allison*, 431 U.S. 63, 82 n. 25 (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive...")(internal quotation marks and citation omitted).

SUPREME COURT RULE 10

Petitioner understands that certiorari review involves questions of exceptional importance. Petitioner asserts this Court's precedents have consistently found that effective assistance of counsel is the fundamental guarantee for the fairness of a criminal trial. **U.S. Const Amendment XIV.**

In relation to Petitioner's case, this petition involves questions of exceptional importance as to: (1) whether Petitioner has made a proper showing of actual innocence; (2) whether a state prisoner is entitled to federal relief under a freestanding claim of actual innocence; and (3) did Petitioner's attorney deprive him of the right to a fair trial.

In Supreme Court Rule 10(c) it states some of the reasons the Court considers for granting certiorari review. Petitioner asserts the State of Michigan has decided important questions of federal law that conflicts with this Court's precedents. The last State court to review the merits of Petitioner's claims was the Michigan Court of Appeals. Petitioner respectfully asks of the Court to grant certiorari, and appoint Petitioner counsel to brief and argue the merits of his case. In the alternative, grant certiorari, vacate the Michigan Court of Appeals decision and order a new trial, or order the State of Michigan to schedule and conduct an evidentiary hearing on Petitioner's claim his trial counsel was constitutionally

ineffective.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Tim Myer

Date: December 19th, 2024