

Case No.: _____

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IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM

In re FREDERICK WEBSTER, PETITIONER

Vs.

UNITED STATES, et al, RESPONDENTS

ON PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. §§ 2241

TO UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. §§ 2241

FREDERICK WEBSTER

UNION CORRECTIONAL INSTITUTION

P.O. BOX 1000

RAIFORD, FLORIDA 32083

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INTERESTED PARTIES

UNITED STATES ATTORNEY GENERAL
SOLICITOR GENERAL OF THE UNITED STATES

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UNITED STATES CONSTITUTION ART. 1 §9 Clause 2.

UNITED STATES CONSTITUTION SIXTH AND FOURTEENTH AMENDMENT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 2241; and Supreme Court Rule 20(1). Petitioner submits that he has no other available remedy to review the Circuit Court's denial of Certificate of Appealability to review his actual innocence; nor the Circuit Court's denial of authorization for Petitioner to file a successive habeas corpus petition based upon his actual innocence, notwithstanding the fact that his actual innocence has not been previously determined on its merits.

STATEMENT OF THE CASE AND FACTS

In this case at bar, Petitioner contends that the United States District Court and the Eleventh Circuit Court of Appeal both has illegally suspended the habeas corpus review to Petitioner where the said courts has denied Petitioner's § 2254 habeas corpus review concluding that the petitioner was untimely without any consideration of his gateway claim of his actual innocence.

Petitioner was tried and convicted in a trial via jury for the criminal offenses listed in a three count indictment filed in the Seventeenth Judicial Circuit Court, in and for Broward County, Florida, under case number 85-12326CF10B. The indictment charged the following:

Count one, First Degree Felony Murder, Count two, Second Degree Felony Murder, and Count three, Burglary of an unoccupied structure¹ (App. A, Exhibit A, indictment).

Eventually, Petitioner was convicted as charges (App. A, Exhibit B), and sentenced (App. A, Exhibit C) to an overall sentence of life imprisonment. The date of Petitioner's conviction was on or about the 16th day of June, 1985. Direct appeal of his convictions and sentences became final on or about the year of 1989. See Webster v. State, 540 So.2d 124 (Fla. 1989), whereupon his conviction was affirmed in part and reversed in part.

Webster submits that because under Florida law his instant claim of ineffective assistance of trial counsel is not cognizable upon direct appeal of his convictions and because he was not afforded counsel at his initial collateral state

¹ All reference to exhibits herein are incorporated by reference to the Appendix exhibits attached thereto.

post conviction review, thereby he claims cause for his defaulted claim of ineffective assistance of counsel as determined by the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1, 132 S. CT. 1309, 182 L.Ed. 2d 272 (2012).

At trial Webster was represented by a court appointed counsel. Webster's sole available trial defense for the charges listed in the indictment was withdrawal/abandonment of the criminal offenses.

On or about July 19, 1995, Petitioner filed his state court post conviction motion in which he claimed that he is innocence of felony murder and ineffective assistance of trial counsel (App. A, Exhibit -D). In the state post conviction proceeding Webster argue that the new evidence and facts will show that Webster did sustain a injury to his wrist as a consequence of is effort to shut off the ignition switch to his fleeing car before it collided with the car being driven by the homicide victim thus demonstrating his withdrawal from the burglary before the homicides occurred and therefore relieving him from all criminal liability for the deaths of the homicide victims pursuant to state and federal law. Petitioner further argued that his court appointed counsel rendered ineffective assistance in the preparation of Petitioner's sole trial defense to wit, withdrawal/abandonment whereas counsel failed to investigate and prepare his sole trial defense whereas counsel did not procure any of the said known evidence which Petitioner has advised his counsel of; and that but for counsel's failure to investigate and procure said new evidence to wit Webster's medical record consisting of the surgery to his wrist form being struck with the backside of a hatchet by the driver of his car when Webster attempted to

shut off the ignition switch to his car, and the would be trial testimony of the doctors who treated Webster's said injury to his wrist which would show that Petitioner's injury to his wrist was consistent with being struck with the backside of the hatchet which was found in their car, and that for counsel's failure to object to the inadequate jury instruction on Webster's trial defense no reasonable jury would have found Webster guilty of felony murder. Furthermore, Webster will further rely and reallege the facts set forth in his state court post conviction motion and its attached exhibits thereto (App. A, Exhibit -D).

When presenting Webster's claims of newly discovered evidence and ineffective assistance of trial counsel the state court summarily dismissed the motion as being time barred notwithstanding the fact that the motion presented claims of newly discovered evidence, an exception to the time limitations under rule 3.850 (App. A, Exhibit -E). Webster will note to this Court that when denying the 3.850 motion the state court did not discuss any evidence in the court's records which would refute Webster's allegation, nor attach to its order of dismissal any portions of the record which would refute Webster's allegations (App. A, Exhibit -E).

Thereafter, on or about October 30, 1997, Webster filed his initial § 2254 habeas corpus petition in the U.S. Southern District Court at which time the appointed Magistrate Judge recommended that the petition be dismissed as time barred under the provisions of § 2244(d)(1), and (2) (App. A, Exhibit -G).

Eventually, the trial court adopted the Magistrate Judge's report and recommendation without any consideration of Webster's gateway claim of his actual

innocence and dismissed the petition as time barred (App. A, Exhibit -H). Webster will further note to this Court that, as in Wyzykowski *infra*, the trial court did not have any portions of the state court trial proceedings to determine the merits of Webster's gateway claim of his actual innocence. A timely appeal of the trial court's dismissal of the § 2254 petition was taken at which time the trial court denied Petitioner a certificate of appealability.

Thereafter, Webster sought certificate of appealability in the Circuit Court at which time Webster further argued that he was entitled to equitable tolling of the limitations based upon his gateway claim of his actual innocence. Nevertheless, the Eleventh Circuit Court of Appeal failed to issued Webster a certificate of appealability on the issue of Webster's would be challenge to the suspension of the writ, but did issues a certificate of appealability on the limited issue of whether Webster's state court post conviction motions were properly filed to toll the statute limitation of § 2244(d). See Webster v. Moore, 199 F.3d 1256 (11th Cir. 2000). Furthermore, the Circuit Court did not and could not make any merit determination on Webster's gateway claim of his actual innocence whereas in Wyzykowski *infra*, the Circuit Court did not have any portions of the trial court trial records to make any merit determination on the claims.

To no avail, Webster has also previously sought authorization to file a successive habeas corpus petition based upon his actual innocence; at which time the court did not have any portions of the state trial court record to make any merit determination on Webster's asserted actual innocence, thus no merit determination

on his claim was made. On or about the 5th day of December, 2017, Petitioner resubmitted his § 2244 habeas corpus petition in which he seeks authorization to file a successive § 2254 habeas corpus petition based upon his actual innocence. The Circuit Court denied the petition based upon the fact that Petitioner has already presented his actual innocence claim in his initial § 2254 habeas corpus petition, and previously sought authorization to file a successive § 2254 habeas corpus petition on the same claim (App. B). The Circuit Court did not consider the fact that at no time has either of the said federal courts made any merit determination on Petitioner's claim of his actual innocence which would render the motion impermissibly successive.

Thus, Petitioner now contends that in light of the fact that there is no prior merit determination in the federal courts, there is no law of the case established to preclude review of his gateway claim of his actual innocence in a belated appeal; and or in a successive § 2254 habeas corpus petition.

RELIEF SOUGHT

The relief sought in this habeas corpus proceeding is an order of this Court compelling the Eleventh Circuit Court of Appeal to grant Petitioner a certificate of appealability for belated appeal on his challenge to the constitutionality of the writ on the grounds that dismissal of his first habeas corpus petition as being untimely without consideration of his gateway claim of his actual innocence constituted an illegal suspension of the writ.

Petitioner also seek in the alternative that this Court compel the Eleventh Circuit Court to grant Petitioner a certificate of appealability of his 2254 habeas corpus petition and or authorization to file a successive § 2254 habeas corpus petition on his gateway claim of his actual innocence.

REASONS FOR GRANTING THE PETITION

Petitioner submits that the granting of this habeas corpus petition is needed to correct a miscarriage of justice whereas Petitioner can show that he is actually innocence of felony murder. Petitioner further submits that the failure of this Court to grant this petition would result in a manifest injustice under the jurisprudence of habeas corpus relief in that “the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion of invasion the public safety may require it.”

ARGUMENTS

I.

WHETHER PETITIONER WHO ARGUED THAT ONE-YEAR STATUTE OF LIMITATIONS OF ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT VIOLATES SUSPENSION CLAUSE OF PETITIONER WHO IS ACTUALLY INNOCENT WAS ENTITLED TO CERTIFICATE APPEALABILITY?

It is well settled that a petitioner who argued that one-year statute of limitations of Antiterrorism and Effective Death Penalty Act violates suspension clause in case of petitioner who is actually innocent was entitled to certificate of appealability. *Lucidore v. New York State Div. of Parole* (2000, CA2 NY) 209 F.3d 107. In this case at bar, Webster argue that the dismissal of his habeas corpus petition is based upon pure questions of law thus, requiring the Circuit Court to review the dismissal de novo. *Teleguz v. Pearson*, 689 F.3d 322, 329 (4th Cir. 2012) (vacating dismissal of habeas corpus petition and remanding to district court for further proceedings on petitioners *Schlup v. Delo* claim of actual innocence because district courts conclusory rejection of claim do[es] not provide sufficient analysis to enable us to review the reasons for, or scope of, the district court's denial of Teleguzs *Schlup* gateway innocence claim); *Dunlap v. United States*, 250 F.3d 1001, 1007 n.2 (6th Cir.), *cert. denied*, 534 U.S. 1057 (2001) (where the facts are undisputed or the district court rules as a matter of law that equitable tolling [of AEDPAs statute of limitations] is unavailable, we apply the de novo standard of review to a district court's refusal to apply the doctrine of equitable tolling; in all other cases, we apply the abuse of discretion standard).; *Cornell v. Nix*, 976 F.2d

376, 381 (8th Cir. 1992) (court of appeals reviews *de novo* district courts ruling on applicability of miscarriage of justice exception to procedural default and abuse of writ defenses). In this case sub judice, Webster contends that where he has alleged that he is actually innocent of felony murder and has presented evidence in support thereof to deny him certificate of appealability on the constitutionality of writ barring him from habeas corpus review of his actual innocence does constitute a suspension of the writ pursuant to the habeas corpus jurisprudence.

In Wyzykowski, 226 F.3d 1213 (11th Cir. 2000) appellant appealed the dismissal of his § 2254 petition as being untimely notwithstanding his claim of actual innocence constituted a suspension of the writ. Thus the court held, "We review the district court's dismissal of petition *de novo* because this issue is solely one of law". *See Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1999) (*per curiam*). On August 25, 1997, the magistrate judge issued the usual show cause order, ordering a response to Wyzykowski's petition. The State responded, asserting that the claim was time-barred. However, the State did not file the record of the state court proceedings. *See* Rule 5, Rules Governing § 2254 Cases. On April 21, 1998, a magistrate judge issued a report, noting in passing that petitioner failed to exhaust his claims in state court, but recommending that the petition be dismissed for failure to comply with the one-year limitation period for habeas corpus petitions enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, codified as amended at 28 U.S.C. § 2244(d). On May 28, 1998, the district court dismissed the petition as time-barred.

On July 6, 1998, the district court granted a certificate of appealability on the following issue:

Whether the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, codified as amended at 28 U.S.C. § 2244(d), as applied to Petitioner is an unconstitutional suspension of the Writ of Habeas Corpus in violation of the United States Constitution Article I, Section 9, clause 2. Accordingly, Wyzykowski appeals on this issue. Wyzykowski claims that he is actually innocent of second degree murder, the crime to which he pleaded guilty, and of first degree murder and burglary, the crimes initially charged but dropped pursuant to the plea agreement. He contends his new evidence, in particular his own testimony, establishes that he was actually innocent of these crimes.

Wyzykowski's argument raises a troubling and difficult constitutional question. *Where the petitioner can show actual innocence and § 2244(d)'s limitation period has expired, does the bar to filing a first federal petition constitute an unconstitutional suspension of the writ of habeas corpus?* The question raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence. The courts faced with Suspension Clause challenges to § 2244(d) have been able to avoid deciding the difficult constitutional issue of whether the clause requires an exception to § 2244(d) for actual innocence because the petitioners were unable to make a showing of actual innocence. *See Lucidore v. New York State Division of Parole*, 209 F.3d 107 (2d Cir.2000).

In Webster's case, as in Wyzykowski neither the magistrate judge nor the district court addressed Wyzykowski's claims of actual innocence. The court held, "We agree with the Second Circuit that the factual issue of whether the petitioner can make a showing of actual innocence should be first addressed, before addressing the constitutional issue of whether the Suspension Clause requires such an exception for actual innocence. " 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' " *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582, 99 S. Ct. {226 F.3d 1219} 1355, 1364, 59 L. Ed. 2d 587 (1979) (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152, 154, 89 L. Ed. 101 (1944)). For example, " 'constitutional issues affecting legislation will not be determined . . . at the instance of one who fails to show that he is injured by the statute's operation.' " *Id.* at 583 n. 22, 99 S. Ct. at 1364 n. 22 (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69, 67 S. Ct. 1409, 1419-20, 91 L. Ed. 1666 (1947)); *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 482, 80 L. Ed. 688 (1936) (Brandeis, J., concurring).

For several reasons, we decline to address the factual issue whether Wyzykowski can make a showing of actual innocence, preferring that the district court do so in the first instance. First, as noted above, the State did not file in the district court the record of the state court proceedings, and thus there is a complete absence in the record on appeal concerning whether Wyzykowski could make a

showing of actual innocence. Although it is represented to us that Wyzykowski entered a guilty plea, we do not have the benefit of any record evidence with respect thereto; for example, we do not have access to the plea colloquy. Second, in any event, such factual determinations are best made in the first instance by the district court. Indeed, if on remand, the district court determines that Wyzykowski has made a showing of actual innocence, we would prefer to have the benefit of the district court's legal analysis of the difficult Suspension Clause issue before tackling same ourselves". Wyzykowski, *supra*.

II.

WHERE PETITIONER'S GATEWAY CLAIM OF HIS ACTUAL INNOCENCE HAS NOT BEEN PREVIOUSLY DETERMINED ON ITS MERITS BY ANY FEDERAL COURT WOULD BAR PETITIONER'S APPLICATION FOR AUTHORIZATION TO FILE A SUCCESSIVE HABEAS CORPUS ON HIS GATEWAY CLAIM OF HIS ACTUAL INNOCENCE?

Webster argue that in light of the fact that the District Court and the Circuit Court has failed to make any merit determination on Webster's gateway claim of his actual innocence a subsequent presentation of the claim would not work to bar his claim in a successive § 2254 habeas corpus petition; and would not work to bar him belated appellate review. A "successive petition" is one that raises a claim or claims already adjudicated through a prior petition. *Martin v. Dugger*, 891 F.2d 807, 809 (11th Cir. 1989), *cert. denied*, 498 U.S. 881, 111 S. Ct. 222, 112 L. Ed. 2d 178 (1990). Furthermore, Rule 9(b) of the rules governing 2254 cases provides that a court may dismiss any such claim unless the "ends of justice" militate in favor of deciding the merits of the claim. *See, e.g., Collins v. Zant*, 892 F.2d 1502, 1505 (11th Cir.) (per curiam), *cert. denied*, 498 U.S. 881, 111 S. Ct. 225, 112 L. Ed. 2d 180 (1990). The ends of justice "are defined by objective standards such as whether there was a full and fair hearing on the original petition or whether there was an intervening change in the facts of the case or the law." *Fleming v. Kemp*, 837 F.2d 940, 943 (11th Cir. 1988) (per curiam), *cert. denied sub nom. Fleming v. Zant*, 490 U.S. 1028, 109 S. Ct. 1764, 104 L. Ed. 2d 200 (1989)

Sanders v. United States, 373 U.S. at 1516. *Accord* 28 U.S.C. § 2244(b) (1994) (superseded) (successive petition rule applies only after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law); Green v. Reynolds, 57 F.3d 956, 95758 & n.3 (10th Cir. 1995) (although petitioner previously raised claim in two petitions, current claim is not successive because previous petitions were dismissed on procedural grounds and thus claim was never decided on the merits); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir.) (*en banc*), *cert. denied*, 497 U.S. 1011 (1990) (The District Court did not abuse its discretion in hearing Hills second habeas petition, because there had been no final determination on the merits of Hills first petition).

CONCLUSION

WHEREFORE, based upon the foregoing facts and authorities in support herein, Petitioner respectfully moves this Court to grant him all relief he seeks in this proceeding along with any other relief that this Court deems just in accordance to law which would correct the manifest injustice which has occurred throughout the lower tribunal proceedings.

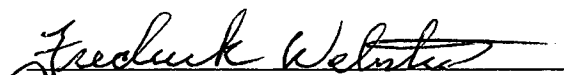
OATH

I, Frederick Webster do hereby certify under penalty of perjury on this 21st day of February, 2018, that I have read the foregoing Petition for Writ of Habeas Corpus and that each and all of the facts set forth therein are true and correct.


Frederick Webster, #856553
Union Correctional Institution
P.O. Box 1000
Raiford, Florida 32083

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above styled foregoing has been furnished via U.S. mail on this 21st day of February, 2018, to Office of the U.S. Attorney General at U.S. Department of Justice, 950 Pennsylvania Ave. N.W. Washington, DC 20530-0001 and to the Office of the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave. N.W. Washington, DC 20530-0001.


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APPENDIX - A

**Additional material
from this filing is
available in the
Clerk's Office.**