

No. 17-6765

2:16-CV-00645-MSD-DEM

IN THE  
SUPREME COURT OF THE UNITED STATES

FRANKIE M. MILLER JR. - PETITIONER  
(Your Name)

VS.

HAROLD W. CLARKE - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI

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

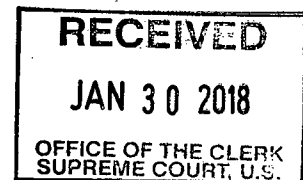
PETITION FOR WRIT OF CERTIORARI

FRANKIE M. MILLER JR.  
(Your Name)

GREENSVILLE CORRECTIONAL CENTER  
(Address) 901 CORRECTIONS WAY

JARRATT, VIRGINIA. 23870  
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

IN A HABEAS CORPUS PETITION UPON WHICH A CREDIBLE CLAIM OF ~~CONVICTED~~ ACTUAL INNOCENCE MUST BE SUPPORTED WITH NEW RELIABLE EVIDENCE NOT PRESENTED AT TRIAL, IS THE DISTRICT COURT OBLIGATED TO APPLY THE SCHUP V. DELO PREDICTIVE STANDARD EVEN THOUGH THE ~~PROFFERED~~ EVIDENCE OF ACTUAL INNOCENCE WAS AVAILABLE TO COUNSEL AT TIME OF TRIAL.

## LIST OF PARTIES

☒ 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 subject of this petition is as follows:

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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,

☒ is unpublished.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,

☒ is unpublished.

☐ For cases from **state courts:** *NO STATE COURT DECISIONS*

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☐ is unpublished.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

11-13-2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12-14-2017, 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**: NO STATE COURT DECISIONS

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)

# TABLE OF AUTHORITIES CITED

PAGE NUMBER

CASES

1) *Schlup v. Delo* 513 U.S. 298 (1995)

2. *Bousley v. United States* 523 U.S. 614 (1998)

3. *Houze v. Bell* 547 U.S. 518 (2006)

4. *McQuinn v. Perkins - US -* 133 S.Ct. 1924 (2013)

5. *Strickland v. Washington* 466 U.S. 668 (1984)

~~6. *Murray v. Carrier* 477 U.S. 478, 91 L.Ed.2d 397 106 S.Ct. 2639~~

~~7. *Wainwright v. Lynwood* 507 U.S. 403 (1993)~~

STATUTES AND RULES

1. U.S.C. § 2244 d(1) ~~2244 d(1)~~

2. U.S.C. § 2254 (a)

3. CODE OF VIRGINIA 1950 RULES OF PRO VIRGINIA S.C.T.

RULE 1.4 (a) (b) (c) RULES OF

PROFESSIONAL CONDUCT

OTHER

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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1. SIXTH AMENDMENT U.S. CONSTITUTION
2. U.S.C. § 2244 FINALITY OF DETERMINATION:  
A 1-YEAR PERIOD OF LIMITATION SHALL APPLY TO AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT
3. ~~14~~ FOURTEENTH AMENDMENT: U.S. CONSTITUTION
4. U.S.C. § 2254(b)(1) STATE CUSTODY: REMEDIES IN FEDERAL COURT:  
AN APPLICATION FOR WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO A JUDGMENT OF STATE COURT SHALL NOT BE GRANTED UNLESS IT:  
A. THE APPLICANT HAS EXHAUSTED THE REMEDIES AVAILABLE IN STATE COURT.

STATEMENT OF THE CASE

9

THIS ~~ORDER~~ CASE UNDERLYING THIS PETITION IS A PETITION FOR FOR HABEAS CORPUS FILED IN THE DISTRICT COURT IN 2016 PRESENTING CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND CLAIM OF ACTUAL INNOCENCE SUPPORTED WITH NEW RELIABLE EVIDENCE THE ISSUES PRESENTED IN THIS PETITION RELATES TO THIS COURTS DECISION IN SCHUPP V. DELO, M'QUIGGIN V. PERKINS, AND HOUSE V. BELL.

IN THE UNDERLYING ACTION MILLER ENTERED PLEAS OF GUILTY TO CAPITAL MURDER ON ADVICE OF COUNSEL ~~ON~~ SHORTLY AFTER UNDER- GOING A MENTAL STATE AT THE TIME OF EVENT EVALUATION ON MARCH AND APRIL OF 2003 BY FORENSIC PSYCHIATRIST DR'S EILEEN RYAN AND DANIEL MURKIE OF INSTITUTE OF LAW PSYCHIATRY AND PUBLIC POLICY UNIVERSITY OF VIRGINIA. MILLER ENTERED PLEAS ON MAY 30, 2003. HOWEVER, ~~COUNSEL~~ MILLERS COUNSEL "NEVER" AT NO TIME PRIOR TO DURING OR AFTER HIS PLEAS NOTIFIED, PRESENTED TO MILLER OR CONSULTED WITH MILLER NEITHER INFORMED MILLER THAT THE FORENSIC PSYCHIATRIST CONCLUSION OF THE EXAMINATION "FINDING WAS "MR MILLER DID NOT INTEND TO KILL HIS INFANT DAUGHTER." "MR. MILLER WAS SUFFERING FROM A SEVERE DEPRESSIVE DISORDER" MILLER DISCOVERED THE MENTAL STATE FORENSIC EVALUATION IN 2009 AND SOUGHT TO HABEAS RELIEF FROM THE CONVICTIONS AND SENTENCES OF LIFE WITHOUT PAROLE ACKNOWLEDGING HIS CLAIMS WERE PROCEEDUALLY DEFRAUDED AND PETITION TIME BARRED. MILLER ~~INVOLVED~~ INVOLVED THIS COURTS DECISION IN M'QUIGGIN V. PERKINS PRESENTING A CLAIM OF ACTUAL INNOCENCE TO OVERCOME THE PROCEDURAL DEFAULT AND ~~THE~~ STATUTE OF LIMITATION. MILLER SOUGHT RELIEF ON GROUND THAT VIRGINIA RULES OF PROFESSIONAL CONDUCT RULE 1.4.(a)(6)(c) COMPELS THAT COUNSEL HAD A RESPONSIBILITY TO KEEP HIM REASONABLY INFORMED ABOUT THE MATTER REGARD- THE FINDING I.E. CONCLUSIONS AND OPINIONS OF THE MENTAL STATE EVALUATION

BECAUSE HIS DECISION TO ENTER ANY PLEA COULD ONLY BE MADE AFTER HE

WOULD HAVE BEEN INFORMED ABOUT MATERIAL MATTERS AND COUNSELS DEFICIENCY  
TWO BELOW THIS COURTS STANDARD IN STRICKLAND V. WASHINGTON.

THE DISTRICT COURT ADOPTED THE MAGISTRATES REPORT AND RECOM-

MENTATION FOLLOWING MILLERS OBJECTIONS, DENYING THE PETITION ~~IN~~ DECIDING

"BECAUSE MILLER DID NOT FILE HIS PETITION WITHIN ONE YEAR LIMITATION AND

HAS NOT ESTABLISHED ANY CIRCUMSTANCES WHICH WOULD ENTITLE HIM TO EQUI-

TABLE TOILING HIS PETITION IS TIME BARRED." "BECAUSE MILLER HAS NOT SHOWN

CAUSE TO EXCUSE HIS FAILURE TO COMPLY WITH STATE PROCEDURE OR MISSTATION-

AGE OF JUSTICE. HIS PETITION IS PROCEDURALLY DEFECTIVE SEE APPENDIX E.

MILLER NOW SEEKS REVIEW OF THE DISTRICT AND APPEALS COURTS DECISION

SINCE THE DECISION REST UPON A REFUSAL TO COMPLY WITH THIS COURTS STAN-

DARDS SET IN SCHUPP V. DELO. THE DISTRICT COURTS DECISION CONFLICTS

OR IS INCONSISTENT WITH THIS COURTS INTERPRETATION OF THE NATURE OF THE

EVIDENCE REQUIRED IN SCHUPP V. DELO AMONG OTHER ERRORS. THE DECISION

DETERMINED THE DISTRICT COURT ADOPTED THE DECISION "MILLER PROFFERED

"NEW RELIABLE EVIDENCE" IS NOT NEW RELIABLE EVIDENCE AND DENIED HIS

MOTION FOR EVIDENTIARY HEARING.

THE DISTRICT COURTS DECISION ALSO CONFLICTS WITH THE FOURTH CIRCUIT

AND NO OTHER CIRCUIT PRECEDENCE SUPPORTS ITS VIEW.

MILLERS PETITION FOR CERTIFICATE OF APPEALABILITY AND APPEAL WERE

DENIED. SEE APPENDIX A.

MILLERS PETITION FOR REHEARING WAS DENIED SEE APPENDIX C.

I.

THIS IS AN EXTRAORDINARY CASE WITH A CLAIM OF ACTUAL INNOCENCE. THE QUESTION PRESENTED GOES TO THE HEART OF THE ACTUAL INNOCENCE ANALYSIS THE DISTRICT COURT FAILED TO CONDUCT.

THIS COURT HAS REAFFIRMED THE EXISTENCE AND IMPORTANCE OF AN EXCEPTION FOR FUNDAMENTAL MISCARriages OF JUSTICE AND HAS EXPLICITLY TIED THE MISCARriage OF JUSTICE EXCEPTION TO HABEAS DEATH- PETITIONERS INNOCENCE. THIS COURT ADOPTED A STANDARD OF PROOF THAT SHOULD GOVERN CONSIDERATIONS OF THOSE CLAIMS STATING THAT PETITIONER MUST SHOW THAT THE CONSTITUTIONAL ERROR PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT MURRAY V. CARREER 477 U.S. 478 (1984). TO BE CREDIBLE, SUCH A CLAIM REQUIRES PETITIONER TO SUPPORT HIS ALLEGATIONS OF CONSTITUTIONAL ERROR WITH NEW RELIABLE EVIDENCE. . . THAT WAS NOT ~~PRESENTED~~ PRESENTED AT TRIAL. SCULLIP V. OLEO 513 U.S. 298, 324 (1995).

THE STANDARD REQUIRES THE COURT TO MAKE A PROBABILISTIC DETERMINATION ABOUT WHAT REASONABLE JURORS WOULD DO UPON A PETITIONERS THRESHOLD REQUIREMENT OF PERSUADING THE DISTRICT COURT THAT IN LIGHT OF THE NEW EVIDENCE NO JUROR ACTING REASONABLY WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLY DOUBT.

IN THIS CASE THE DISTRICT COURT MISCHARACTERIZED THE EVIDENCE REFERRED NEW RELIABLE EVIDENCE AND REFUSED TO CONDUCT A PROBABILISTIC INQUIRY THATS REFUSING TO ASSESS THE PROBABLY PROBATIVE FORCE OF THE NEWLY PRESENTED EVIDENCE DETERMINING WHAT REASONABLE JURORS WOULD. THIS IS THE CORE OF THE MISCARriage OF JUSTICE EXCEPTION.

THIS CASE "IS" A CASE OF MATERIAL IMPORTANCE BECAUSE THE DISTRICT COURT IGNORES AN IMPORTANT ASPECT OF THE EXCEPTION THAT SHOULD APPLY TO THIS CASE TO SECURE SOCIETAL AND INDIVIDUAL JUSTICE WHEN THE CLAIMED INJUSTICE IS THE CONSTITUTIONAL ERROR HAS RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT OF CAPITAL MURDER.

THIS COURT CORRECT THE DISTRICT COURTS DECISION BECAUSE THE DISTRICT COURT DECISION PLACES GREATER LIMITATIONS ON THE MISCARriage OF JUSTICE / ACTUAL INNOCENCE EXCEPTION THAN THIS COURT CONTEMPLATES.

## II

THE DISTRICT COURTS DECISION CONFLICTS WITH MANY DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. THE SUPREME COURTS DELIMITATION OF WHAT CONSTITUTES NEW RELIABLE EVIDENCE UNDER THE FACTS OF SCHUPP V. DELO REVEALS A CONFLICT WITH THE DISTRICT COURTS VIEW OF MILLERS PROFFERED NEW RELIABLE EVIDENCE AND THAT OF SCHUPP V. DELO.

IN SCHUPP V. DELO THIS COURT STATED THAT A PETITIONER MUST

SUPPORT HIS ALLEGATIONS OF CONSTITUTIONAL ERROR WITH NEW RELIABLE

EVIDENCE... THAT WAS NOT PRESENTED AT TRIAL. THIS COURT DID NOT

LIMIT "NEW EVIDENCE" TO EVIDENCE WHICH WAS UNAVAILABLE AT THE

TIME OF TRIAL.

RATHER, THIS COURT DIRECTED THE HABEAS COURT TO CONSIDER "ALL THE

EVIDENCE" WHICH INCLUDES BUT IS NOT LIMITED TO EVIDENCE AVAILABLE ONLY

AFTER TRIAL. 513 US. 324. THIS COURT CHARACTERIZED THE EVIDENCE

PROFFERED BY SCHUPP AS "NEW RELIABLE EVIDENCE" EVEN THOUGH

THE INFORMATION WAS AVAILABLE TO HIS COUNSEL AT TRIAL AND COULD BEEN

DISCOVERED THROUGH EXERCISE OF DUE DILIGENCE.

FURTHER, THIS COURT EMPHASIZED IN SCHUPP THAT "BY THEIR NATURE SUB-

STANTIAL CLAIMS OF ACTUAL INNOCENCE ARE EXTREMELY RARE AND TO

RESTRICT THE AVAILABILITY OF THE ACTUAL INNOCENCE EXCEPTION UPON WHETHER

THE EVIDENCE WAS AVAILABLE AT TIME OF TRIAL PLACES GREATER LIMITS ON

THE EXCEPTION THAN THIS COURT CONTEMPLATES.

THIS COURT REVISITS THIS ISSUE IN HOUSE V. BEN 165 L. CD 3d. 23 ~~2006~~

(2006) AND RULED THAT EVEN IF THE DISTRICT COURT DREW CERTAIN CONCLU-

SIONS ABOUT THE EVIDENCE, THE COURT MUST PROPERLY APPLY SCHUPP'S

PREDICATIVE STANDARD.

THE ADOPTED MAGISTRATE REPORT AND DISTRICT COURT NOW SIMPLY AVOIDED

THIS PREDICATIVE TEST BY DECIDING THAT EVIDENCE KNOWN TO COUNSEL

DURING ~~THE~~ AT TIME OF TRIAL IS NOT NEW RELIABLE EVIDENCE. HERE, IN

CONSIDERING ~~THE~~ WHETHER MILLER'S GATEWAY CLAIM OF ACTUAL INNOCENCE

EXCEEDED HIS TIME BARRED AND PROCEDURALLY DEFICIENT CLAIM. THE COURT

Simply Concluded That Miller Has Not Presented Any New Reliable Evidence To State A Claim Of Actual Innocence. Appendix E, Page 3579. The District Court Adopted The Reasoning That The Evidence Was ~~Not Available To Miller Counsel~~ At The Time Of Miller's Trial. See Appendix E, Page 3579. FN. The District Courts' Decisions Steps This Court Scraps Predictive Tests That "Must" Be Applied Without Giving Additional Reason, Even Though This Court Has Repeatedly Emphasized That Such Predictive Is Part Of The Actual Innocence Analysis. This Court Should Grant Certiorari To Review The District Courts' Decision. Not Follow This Rule

8. THE DISTRICT COURT DECISION CREATES A CONFLICT AMONG OTHER DISTRICT AND APPEALS COURTS. ~~THE DISTRICT COURT DECISION~~

IN THE SIXTH CIRCUIT FOR EXAMPLE, EVEN THOUGH THE DISTRICT COURT CHARACTERIZED PETITIONERS' PROFFERED EVIDENCE AS "DUBIOUS" AND NOT NEW EVIDENCE, THE DISTRICT COURT STILL APPLIED SCRAP'S PREDICATIVE STANDARD IN ASSESSING WHETHER REASONABLE JURORS WOULD HAVE REASONABLE DOUBT. *McQuiggin v. Perkins*, 670 F.3d 665, 670 (2012).

THIS COURT GRANTED CERTIORARI IN THAT CASE AND HELD ACTUAL INNOCENCE OVERCOMES AEDPA LIMITATION AND PROCEDURAL DEFAULT. THIS COURT WENT EVEN FURTHER AND REMANDED WITH INSTRUCTIONS TO CONSIDER HOW THE TIMING OF THE SUBMITTED EVIDENCE AND THE LIKELY CREDIBILITY OF THE AFFIANT BEAR ON THE PROBABLE RELIABILITY OF... EVIDENCE OF ACTUAL INNOCENCE. *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013) CITING *SCRAP v. DELO*.

~~THE DISTRICT COURT HAS SCHEDULED~~ ~~THE DISTRICT COURT~~ ~~DEPARTURE~~ BY THE DISTRICT COURT IN THIS CASE, THE DISTRICT COURT DECISION WAS NOT BASED UPON WHAT REASONABLE JURORS WOULD DO BUT UPON THE COURTS OWN INDEPENDENT JUDGMENT ABOUT MILLER'S EVIDENCE. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DISTRICT COURTS' FAILURE TO FOLLOW THIS COURT'S BINDING PRECEDENCE. ~~AND HOLDING IN~~ *McQuiggin*.

# CONCLUSION

THE ADOPTED MAGISTRATE REPORT AND DISTRICT COURT ORDER / DECISION PLACES A GREATER LIMITATION ON THE ACTUAL INNOCENT / MISCHANCE OF JUSTICE EXCEPTION THAN THIS COURT INTENDED, BY CHARACTERIZING PROFFERED NEW RELIABLE EVIDENCE NOT PRESENTED AT TRIAL AS "NOT NEW RELIABLE EVIDENCE" AND REFUSING TO APPLY SCALP'S PREDICATIVE STANDARD. CONFLICTS WITH THIS COURT'S PRECEDENT AND OTHER FEDERAL DISTRICT AND CIRCUITS. "THE PETITION FOR CERTIORARI" SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED.

Frankie M. Miller Jr.

DATE: 1-23-18