No. _____

In The

Supreme Court of the United States

DAYVON BRYAN RILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a petitioner's claim in a federal habeas case that it is logically impossible that they committed an element of the offense—even when no new evidence is offered—is an actual innocence claim reviewed under the less stringent equitable analysis articulated by this Court in *Schlup v. Delo* and not subject to the more stringent test governing legal sufficiency of the evidence claims.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Dayvon Riley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's opinion is unreported, but is available at *United States v. Riley*, 730 F. App'x 175, 2018 U.S. App. LEXIS 19217 (4th Cir. July 13, 2018). Pet. App. A. The District Court's judgment is available at Pet. App. B.

JURISDICTION

The Fourth Circuit issued its opinion on July 13, 2018 and denied Mr. Riley's motion for rehearing and rehearing en banc on September 25, 2018. Pet. App. C. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Congress defined aggravated identity theft as:

> (a)(1) Whoever, during and in relation to any felony violation enumerated in subsection (c), **knowingly** transfers, possesses, or uses, without lawful authority, a means of identification of

> **another person** shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.
>
> ***
>
> (b)(2) except as provided in paragraph (4), **no term of imprisonment** imposed on a person under this section **shall run concurrently** with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;
>
> ***

18 U.S.C. § 1028A (emphasis added).

STATEMENT OF THE CASE

On December 20, 2012, Mr. Riley was indicted by a grand jury in the Eastern District of North Carolina on one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, one count of access device fraud in violation of 18 U.S.C. § 1029(a)(1), one count of unlawful use of unauthorized access devices in violation of 18 U.S.C. § 1029(a)(2), one count of access device fraud involving more than once access device and received $1,000 dollars or more within a year in violation of 18 U.S.C. § 1029(a)(5), one count of fraud in connection with identification documents and authentication features in violation of 18 U.S.C. § 1028(a)(7), and one count of aggravated identity theft in violation of 18 U.S.C. § 1028A. CAJA 19-33[1]. Mr. Riley signed a plea agreement and pled guilty to one count of aggravated identity theft in violation of 18 U.S.C. § 1028A (Count 6), as well as three other charges. CAJA 98-105. Specifically, in the plea agreement it drafted, the Government described the

[1] "CAJA" refers to the Joint Appendix filed in the U.S. Court of Appeals for the Fourth Circuit.

third element (a specific allegation it did not submit to the grand jury in the indictment) in Count 6 as "the defendant knew that the individual whose means of identification he transferred, possessed, or used actually existed." CAJA 103.

For its part, the Government never presented evidence at the arraignment, in the PSR, or during the sentencing hearing that Mr. Riley knew that that the credit card account numbers—purchased from overseas sellers—belonged to a real people or explained a logically plausible theory of how Mr. Riley could know whether they did. The Government alleged that Mr. Riley and other two people charged, Carter and Williams, obtained the account numbers from websites and wired money overseas, including to Vietnam and the Ukraine, to pay for the information. CAJA 94-95, 180. The credit card numbers purchased online were then re-encoded onto new cards. CAJA 180. Counterfeit identification cards or driver's licenses were also used to facilitate the use of the re-encoded cards. CAJA 180. These re-encoded cards were then used to purchase gift cards. CAJA 180. The gift cards were then used to purchase items such as clothes, food, gas or were sold to people at a discounted price. CAJA 180.

On On October 16, 2013 the District Court sentenced Mr. Riley to 132 months in prison on Count 1 (concurrent with sentences of 120 months for Count 3 and 132 months for Count 4) and also imposed the mandatory, consecutive sentence of 24 months in prison for Count 6, the aggravated identity theft conviction, yielding a total imprisonment sentence of 156 months (plus 5 years for supervised release at the end of the prison sentence). CAJA 2, 106.

Mr. Riley timely appealed his conviction and sentence in a direct appeal, however, the Fourth Circuit Court of Appeals affirmed the validity of his guilty plea and dismissed his sentencing claims based on the appeal waiver in his plea agreement in an unpublished per curiam opinion on August 6, 2014. *United States v. Riley*, 581 F. App'x 206 (4th Cir. 2014). CAJA 11.

On October 17, 2014, Mr. Riley moved to vacate his convictions and sentence through post-conviction claims under 28 U.S.C. § 2255. CAJA 12. On November 9, 2105, Mr. Riley amended his post-conviction motion to add claims that the failure of his trial counsel to give adequate advice not only led him to plead guilty to aggravated identity theft instead of going to trial on that count—which he asserted he would have done had he been given the correct advice—he asserted that he pled guilty to a crime that he did not commit. *United States v. Riley*, No. 7:12-cr-140-BO, DE 248-1, pp. 4-6 (E.D.N.C. Nov. 9, 2015). The District Court appointed counsel to assist Mr. Riley with one of his claims alleging that he received ineffective assistance of counsel prior to the plea and sentencing on the basis that his former attorney failed to challenge the Government's accusation that he committed aggravated identity theft under 18 U.S.C. § 1028A since there was no evidence that Mr. Riley knew that the credit card account numbers belonged to real people, an element of the offense that this Court announced has always been the law in *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009). CAJA 17. Mr. Riley, through counsel, filed a response to the Government's motion to dismiss, and showed that Mr. Riley was actually innocent because when the Government presented evidence on the alleged offense at the arraignment, in the

PSR process, and at sentencing, it never presented evidence that Mr. Riley knew that the credit card accounts belonged to real people. CAJA 17.

The Government filed a reply and attached an affidavit from Mr. Riley's former attorney. The former attorney believed that Mr. Riley admitted in private meetings that Mr. Riley knew that the credit card account information he and others involved in the offense purchased over the internet belonged to real people. CAJA 150-59. In support of his belief, his former attorney attached some handwritten notes the attorney had received from Mr. Riley raising questions about the aggravated identity theft charge. CAJA 159.

On May 18, 2017, the District Court, without holding an evidentiary hearing, denied Mr. Riley's post-conviction motion. CAJA 163. As to Mr. Riley's challenge to his conviction for aggravated identify theft under Count 6, the District Court ruled that because Mr. Riley failed to raise his claim in his direct appeal that his former attorney was ineffective for failing to challenge the lack of evidence on an essential element of aggravated identity theft, his claim was procedurally defaulted. CAJA 168. Additionally, the District Court ruled that Mr. Riley was still not entitled to relief because his guilty plea and statement to the District Court at the arraignment that he understood his plea agreement defeated any claim of actual innocence on the aggravated identity theft charge. CAJA 168. However, the District Court granted a certificate of appealability on his claim challenging his conviction to aggravated identity theft on the basis that reasonable jurists could disagree as to his actual

innocence and whether the conviction was the product of constitutional error in the form of ineffective assistance of counsel. CAJA 172.

On appeal to the Fourth Circuit, Mr. Riley argued that he was actually innocent of the aggravated identity theft charge despite his guilty plea because he had shown the District Court that he was actually innocent of the aggravated identity theft charge because there was no plausible theory of how someone who purchased a list of credit card account numbers on the internet from an overseas seller (including account numbers linked to foreign banks) would actually know that those accounts belong to real people instead of being created from fictitious identities or belonging to business entities. Mr. Riley also argued that the District Court had erred as a matter of law by applying the procedural default doctrine to his claim that was ultimately based on ineffective assistance of counsel.

On July 13, 2018, the Fourth Circuit agreed that the District Court had erroneously applied the procedural default doctrine but ultimately rejected his argument that he was actually innocent of aggravated identity theft on the basis that Mr. Riley did not sufficiently profess actual innocence but instead had merely challenged the legal sufficiently of the evidence. The Fourth Circuit, relying on this Court's decision in *Bousley v. United States,* 523 U.S. 614, 623 (1998), held that Mr. Riley merely challenged the sufficiency of the factual basis for his guilty plea but had not colorably asserted that he is in fact innocent of the aggravated identity theft charge, thus, he failed to demonstrate that no reasonable juror would have found him guilty beyond a reasonable doubt.

Mr. Riley filed a timely motion for a re-hearing and re-hearing en banc to the Fourth Circuit, arguing that he had professed his actual innocence, which was underscored by his arguments that it was effectively a logical impossibility that he would know that credit card account numbers he purchased on the internet from an overseas seller belonged to actual people. However, on September 25, 2018, the Fourth Circuit denied Mr. Riley's motion.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal habeas corpus law, where the Fourth Circuit's decision below conflicts with relevant decisions of this Court that have repeatedly emphasized the ultimate equitable inquiry governing actual innocence claims in habeas cases. Despite professing his innocence and arguing that it was logically impossible given the nature and circumstances surrounding his conviction that he committed an element of the offense, the Fourth Circuit rejected Mr. Riley's challenge under the more stringent burden for sufficiency of the evidence challenges rather than the less stringent analysis for actual innocence governed by equitable principles. In its decision, the Fourth Circuit effectively imposed a bright line rule, also contrary to this Court's relevant decisions, that actual innocence claims in habeas cases can only be based on newly presented evidence, otherwise they are treated as sufficiency of the evidence claims. This case is also a proper vehicle to address this question because Mr. Riley raised his actual innocence claim below, and it was pressed to and passed upon by the Fourth Circuit.

Accordingly, Mr. Riley respectfully requests that this Court issue a writ of certiorari in this case. If this Court decides that plenary review is not appropriate, Mr. Riley respectfully requests that this Court summarily reverse, vacate the decision below, and remand for further proceedings because the Fourth Circuit's analysis below plainly conflicts with relevant decisions from this Court.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL HABEAS LAW WHERE THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Despite professing his innocence and explaining why it was logically impossible for the Government to prove an element of the challenged offense in his case, the Fourth Circuit Court of Appeals below summarily treated (and ultimately rejected) Mr. Riley's claim as simply a challenge to the legal sufficiency of the evidence, presumably because, it its view, Mr. Riley's claim was not based on newly discovered evidence outside of the record. This was in conflict with relevant decisions from this Court. In *Schlup v. Delo*, 513 U.S. 298 (1995), this Court reiterated that in order to prevent a miscarriage of justice, habeas corpus operates at its core as an equitable remedy, and the threshold burden to establish an actual innocence claim in support of a showing of constitutional error in the trial court is a less stringent burden on the claimant than challenging the legal sufficiency of the evidence. *Id*. at 319, 323-24. Sufficiency of the evidence focuses on whether a rational juror could have convicted based on the evidence in the record, where the word "could" is an inquiry about the juror's power as a matter of law to convict. *Id*. at 330. In contrast, a claim of actual innocence requires the trial court to engage in a less stringent, probabilistic

inquiry about whether reasonable jurors would find a reasonable doubt as to guilt, an inquiry that enables both the claimant and the Government to go outside of the record to present even new evidence or consider evidence that was offered but excluded from trial. *Id*. at 329-31; *see also Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (noting, as one of the differences in the nature of an actual innocence claim compared to a legal sufficiency of the evidence challenge, the Government is not limited to the record in defending against an actual innocence claim). While new evidence may be sufficient to determine whether the threshold showing has been made on an actual innocence claim, this Court's relevant decisions to not establish that new evidence is a necessary condition to make that determination.

Unlike the assessment of sufficiency of the evidence challenges, the special and overriding interest in using equitable principles to assess actual innocence claims in habeas or collateral review cases, when those claims bolster arguments about constitutional errors that occurred in the trial court, has been repeatedly emphasized by this Court as well as several circuit courts. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 362 (2004) (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) ("Great Writ's basic objectives" include "protecting the innocent against erroneous conviction"); *Dretke v. Haley*, 541 U.S. 386, 398–99 (2004) (Stevens, J., dissenting) ("Habeas corpus is, and has for centuries been, a 'bulwark against convictions that violate fundamental fairness.' "); *Bousley*, 523 U.S. at 620 ("one of the 'principal functions of habeas corpus [is] "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will

be convicted."'"); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) ("basic purposes underlying the writ of habeas corpus" include curing "error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Schlup*, 513 U.S. at 324–25 ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." (footnote omitted; citing numerous authorities)); *id.* at 326 ("paramount importance of avoiding the injustice of executing one who is actually innocent"); *id.* at 326 n.42 ("fundamental injustice would result from the erroneous conviction and execution of an innocent person"); *Jacobs v. Scott*, 513 U.S. 1067, 1067–70 (1995) (Stevens, J., dissenting from denial of stay, joined by Ginsburg, J.) (prosecutor admittedly made inconsistent arguments at petitioner's trial and at his sister's trial about whether petitioner or sister actually committed the capital murder, and "[i]f prosecutor's statements at the [sister's] trial were correct, then [petitioner] is innocent of capital murder"; case accordingly presents "self-evident" and "deeply troubling" "injustice" warranting stay of execution to consider petitioner's claims); *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part) (discussing "the ultimate equity on the prisoner's side—a sufficient showing of actual innocence"); *id.* at 718 (Scalia, J., concurring in part and dissenting in part) ("The most significant countervailing equitable factor [on which habeas corpus petitioner may seek to rely

is] possibility that the assigned error produced the conviction of an innocent person … ."); *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) (citing authority) ("If there is a unifying theme to this Court's [recent] habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim."); *United States v. Barron*, 172 F.3d 1153, 1161 (9th Cir. 1999) (en banc) (28 U.S.C. § 2255 "incorporates the fundamental principle that it is never just to punish a man or woman for an innocent act"). *See generally Weidner v. Thieret*, 932 F.2d 626, 631 (7th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992).

While an actual innocence claim is a probabilistic inquiry, a difficulty surrounds just how likely it must be that there is a reasonable doubt as to guilt, since this Court's articulations have diverged from a requirement of proof by "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible … under the applicable state law" for the verdict imposed, *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992), to proof that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," *Schlup*, 513 U.S. at 327, to Justice Black's concern for "the kind of constitutional claim that casts some shadow of a doubt on his guilt," *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting) (emphasis added). However, after *Schlup*, the prevailing test is that actual innocence claims in habeas cases are analyzed under the less stringent probabilistic inquiry about whether

reasonable jurors would find reasonable doubt as to guilt compared to sufficiency of the evidence challenges.

In *Schlup*, this Court recognized the confusion in the lower courts on the nature of the inquiry when distinguishing between actual innocence claims in habeas cases from sufficiency of the evidence challenges, and identified the fallacy of the Eighth Circuit's decision to reject the habeas petitioner's actual innocence because that court focused on the jury's power to convict as a matter of law, instead of the less stringent probabilistic inquiry into whether reasonable jurors would find a reasonable doubt as to guilt. *Id*. at 513.

Like the Eighth Circuit, the Fourth Circuit below also fell prey to the same fallacy when it rejected Mr. Riley's challenge as one that simply criticized the legal sufficiency of the record in the trial court. In *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009), this Court announced what the law has always been: a conviction for aggravated identity theft under 18 U.S.C. § 1028A requires the Government to prove, as an element of the offense, that the accused know that the means of identification possessed or used belonged to a real person. *Id*. The Fourth Circuit below correctly observed that the only evidence at the arraignment of Mr. Riley's having the required knowledge that the credit card account numbers (bought on the internet from an overseas seller) belonged to real people was his admission in the written plea agreement to only a general recitation of the facts. But like the Eight Circuit's fallacy in *Schlup* in analyzing an actual innocence claim under the more stringent test for a sufficiency of the evidence claim, the Fourth Circuit, in its

rejection of Mr. Riley's claim that it was logically impossible for him to have committed an element of the offense, effectively imposed a bright line rule that the threshold for showing actual innocence in a habeas case can only be based on newly presented evidence and any other challenge to whether they committed the offense at issue falls under the more stringent approach governing sufficiency of the evidence claims. This bright line rule approach is contrary to relevant decisions from this Court that have repeatedly emphasized the equitable nature of analyzing actual innocence claims in habeas cases. Based on *Schlup*, *Bousley*, and other relevant decisions, this is an important question that this Court should decide to clarify, correct, and provide guidance to the lower courts.

II. THIS CASE IS A PROPER VEHICLE FOR DECIDING THE QUESTION

This case presents a proper vehicle for deciding the question presented. In his habeas case, Mr. Riley raised a challenge to his conviction for aggravated identity theft and specifically argued that he was actually innocent and that the constitutional error that led to his conviction for this offense was ineffective assistance of counsel by his former attorney. His conviction for this offense necessarily increased his prison sentence by two years because the statute mandates that a conviction for this offense runs consecutive to any sentence imposed for the underlying offense. This issue is properly preserved because Mr. Riley timely appealed, and the issue was both pressed to and passed upon by the Fourth Circuit, which denied Mr. Riley relief in an unpublished decision. Pet. App. A.

III. EVEN IF THE COURT BELIEVES PLENARY REVIEW IS NOT WARRANTED, IT SHOULD SUMMARILY REVERSE

The Fourth Circuit's decision so plainly conflicts with this Court's precedents that this Court should, in the alternative, summarily reverse. *See Maryland v. Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curium) (summarily reversing a judgment inconsistent with the Court's Fourth Amendment precedents); *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

The Fourth Circuit below only applied a governing case from this Court in name only. In rejecting Mr. Riley's actual innocence claim, it cited *Bousley*, 523 U.S. at 623, for the proposition that sufficiency of the evidence claims are governed by a different standard than actual innocence claims in habeas cases but failed to recognize that *Bousley* discussed sufficiency of the evidence claims to give guidance that neither litigant is constrained to the trial court record in either defending against or in making an actual innocence claim. *Id*. This Court never set out the effective bright line rule employed by the Fourth Circuit below that an actual innocence claim in a habeas case has to be based on newly presented evidence outside of the trial court record in order for it to avoid the more stringent analysis that governs sufficiency of the evidence challenges.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. Even if the Court believes that plenary review is not warranted in Mr. Riley's case, it should summarily reverse, vacate the decision below, and remand for further proceedings.

Respectfully submitted,

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