

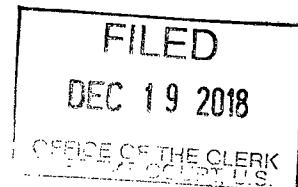
18-7222

ORIGINAL

No. _____

In The

Supreme Court of the United States



WINIFRED JIAU,

Petitioner,

v.

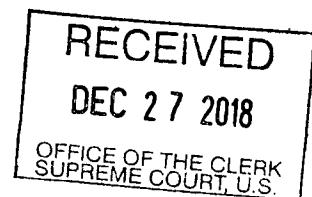
UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit*

Appeal Case No. 18-1460
in the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit held, contrary to the holdings of Supreme Court considering the question, a prisoner seeking a Certificate of Appealability (COA) must prove before the issuance of a COA, that some jurists would grant the petition for habeas corpus.

1. Whether when the district court denies relief on the merits of a habeas petition, a prisoner satisfies the standard set by 28 U.S.C. § 2253(c)(2) by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong?
2. Whether an ailing jury instruction by itself so infected Petitioner's trial that the resulting conviction is a valid claim of the denial of a petitioner's constitutional right and that jurists of reason could disagree with the district court's resolution of his/her constitutional claims by issuing a COA? Whether this Court in *Salman v. United States*, 137 S. Ct. 420 (2016) defined a jury instruction of "personal benefit" may be inferred based upon the test of meaningfully close personal relationship for insider trading and whether that constitutes a new substantive rule of law controlling the outcome of a case?
3. Whether the Magistrate's expression of incredulity and skepticism as to the absence of evidence at trial that Petitioner ever gave her tippers any benefits (i.e. stock tips), and the trial judge's "relaxed" jury instruction which rested on the circumstance of weak friendship between the tippers and the tippee, demonstrated that Petitioner's constitutional claims are debatable among jurists of reason?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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No. ____

WINIFRED JIAU,

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UNITED STATES OF AMERICA,

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*On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Winifred Jiau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's order of denial in 2018 is unreported. Pet. App. 2a. The Second Circuit's order denying rehearing and rehearing en banc is unreported. *Id.* at 1a. The district court's 2018 order denying Jiau's petition under 28 U.S.C. § 2255 is unreported. *Id.* at 3a. The Magistrate's Report and Recommendation in 2017 is unreported. *Id.* at 6a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254. The judgment of the Court of Appeals was entered on August 8, 2018. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on October 4, 2018.

STATUTORY AND RULE PROVISIONS INVOLVED

28 U.S.C § 2253 – Title 28 – Chapter 153 – Habeas Corpus - Sec. 2253 - Appeal. Pet. App. 12a.

28 U.S.C. § 2255 – Title 28 - Chapter 153 – Habeas Corpus - Sec. 2255 - Federal custody; remedies on motion attacking sentence Pet. App. 13a-14a.

STATEMENT OF THE CASE

On June 20, 2011, a jury convicted Jiau of two counts of securities fraud and conspiracy to commit securities fraud. Ms. Jiau filed her *pro se* Habeas Corpus petition pursuant to 28 U.S.C. § 2255, challenging her conviction for insider trading in September 2012. It was suspended by the district court on October 1, 2012. On January 16, 2015, Jiau proceeded in forma pauperis and re-filed her first and only Petition under 28 U.S.C. § 2255 (the “Petition”). The Petition challenged her conviction on constitutional grounds based on an ailing jury instruction which, by itself, infected the resulting conviction, including that the instruction given on “personal benefit” was erroneous, as under the circumstances proven at trial, there was no meaningful close friendship between the tippee and the tippers identified by Magistrate Judge Francis. In the Petition, Jiau also raised claims of ineffective assistance of counsel, impartial-jury, and *Brady* challenges, etc. District Judge Jed Rakoff first sent Jiau’s petition to Magistrate Judge Frank Maas. After over a year and half of not being reviewed by the Judge Maas, on September 7, 2016, the case was reassigned to Magistrate Judge James C. Francis just prior to his retirement.

On November 16, 2016, prior to the Supreme Court’s decision in *Salman v. United States*, 137 S. Ct. 420 (2016), Magistrate Judge James C. Francis issued the Report & Recommendation (R & R) and reported many debatable issues accompanied by some inconsistent facts of Jiau’s trial. The Magistrate found that the evidence at trial to prove the existence of a friendship Jiau had with either tipper (Mr. Ng or Mr. Nguyen) was weak (R&R, page 21, line 23) Pet. App. 11a. Thus, Judge Rakoff’s “relaxed” jury instructions¹ of personal benefit would be erroneous and impermissible in the absence of proof of a meaningfully close personal relationship under *Salman* or *Newman*. (R&R, page 17, line 11) Pet. App. 9a. Moreover, the Magistrate erroneously thought

that Jiau's claims of error as to the jury instructions was procedurally defaulted by failing to pay attention to Jiau's *Pro Se* filings on her direct appeal. (See R&R, page 19, line 13) Pet. App. 10a. Still, Judge Francis reported that the evidence at trial did not indicate whether Jiau ever gave Mr. Ng any stock tips (See R&R, page 3, line 19) Pet. App. 8a. This finding by Judge Francis undermines the trial judge's conclusion that an "investment club" was a quid pro quo arrangement between Jiau and Mr. Nguyen, and Mr. Ng was recruited for the same purpose.

On November 3, 2017, Jiau's case was reassigned to Magistrate Judge Robert W. Lehrburger after Judge Francis's retirement. On May 8, 2018, trial judge Rakoff denied Jiau's petition with prejudice, denied a certificate of appealability, and denied permission to proceed in forma pauperis. Judge Rakoff's May 8, 2018's order revoked Jiau's IFP status and ordered any appeal would not be taken in good faith, as petitioner's claim allegedly lacks any arguable basis in law. This order was arbitrarily and wrongfully made as it contradicts his earlier order of December 24, 2016 which found that Jiau's claim is debatable -- stating that "her objections in material part presupposed the applicability of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), and Ms. Jiau did not have the advantage of seeing the Supreme Court's decision in *Salman v. United States*, 137 S. Ct. 420 (2016)." Pet. App. 5a.

Judge Rakoff's December 24, 2016's order evidently demonstrates that Jiau's claims are debatable under a new substantive rule of constitutional law that controls the outcome of a case, to wit: *Salman*. Moreover, the Court in *Salman* decided that when a tipper gives inside information to "a trading relative or friend," the jury can infer that the tipper meant to provide the equivalent of a cash gift, "such an inference," the inference "is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. 773 F.3d, at 452." *Salman*, 137 S.Ct. at 425 & n1.

On August 8, 2018, the Second Circuit affirmed the district court's order in this case and found that Jiau has not shown that her motion "states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 28 U.S.C. § 2253(c); see also *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Pet. App. 2a.

The Second Circuit denied rehearing and rehearing en banc. *Id.* at 1a.

1. The jury instructions given by Judge Rakoff at Jiau's trial required only that the tippers "anticipated some kind of benefit, however modest, such as stock tips or simply friendship." (R&R, page 17, line 7) Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision is inconsistent with well-settled federal law. It also conflicts with Supreme Court law. As this Court explained in *Miller-El v. Cockrell*, 537 US 322, 327 (2003):

Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra*, at 484.

If the Court of Appeals' decision stands, the denial of a prisoner's constitutional right will be left without a remedy since the district court will have the discretion to deny a COA regardless of whether a petitioner demonstrates that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. In this case, Jiau's habeas claims are under the protection of Sixth and Fourteenth Amendment. Her claims include erroneous jury instruction, ineffective assistance of counsel, impartial-jury, and *Brady Challenges*, etc. This Court in *Montgomery v. Louisiana* held that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. This Court in *Salman* explained that when a tipper gives inside information to "a trading relative or friend," the jury can infer that the tipper meant to provide the equivalent of a cash gift, but "such an inference," the inference "is impermissible in the absence of proof of a meaningfully close personal relationship. This new substantive rule of law is retroactive in cases on collateral review. Reasonable jurists at least could debate whether Jiau is entitled to relief sought. The Court of Appeals' rejection of the Supreme Court's conclusion is particularly unsettling because the lower court is bound to the High Court's decision. Further review is warranted.

I. THE COURT OF APPEALS DECISIONS AGAINST THIS COURT'S PRECEDENTS DEFER TO THIS COURT'S INTERPERATION OF THE STATUTE 28 USC § 2253 (c)(2)

The Court of Appeals did not address — or even mention in the order of denial — whether Magistrate Judge Francis's remarks regarding Jiau's claim establish any denial of constitutional rights of Jiau and that jurists of reason would find it debatable. Notably, Magistrate Judge Francis's findings included that Judge Rakoff gave "relaxed" jury instructions of personal benefit without

any meaningful close friendship between the tippee and the tippers. Pet. App. 11a; the trial evidence did not indicate whether Jiau ever gave Mr. Ng any stock tips Pet. App. 8a., with the trial judge's instruction that an investment club" was a *quid pro quo* arrangement between Jiau and Mr. Nguyen, and Ng was recruited for the same purpose. Pet. App. 7a. Instead, the Second Circuit rejected Jiau's first and only 2255 motion for allegedly not "stat[ing] a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 28 U.S.C. § 2253(c); see also *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Pet. App. 2a. More importantly, the lower courts denied Jiau's habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims which set forth violations of the Sixth and Fourteenth Amendments. Jiau's claims are erroneous jury instruction, ineffective assistance of counsel, impartial-jury, and *Brady* Challenges, etc.

In Jiau's objections to the Magistrate's R&R, she has identified that many conflicts of interest actually affected the adequacy of her trial counsel's representation. Additionally, Jiau's trial counsel's representation was constitutionally deficient during jury selection. Counsel's failure to use her peremptory challenges to address the trial court's error was compounded by Judge Rakoff's abusing his discretion to retain a biased jury which included a recent Security Fraud victim. Moreover, by failing to dispute this, the Government has waived its right to contest Jiau's ineffective assistance of counsel claim and her impartial-jury claim. In Jiau's Reply to Government's Opposition, Jiau asserted that she has properly alleged two *Brady* violations. The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Jiau has therefore satisfied the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution. She has also demonstrated cause for failing to raise this claim during trial and there is a reasonable probability that her conviction or sentence would have been different had these materials been disclosed.

Cases in this Court have made clear that the Second Circuit's position, and it's denial of Jiau's motion for a COA, is wrong. This Court explained that" "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court also affirmed that *Johnson* constitutes a new substantive rule of law having retroactive effect for purposes of challenging a sentence under §2255.

The Second Circuit's rule has no foundation in reason or in the case law. Although the Court of Appeals cited *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), that decision does not support its ruling here. The dispute in *Slack* was that the district court's procedural rulings were wrong because the district court dismissed claims Slack failed to raise in his 1991 petition based on its conclusion that Slack's 1995 petition was a second or successive habeas petition. That conclusion was wrong. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition. See *Slack v. McDaniel*, 529 US 473, 486 (2000). Yet again, this Court clarified *Barefoot's* and *Slack's* holdings in *Miller-El*. "A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot, supra*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong." (See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); also see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003)).

It is not disputed that that Jiau's constitutional claims in question are not frivolous. It is not disputed that Jiau's *habeas* petition is in good faith on her part. In affirming the district court's decision based on its misconstruing of *Slack*, the Second Circuit departed from this Court's precedent. "An abuse of discretion will be found if the district court relies on clearly erroneous findings of fact, improperly applies the law or uses an erroneous legal standard." *Venture Industries Corp. v. Autoliv ASP, Inc.*, 457 F. 3d 1322, 1327 (Fed. Cir. 2006), citing *United States v. Chambers*, 441 F.3d 438, 455 (6th Cir. 2006).

In any event, because of this Court's unique role as the final arbiter of the law on a nationwide basis, the effect of a decision of this Court on the right to issue a COA is much different from that of a court of appeals. Even if the Second Circuit believes Jiau would not demonstrate an entitlement to the ultimate relief sought, it should not deny her motion for a COA merely because of this. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. Evidently, Jiau had convinced a lower level Judge, Magistrate Francis that the trial judge's jury instruction is "relaxed" and is somewhat debatable. Thus, the Court of Appeals erred in striking down Jiau's application for a COA, and this Court's review is warranted to resolve the circuit conflict exacerbated by the decision below.

II. THE TRIAL COURT'S AILING INSTRUCTION BY ITSELF SO INFECTED THE ENTIRE TRIAL THAT THE RESULTING

CONVICTION VIOLATES DUE PROCESS

On November 16, 2016, Magistrate Judge James C. Francis issued his R&R. On December 6, 2016, the Supreme Court in *Salman* affirmed certain holdings in *Newman*: “[t]o the extent” *Dirks* permits “such an inference,” the inference “is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.” 773 F.3d, at 452.” *Salman*, 137 S.Ct. at 425 & n1. Yet, the court in *Salman* declined to clarify who may qualify as a “close friend” for purposes of tippee liability.

In the R&R, the Magistrate reported that the jury instructions given by Judge Rakoff at Jiau’s trial required only that the tippers “anticipated some kind of benefit, however modest, such as stock tips or simply friendship.” (R&R, page 17, line 7) Pet. App. 9a. In giving its instruction, the trial court deviated in part from the standard jury instruction on the liability for criminal guilt under the federal securities laws. It also failed to follow the rules of conducting a close friend test, set forth in *Newman*, for determining the personal benefit of tippees, as the court in *Salman* did not define who may qualify as a “close friend” for purposes of tippee liability. But, neither *Salman* nor *Newman* suggests that a tipper personally benefits whenever the tipper discloses confidential trading information for a noncorporate purpose. Nonetheless, under both *Newman* and *Salman*, a court is required to engage in a gift analysis -- he or she must have a “meaningfully close personal relationship” with the insider; friendships of a “casual or social” nature are not enough. *Salman*, 137 S.Ct. 420, at 425, 429. Judge Francis clearly reported that the relationship between Jiau and Nguyen or Ng was not strong enough to pass the “relative or friend” test.

Jiau’s criminal case dealt with identifying what kind of conduct must be proven to support a finding of criminal guilt under the federal securities laws. It was essential that Jiau’s jury was properly instructed on the standards for reasonable doubt and the correct burden of proof, the trial court’s additional instruction on circumstantial evidence were confusing and incorrect. The trial judge should have recognized the infirmities in these instructions, but he reluctantly concluded that he was required to give such a charge under the standard set forth in *United States v. Newman*, 773 F.3d 438 (2nd Cir. 2014) or *Salman v. United States*, 137 S. Ct. 420 (2016) which, Judge Rakoff thought, in declining to define “personal benefits” under the federal securities laws, had declined to specify the standard of liability for criminal guilt.

Judge Rakoff previously ordered Jiau to submit additional objections to her previously filed papers on December 24, 2016, stating “Since her objections

in material part presupposed the applicability of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), and Ms. Jiau did not have the advantage of seeing the Supreme Court's decision in *Salman v. United States*, 137 S. Ct. 420 (2016)". Pet. App. 6a. His later order denying Jiau's COA conflicted with his earliest order that Jiau could at least debate whether *Salman* constitutes a new substantive rule of law for jury instruction of personal benefit inferred upon the test of meaningfully close personal relationship. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), this Court affirmed that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. The Court of Appeals did not address or even mention this question. Here, in light of *Newman* and *Salman*, the Court of Appeals was required to review the ailing instruction at issue here and inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.

III. THE MISCONSTRUCTION OF THE STATUTE 28 USC § 2253 (c)(2) PRESENTS AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE

The Court of Appeals' decision, which has a cross-district effect, creates immediate and urgent difficulties for a prisoner seeking to file a COA motion and thus warrants intervention by this Court.

1. Jiau's case illustrates the tension that exists when denying a COA between two conflicting principles: a prisoner's constitutional rights, and the power of the appeals court. As the Supreme Court held in *Buck v. Davis*, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The Supreme Court intended to clarify this significant and recurring question on the statutory construction of 28 USC § 2253 (c)(2) by using ordinary interpretive techniques. The Second Circuit decided notwithstanding, just the contrary.

2. If allowed to stand, the Second Circuit's decision would fundamentally change the standard of a lower federal court's issuance of a COA. The district court may well deny COA applications on grounds such as "petitioner's claim lacks any arguable basis in law". It would also violate this Court's conclusion that "A prisoner seeking a COA must prove "something more than the absence of frivolity"" or the existence of mere "good faith" on his or her part." Under the principle set forth by this Court in *Barefoot*, *Slack*, *Miller-El* and *Buck*, the district court erred in denying Jiau's COA application given that the Magistrate Judge reported, in a 51-page report, that many of Jiau's claims

were indeed arguable. The effect of rejecting a prisoner's valid claims of the denial of a constitutional right, and that jurists of reason would find it debatable, could lead the district court to invoke 28 USC § 2253 to upset a decision on the merits of the defendant's *habeas* petition, given the evidence supporting Jiau's claims regarding erroneous jury instruction, ineffective assistance of counsel, impartial-jury, and *Brady* Challenges, etc.

3. Furthermore, even if the instant decision does not directly compel the district court to blanketly deny prisoners' COAs based on § 2253, citing *Slack* in this manner, the Second Circuit is in contradiction of the Supreme Court's warning against interpreting § 2253 in surprising and novel ways that impose unexpected burdens on prisoners. Unlike the Second Circuit against prisoners under an expansive definition of § 2253, in *Buck*, this Court held that at the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." See *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). This Court unequivocally warned the lower courts that "[t]his threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims," because "[w]hen a court of appeals sidesteps the COA process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." See *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

Finally, no other Circuits have adopted the Second Circuit position after this Court's recent decision in *Buck*. The Second Circuit's divergence from the standards of seeking a COA set forth by this Court not only creates circuit split, but also produces uncertainty for prisoner's COA application in Second Circuit. The district judges can continuously abuse the discretion by denying COAs to prevent prisoners from appealing their convictions and sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 20, 2018

Respectfully submitted,



Winifred Jiau
Pro Se