

No. _____ - _____

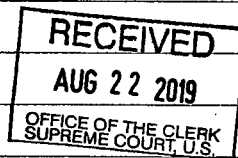
IN THE
SUPREME COURT OF THE UNITED STATES

WARDELL NELSON JOINER JR.,
Petitioner

v.
JOHN SUTTON, WARDEN,
Respondent

On Petition for a writ of certiorari
to the Supreme Court of the United States

MOTION FOR REHEARING



August 14, 2019

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Wardell Nelson JORDEN JR. — PETITIONER
(Your Name)

VS.

John Sutton, Warden — RESPONDENT(S)

PROOF OF SERVICE

I, _____, do swear or declare that on this date, _____, 20____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

I was unable to serve the Respondent as a direct result of
being unable to photocopy the enclosed documents.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 4 August 11, 2019

Wardell N. Jordan Jr.
(Signature)

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INTRODUCTION

Petitioner humbly Requests that the court Bearer his Petition for writ of Certiorari as he contends he was denied the Equal Protection of the Laws by the lower courts' failure to accord him due process of law when disposing of his Schlup claim.

The Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution guarantee all persons the equal protection of the laws. Petitioner contends that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Petitioner contends that in habeas proceedings, a remedy free from favoritism or bias, the state has created two classes of people: those who are represented by counsel, with the full plethora of resources at their disposal and the prose inmate, who is indigent and does not have the same resources or legalise to adequately present or argue or presents his facts before the courts. In virtually every case where a petitioner, represented by counsel, has presented a Schlup innocence claim with a proffer of evidence that would cast doubt on the case presented by the prosecution at trial he has been afforded due process. Specifically, two separate and distinct things have occurred: First, the petitioner's version of the facts were accepted as true no matter how much the Government asserted that the witnesses were not credible or the proffered evidence was unreliable. Second, when the new evidence inevitably created questions of fact, involving the resolution of a factual dispute, or merely pointed to the possibility of constitutional error there was an evidentiary hearing held to determine if the petitioner fell within the "actual innocence" exception to procedural default.

REASONS FOR GRANTING REHEARING

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of confronting, by proof, every material fact which bears on the question of right in the matter involved. The essential elements of due process of law are notice and opportunity to be heard and to defend in orderly proceeding adapted to nature of case, and the guarantee of due process requires that every man have protection of day in court and benefit of general law.

Petitioner contends that he was denied the protection of due process of the law when the lower courts failed to presume the truth of the facts presented in his habeas petition. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009). ("In ruling on a motion to dismiss, the Supreme Court has instructed that courts 'must take all of the factual allegations in the complaint as true.'"); *Blackledge v. Allison*, 431 U.S. 63, 76 (1977); *Cooper v. Pate*, 378 U.S. 546; *Marchbanks v. United States*, 368 U.S. 487, 495, 496 (1962); *Pennsylvania ex. Rel. Herman v. Claudy*, 350 U.S. 116, 118-19 (1956).

Petitioner presented factual allegations that constitutional error, namely prosecutorial misconduct and ineffective assistance of counsel, deprived the jury of critical evidence that would establish his innocence. To presume the factual allegations were true, the court had to presume that there was evidence that was false that was used to convict petitioner and that there was exculpatory evidence that was not presented to the jury as these were part of the claims in support of his probable innocence claim. Consequently, there should have been no reliance on evidence that petitioner specifically alleged to be knowingly false prior

to any further fact development to ascertain the truth behind his allegations. Petitioner presented evidence such as the Autopsy Report and Death Certificate, Official documents for the purpose of proving the fact that Messner died on February 12, 2004, see *Meleendez-Diaz v. Massachusetts*, 129 S.Ct. at 2543, 2532, and affidavits signed under penalty of perjury that would not only substantiate the aforementioned documents but also establish a factual alibi for when the jury was told the murder occurred. The district court was required to accept as true petitioner's version of the facts in support of his innocence claim however, the district court accepted the Government's alternative facts even when their version of the truth could not be reconciled with the facts.

Petitioner contends that he was denied the protection of due process of law when the lower courts failed to hold an evidentiary hearing on facts that were placed in dispute by the new evidence presented in his petition. See *Townsend v. Sain*, 372 U.S. 293, 312-20 (1963) ("if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding," the court held that the federal court "must hold an evidentiary hearing" to resolve any facts that "are in dispute".) The district court was required to accept as true petitioner's version of the facts in support of his innocence claim however, resolved all conflicts within the evidence by conclusively presuming that the evidence did not establish his innocence. When the evidence presented by petitioner conflicted with the evidence of guilt adduced at trial the district court either accepted the government's version of the facts or relied on state determinations of fact that were not binding, *Townsend*, 372 U.S. at 312,

in essence denying him due process of law.

Petitioner contends that the treatment of a particular Schlup claim in the 9th Circuit illustrates the requirements of due process while convincingly demonstrating the disparity in the two classes of habeas petitions created by the state. In *Larsen v. Soto*, 730 F.3d 930, the judge held two hearings: one to determine if the evidence could reliably prove his probable innocence and another to settle the question of his constitutional claims. The treatment of this petition fulfilled the essential requirements of due process, the right to be heard and to defend against the nature of the charges against him. See *Schlup*, 513 U.S. at 316. The glaring difference in the treatment of the two Schlup claims is that petitioner has not been represented by counsel while Mr. Larsen was represented by counsel, creating an inference that he is not entitled to his day in court if he is unable to secure counsel to give validity to his claims. Petitioner recognizes that the sheer logistics of requiring two separate hearings to settle a Schlup claim would counsel against this particular treatment. However, the rarity of successful innocence claims would suggest there are not many who would be able to mount a successful 'probable innocence' claim. When a pro se petitioner is able to locate evidence not presented at trial that would cast doubt on the evidence of guilt and survive Rule 4 unscathed then due process demands that he be given his day in court to prove his factual allegations.

CONCLUSION

The intent of the Due Process Clause of the Constitution was meant to ensure that all citizens of this country would receive certain protections no matter their race, religion, social background, or their ability to afford representation of counsel. To a fact intensive inquiry such as the court's holdings in *Schlup* mandates it would constitute a denial of the equal protection of the law of due process when petitioner has presented credible evidence creating a conflict in the case against him and not be afforded a means to controvert every aspect of the case against him. Importantly, a *Schlup* claim involves allegations that constitutional errors deprived the jury of critical evidence that would have established his innocence implicating a denial of his right to due process of law. There was no rational explanation as to why petitioner was not afforded due process in the habeas proceedings except for the fact that he was not represented by counsel. Certiorari is the only recourse petitioner possesses whereby the court would inspect the proceedings that occurred in the lower courts and determine whether there were any violations of established rules and procedures. For this reason, petitioner humbly requests that the court inspect the proceedings and make a determination on whether he was denied the equal protection of the law of due process.