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No. _____

FILED
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In The
Supreme Court of The United States

WARDELL NELSON JOINER Jr.,
Petitioners,

v.

JOHN SUTTON, Acting Warden.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the courts below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to establish a reasonable doubt in regards to his guilt- merely because the evidence did not affirmatively prove his innocence?

II. When presented with reliable evidence in a Schlup gateway claim is there a denial of due process when there is no evidentiary hearing and the facts are conclusively presumed against a Petitioner?

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The unpublished order of the Court of Appeals for the Ninth Circuit denying rehearing is reprinted at Pet. App. A. The unpublished order of the Court of Appeals for the Ninth Circuit denying certificate of appealability is reprinted at Pet. App. B. The unpublished order of the United States District Court for the Southern District of California Adopting the Report and Recommendations and Denying Certificate of Appealability is reprinted at Pet. App. C. The unpublished Report and Recommendation of the United States Magistrate Judge for the District Court Southern District of California is reprinted at Pet. App. D. The unpublished California Supreme Court minutes June 29, 2016 Summarily Denying Petition for Writ of Habeas Corpus is reprinted at Pet. App. E. The unpublished Decision of California Court of Appeals is reprinted at Pet. App. F.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on December 21, 2018 and a copy of the order denying rehearing appears at Appendix A. The Court has jurisdiction pursuant to 28U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which respectively provide that: "In all criminal prosecutions, the

accused shall enjoy the right...to have the Assistance of Counsel for his defense"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. 2254d(1), which provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim...resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...."

STATEMENT OF THE CASE

A California jury convicted Wardell Nelson Joiner Jr. of first-degree murder after the prosecution urged jurors to conclude from circumstantial evidence that he had strangled and drowned the victim. In federal habeas corpus proceedings below, Joiner presented new evidence, including objective scientific evidence, which proved that the key evidence adduced by the prosecution at trial to link him to the crime was either false or unreliable. He also presented credible new evidence demonstrating that the victim was alive after he had left the apartment and that someone had entered the apartment the day the forensic evidence proved the murder occurred. The district court dismissed Joiner's petition and a panel of the

court of appeals opined that there was not a substantial showing of the denial of a constitutional right. The record shows the following:

A. State Trial Court Proceedings

1. The Crime

This case arises from Fallbrook, California, an area on the outskirts of Camp Pendleton. Wardell Nelson Joiner Jr. and Vanessa Monet Messner began dating when they were both enlisted personnel in the Marine Corps and deployed to Kuwait and Iraq during 2003. While stationed in Iraq, they became engaged to be married. Upon Messner's return to the United States in August or September 2003, she lived with Joiner in an apartment in Fallbrook. On February 11, 2004, Messner did not show up for a 6:00 p.m. appointment to attend a party with some friends. At approximately 11:30 p.m., Sheriff Deputy Perkins was told to contact Joiner and he spoke with Joiner, who informed him that between 5:30 and 6:00 p.m., Messner had stabbed him with a steak knife when he stood in the doorway to stop her from leaving. Perkins drove to the apartment and knocked on the door, but no one answered and the lights were not on in the apartment. At approximately 10:16 a.m. on February 12, 2004, Deputy Sheriff Jeffrey Schmidt and other deputies responded to a call to check on Messner. They entered the apartment and discovered Messner's body in the bathroom where the light was on. Almost immediately, after deputies interviewed Joiner regarding the domestic violence incident, he was arrested. His

motive, it was supposed, was jealousy that he could not be with Messner and his discovery that she was in a relationship with another Marine.

2. Trial Proceedings

On April 22, 2005, a jury convicted Joiner of first-degree murder and found true the special circumstance of intentional infliction of torture pursuant to the *California Penal Code 187(a), 190.2(a)(18)*. The evidence showed that Joiner left the apartment at 6:00 p.m. on February 11, 2004 and went to a bar in Oceanside where a waitress first contacted him between 6:30 and 7:00 p.m. The medical examiner testified that the death "most likely, occurred either late in the evening of [February 11] or possibly in the morning hours of the 12th of February," adding, "It could certainly be three or four hours on either side" of that estimate. The prosecution sought to show entirely by circumstantial evidence, that Joiner went to the house and got into a fight with Vanessa Messner and killed her in a jealous rage. The defense offered no witnesses nor any evidence but asserted in closing that Joiner was innocent and that the evidence failed to show his guilt beyond a reasonable doubt.

3. The Circumstantial Case for Joiner's Conviction

The evidence presented by the prosecution focused upon five issues: Did Joiner have the opportunity to commit the crime before he left the apartment? Was Ms. Messner alive after Joiner left the apartment on February 11, 2004 at 6:00 p.m.? When did the forensic evidence prove that Ms. Messner died? Was the forensic evidence

capable of providing a wide window of opportunity to inculpate Joiner? Was there a factual basis to support the hypothesis that Joiner committed previous acts of domestic violence to create an inference that he was guilty of first degree murder?

a. The equivocal evidence concerning Joiner's opportunity to commit the crime

The evidence presented by the prosecution established that Joiner was involved in a fight with Ms. Messner between 5:30 and 6:00 p.m. which resulting in him sustaining a knife wound. When Joiner left the apartment, he went to a bar in Oceanside where Linda Singley testified that she first saw him "after happy hour, so approximately anywhere from 6:00 to 7:30" p.m. He was there having drinks and watching television until between 10:00 and 10:45p.m. Dr. Glenn Wagner, Chief Medical Examiner for San Diego County, arrived at the crime scene at 9:30 p.m. on February 12, 2004. Dr. Wagner testified that when he placed Ms. Messner's body on the living room floor at 10:00 p.m. the body was in full rigor mortis. Dr. Wagner testified that full rigor mortis is established twelve hours after a person is deceased, but concluded nonetheless that Messner's death "most likely, occurred either late in the evening [of February 11] or possibly in the morning hours of the 12th of February." He added, "It could certainly be three or four hours on either side" of that estimate.

During closing, the prosecutor urged jurors to conclude that Joiner committed the murder before he left the apartment on February 11, 2004. The defense,

notwithstanding a complete lack of any rebuttal evidence, countered that the evidence did not prove beyond a reasonable doubt that Joiner committed the murder on February 11th.

4. The Instructions and Verdict

During the court's instructions, the jury was charged, *inter alia*, on circumstantial evidence and reasonable doubt. The jury returned a verdict of guilty of first-degree murder.

B. State Postconviction Proceedings

On September 30, 2005, Joiner brought a motion for a new trial based on alleged prosecutorial misconduct and sought dismissal of the special allegation because of insufficient evidence. The court denied the motion ruling that there was no misconduct and the special circumstance was supported by sufficient evidence. On June 22, 2006, Joiner appealed his conviction contending: (1) the prosecutor committed prosecutorial misconduct during closing argument; (2) the permissive inference in CALJIC No. 2.50.02 violated Joiner's due process; (3) the special circumstance finding of torture should be reversed based on trial counsel's failure to object to a hearsay statement during a videotaped experiment simulating the circumstances of the murder; and (4) the trial court erred in ordering a parole revocation restitution fine per section 1202.45. The California Court of Appeal affirmed the judgment but remanded the matter to the trial court with instruction to strike the parole revocation restitution fine as Joiner is ineligible for parole.

Joiner filed his first habeas petition in the trial court on February 6, 2008 in which he claimed ineffective assistance of trial counsel due to counsel's failure to locate and interview an alibi witness and failure to call an expert witness regarding the victim's time of death. The Superior Court denied the petition on July 7, 2008.

Joiner filed his first petition in the California Court of Appeal on May 31, 2009 in which he claimed that the medical examiner miscalculated the victim's time of death. This petition was denied without prejudice so that Joiner could raise this claim in the first instance before the trial court.

Joiner filed his second habeas petition in the trial court on February 5, 2010 and asserted that a miscarriage of justice had occurred and claimed his actual innocence based on evidence regarding the victim's time of death. On April 9, 2010, the court denied the second habeas petition as the certificate noting the victim's time of death was not "newly discovered evidence" and did not point "unerringly towards innocence". The trial court noted that Joiner's efforts to rely on the victim's death certificate and autopsy report which state her official time of death as February 12, 2004 at 10:05 "are baseless" as it is clear that this date and time refer to when the victim's body was found, thusly Joiner's claims had no merit.

Joiner filed his second habeas petition in the California Court of Appeal on April 22, 2010 claiming actual innocence based on evidence regarding the victim's time of death. In denying the petition on June 9, 2010, the court found there was no

"new exculpatory evidence and the issue of sufficiency of the evidence is not cognizable on habeas corpus...The evidence showed [the victim's] body was found at approximately 10:00 a.m. on February 12, 2004, and was in rigor mortis. The logical conclusion is Dr. Wagner noted the date and time the body was found in his autopsy report and the Certificate of Death." Further, the Court referred to its prior finding on direct appeal that "there was overwhelming evidence of Joiner's guilt."

On June 21, 2010, Joiner filed a habeas petition in the trial court in which he raised the same claims he had raised in his previous petitions to the trial court. It was denied on July 9, 2010. Joiner filed a habeas petition in the trial court on January 18, 2011 and a habeas petition in trial court on February 25, 2011 making innocence claims. On August 8, 2011, Joiner filed his sixth habeas petition in the trial court and the court denied the petition as successive on September 8, 2011.

On October 30, 2011, Joiner filed a habeas petition in the California Court of Appeal claiming actual innocence based on a January 8, 2011 investigation. The court denied the petition without prejudice on January 31, 2012 subject to refiling once the trial court ruled on Joiner's new contentions. On April 17, 2012, Joiner filed a petition for writ of mandate seeking discovery. The petition was denied without prejudice on May 2, 2012 so that Joiner could show he had made good faith efforts to obtain requested discovery from counsel and he was unsuccessful. On July 9, 2013, Joiner filed a habeas petition in the trial court which was denied on November 14, 2013.

On December 1, 2014, Joiner filed a habeas petition in the trial court. In this petition, Joiner relied on a new report from forensic expert Cindy Balch, RN, BS, CCRN, CEN, CLNC, which demonstrates his factual innocence. This document calls into question the victim's time of death, as well as various other aspects of the evidence in this case. The trial court denied the petition as none of the "newly discovered" evidence presented by Joiner undermined his conviction or pointed "unerringly to innocence or reduced culpability". Joiner filed his habeas petition in the California Court of Appeal on October 1, 2015 and alleged that constitutional error deprived the jury of evidence that would have established his innocence. Joiner utilized the report from Cindy Balch, RN, BS, CCRN, CEN, CLNC and an affidavit from a witness, Michael Focke, who talked to Messner after he had left the apartment. Additionally, Joiner also included a report from a private investigator establishing the travel time from the apartment to the bar and including a statement from a waitress detailing when he arrived at the apartment. On October 9, 2015, the court denied the petition finding it was barred as untimely given that it was filed more than ten years after Joiner was sentenced without an adequate explanation for the delay.

On April 1, 2016, Joiner filed a habeas petition in the California Supreme Court raising the claim that constitutional error deprived the jury of critical evidence that would have established his innocence regarding the victim's time of

death and evidence that the victim was alive after he left the apartment. The petition was summarily denied on June 29, 2016.

C. Federal Habeas Corpus Proceedings in the District Court

On November 9, 2016, Joiner filed a habeas corpus petition in the United States District Court. He claimed that he was innocent of the underlying crime and pleaded his ineffective assistance of counsel claims, together with his claims that the prosecution knowingly presented false, material evidence at trial. He requested an evidentiary hearing. The District Court ordered the Warden to file a response. May 2, 2017, Respondent moved to dismiss the Petition on the basis that it is untimely under the AEDPA and lodged the state court record. June 2, 2017, Joiner filed his Opposition to the motion to dismiss. On March 26 the District Court granted the Warden's motion to dismiss and denied a certificate of appealability. Joiner filed a request for a certificate of appealability with the Ninth Circuit Court of Appeals and was denied on November 5, 2018.

1. The New Evidence Supporting Joiner's Innocence

In support of his claims, Joiner presented both expert testimony and lay testimony to establish two points. First, new scientific evidence demonstrated that the forensic evidence which had been crucial in establishing at trial the prosecution's theory that Joiner killed Messner during the altercation on February 11, 2004 - the prosecution's only theory that Joiner had the opportunity to kill Ms.

Messner -was false or completely untrustworthy. Second, testimonial evidence showed that Messner was alive after Joiner had left the apartment and that someone else had been in the apartment. The Warden submitted no rebuttal evidence. The habeas record shows:

- a. **There is new evidence establishing beyond peradventure that much of the State's circumstantial case rested upon inaccurate and misleading evidence**
 - i. **Forensic science markers prove that there it is scientifically impossible that Vanessa Messner died on February 11, 2004**

The authorities who responded to the welfare check on February 11, 2004, entered the apartment and discovered Vanessa Messner's body at 10:19 a.m. Dr. Glenn Wagner, Chief Medical Examiner, testified at trial that he arrived at the apartment approximately twelve hours later at 9:30 p.m. Dr. Wagner went on to state that he removed Messner's body from the tub and placed her on the living room floor and that the body was in full rigor mortis. Dr. Wagner surmised that the death occurred late evening February 11, 2004 or early morning February 12, 2004; however, the jury was never informed that Dr. Wagner had previously certified that based on reliable principles and methodology it was his opinion that Messner died February 12, 2004 at 10:05 a.m.

- ii. **New analysis of the forensic evidence juxtaposed beside the reliable principles and methodology strongly points to the time of death testimony being false or untrustworthy**

Cindy Balch, a respected forensic expert, examined the court records, Medical Examiner's report, trial testimony, and Sheriff's investigative reports and concluded

that the death timeline presented by the Prosecution conflicts with the science of rigor mortis. Cindy Balch stated that if the murder occurred at 6:00 p.m. on February 11, 2004 then 36 hours later the body should have been completely out of rigor mortis and it was not. Rigor mortis was still passing during the time of the autopsy at 1:00 p.m. on February 13, 2004, 43 hours after Prosecution's death timeline of 6:00 p.m. on February 11th.

Cindy Balch stated that based on Dr. Wagner's testimony at trial detailing the time when Messner's body was in full rigor mortis, then the death must have occurred on February 12, 2004 about 10:00 a.m. and that the earliest that the death could have occurred was four hours earlier about 6:00 a.m. on February 12th. Finally, Cindy Balch noted that it was illogical that the Autopsy Report and Death Certificate, whereupon Dr. Wagner certified that the death occurred on February 12, 2004 and not on February 11, 2004, was not presented in a murder trial. This new evidence would destroy all factual support for the prosecution claim that Joiner committed the murder before he left the apartment at 6:00 p.m. on February 11, 2004.

iii. New testimonial evidence from a witness who talked to Messner after Joiner left the apartment would prove that he did not commit the murder

Michael Focke, a Marine who initially gave a statement to the authorities in 2004, stated that between the hours of 6:00 and 7:00 p.m. on February 11, 2004 Vanessa Messner contacted him telephonically at the barracks on Camp Pendleton.

Focke stated that Messner called him to relay a message to Kaszniak and Nolan that she would meet them at the party instead of at the barracks as had been originally planned. Focke stated that Messner was in good spirits and in no distress during the death timeline presented by the prosecution that would further weaken the claim that Joiner committed the murder before he left the apartment at 6:00 p.m. on February 11, 2004.

iv. Testimonial evidence indicates that another unidentified person had entered the apartment

Detective Perkins took the crime report on February 12, 2004 at approximately 12:46 a.m. and subsequently responded to the apartment in Fallbrook and received no answer at the front door. Significantly, when Deputy Perkins responded to the apartment in Fallbrook and received no answer at the front door, he also observed that there were no lights on in the apartment. The next day, February 12, 2004, when Messner's body was discovered by the authorities there was a light on in the apartment. This evidence, if proven to be true, would be wholly inconsistent with the prosecution's theory that only Joiner could have committed the crime.

v. Trial counsel either did not see or did not investigate key prosecution evidence that impeached the prosecution's case

Joiner's trial counsel, Michael Washington, did not investigate much of the evidence provided by the prosecution that would have proved exculpatory in nature. Nowhere is this more evident than the failure of trial counsel to impeach Dr.

Wagner with the Autopsy Report and Death Certificate whereupon he certified that Messner died on February 12, 2004 at 10:05 a.m. This evidence would have given credence to the theory that the death occurred when Joiner was not at the apartment establishing a de facto alibi. Trial counsel also failed to investigate numerous other aspects of the case including: 1) Focke establishing that Messner was alive after Joiner had left the apartment and 2) that someone else was in the apartment when it was proven Joiner was at another location. This evidence would have been indispensable in support of the defense argument, in light of trial counsel's failure to present evidence, that another unnamed individual had entered the apartment and would thus discredit the prosecution's theory that Joiner committed the murder during the fight with Ms. Messner.

vi. The prosecution knowingly utilized false evidence in regards to the time of death evidence

The State's expert, Dr. Glenn Wagner, conducted the examination of Messner's body utilizing reliable principles and methodology and made a determination regarding when he believed, in his opinion, that the death occurred. This opinion was presumably reached based on principles such as rigor mortis, liver mortis, vitreous fluid and body temperature. Dr. Wagner certified on an official document that in his opinion Messner died on February 12, 2004 at 10:05 a.m. but proceeded to give the jury the false impression that the forensic evidence would support a finding the death occurred on February 11, 2004 at 6:00 p.m. A report from an independent forensic expert pinpointed the reliable principles and

methodology and the deviation from these principles during the time of death testimony given at trial establishing that it was scientifically improbable that the death occurred on February 11th.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH THE PRECEDENT SET FORTH BY THIS COURT IN *SCHLUP V. DELO*

The reasons for granting the Writ reach far beyond Mr. Joiner's innocence claim and his allegations of constitutional error. In House, the Court did not elaborate on Schlup's observation that when considering an actual-innocence claim in the context of a request for an evidentiary hearing, whether the District Court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment". Further clarification is needed as the lower courts hold an erroneous belief that their role as gatekeeper requires them to weigh the credibility of the evidence at face value. Consequently, the lower courts would continue to issue blanket denials based on the rarity of credible actual innocence claims. This approach would foreclose the gateway to the handful of petitioners advancing credible innocence claims, preventing them from gaining fair and objective consideration of evidence not presented at trial to prove their probable innocence.

In House, the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions but the Court still found that the District Court did not clearly apply *Schlup's* predictive standard

regarding whether reasonable jurors would have reasonable doubt. It would not be a stretch of the imagination to surmise that when there is no evidentiary hearing held, where there are no credibility determinations and the reliability of the evidence is not tested, there can be no proper decision on how reasonable jurors would react to the supplemented record. This approach cannot be what the Court had in mind when they decided *Schlup* but this aberrational standard would ensure that the *Schlup* doctrine would lose its meaning as the lower courts would be empowered to make findings that are not consistent with their functions without having to explain the rationale for their decisions.

II. THE COURTS BELOW MISSAPPLIED SCHLUP BY FAILING TO INQUIRE INTO THE FACTS WHEN FACED WITH THE POSSIBILITY OF CONSTITUTIONAL ERROR IN A SCHLUP ACTUAL INNOCENCE CLAIM

A. An Evidentiary Hearing Was Required To Assess the Probative Force of the New Evidence to Assess Its Credibility

In *Schlup*, the Court made clear that implicit in the requirement that a habeas petitioner presents reliable evidence is the expectation that a factfinder will assess reliability. The new evidence at issue in *Schlup* had not been subjected to such an assessment and the Court stated that the district court, as the "reviewing tribunal" was tasked with assessing the "probative force" of the new evidence of innocence, and "may have to make some credibility assessments." *Schlup*, 513 U.S. at 327-328, 330.

B. Under *Schlup*, Due Process Violations and the Denial of a Fair Trial Will Require Credibility Assessments of the Evidence

The rules of *Strickland v. Washington* and *Giglio v. U.S.* are founded upon the most basic constitutional guarantee to a person accused of a crime: the right to due process of law and a fair trial. As a result, the instant petition presents an unique and extraordinary case where Mr. Joiner was convicted of a crime and sent to prison through the knowing presentation of false evidence in an attempt to conceal material evidence that tends to show that he is not guilty. Dr. Wagner's testimony conflicts with his own prior opinions expressed in the Autopsy Report and Death Certificate but the defense did not investigate this conflict or cross-examine it. Trial counsel also failed to investigate exculpatory evidence from Focke that Messner was alive after Joiner had left the apartment and evidence that an unidentified perpetrator had entered the apartment during the time frame when the death actually occurred. In the light of the new evidence, Joiner's defense suffered from an "actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions."

The disadvantage was substantial because self-contradictory opinions by Dr. Wagner probably would undermine confidence in the compatibility of the medical evidence with the prosecution's theory that Messner died on February 11, 2004. See *Schlup*, 513 U.S. at 327("a habeas petitioner is required to show that a constitutional violation has probably resulted in the conviction of one who is

actually innocent.") And the disadvantage was of constitutional dimension because it affected the way in which trial counsel conducted the part of the trial which could well have exonerated Joiner, implicating a violation of his constitutional guarantee of due process. In light of *Schlup*, the Court cannot have confidence in the outcome of the trial short of a fully informed cross-examination of Dr. Wagner that would have confronted him with opinions which he held shortly after autopsy when his memory of the details was freshest, but which plainly contradicts important parts of his testimony at trial. In addition, the new evidence presented, if true, would further weaken the case against Joiner whereupon a juror applying their reason to the evidence before it would not be satisfied to a moral certainty that he had committed the crime. Without unassailable forensic evidence, without a window of opportunity, without eyewitnesses, and without convincing circumstantial evidence linking him to the crime, no rational juror would have any basis for convicting Joiner beyond a reasonable doubt. Add to that the rational juror's consideration of testimony that someone else had entered the apartment when the forensic evidence would prove that the death occurred and there is no escaping reasonable doubt.

C. The Case at Hand is Ripe for the Court's Consideration Due to the Importance of the Issues Involved and the Societal Impact From This Decision

Put simply, viewing the trial and habeas evidence as a whole, there would remain no legal or factual basis upon which to hang Wardell Joiner's conviction. A

petitioner who has put forth credible evidence demonstrating as much warrants a forum upon which his claims would gain proper consideration. Importantly, the point in *Schlup* was not simply that a hearing was required, but why-because the district court had to assess the probative force of the petitioner's newly presented evidence, by engaging in factfinding rather than performing a summary judgment-type inquiry. *Schlup*, 513 U.S. at 331-332. The lower courts assessment of Joiner's new evidence is precisely the summary judgment-type inquiry *Schlup* said was inappropriate.

The circumstances of this case are also what the Court envisioned when they created the gateway as there could be no greater 'miscarriage of justice' than Mr. Joiner spending the rest of his life in prison for a crime that he did not commit without the proper consideration of any evidence that could well exculpate him. It would suspend disbelief that a petitioner would be disallowed to prove his probable innocence claim because the lower courts were faced with the possibility of imposing liability on the prosecution and defense counsel for egregious misconduct. To allow this aberrational precedent to stand would betray *Schlup*'s promise of a meaningful avenue for review of the handful of habeas petitioners presenting credible claims of actual innocence and procedurally defaulted constitutional claims.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Date ~~20 March 20, 2019~~ ^{wp} April 12, 2019

Respectfully Submitted,

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