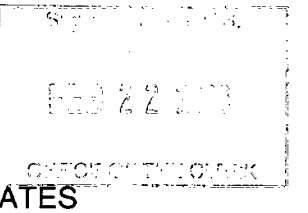
19-6060

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Louis Ivester Peets — PETITIONER
(Your Name)

vs.

Robert W. Fox, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Louis Ivester Peets
(Your Name)

California Medical Facility; P.O. Box 2500
(Address)

Vacaville, CA 95696-2500
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

(1) If Petitioner provided sufficient newly presented evidence for all reasonable jurors to conclude that he was "not guilty by reason of insanity"—would that constitute "actual innocence" to allow passage through *Schlup*'s actual innocence gateway and have his otherwise procedurally barred habeas corpus claims reviewed on the merits?

(2) If the answer to question #1 is "Yes", did the Ninth Circuit err in denying Petitioner's motion for a COA, given that he had provided evidence to satisfy both components of the *Slack* test?

LIST OF PARTIES

[X] 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 the subject of this petition is as follows:

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STATE CASES

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OTHER

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

[X] 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,
[X] is unpublished.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,
[X] is unpublished.

[ ] For cases from **state courts:**

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

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was **27 September 2019**.

[X] 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: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including **24 February 2020** (date) on **12 December 2019** (date) in Application No. **19 A 661**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. CONST., AMEND. V — [SEE PAGE 6.]

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

- U.S. CONST., AMEND. VIII — [SEE PAGE 6.]

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in this United States, and subject to the jurisdiction thereof, or citizens of the United States and of the State wherein they resides. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, libetry, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the

validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeal from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) A application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) A applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under

the law of the State to raise, by any available procedure, the question presented.

(d) An 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—

(1) 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If

the State cannot produce such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed b section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

U.S. CONST., AMEND. V - NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTATION OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB, NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

U.S. CONST., AMEND. VIII - EXCESSIVE BAIL SHALL NOT BE REQUIRED NOR EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED.

STATEMENT OF THE CASE

Petitioner pled not guilty and not guilty by reason of insanity (NGI) to the charges of murder, child endangerment, and desertion of a child.

On 6/18/02, after bench trials as to both his guilt (decided via the so-called "guilt phase" of the trial) and sanity (decided via the so-called "sanity phase" of the trial), the Santa Clara County Superior Court (SCCSC) found Petitioner guilty of all charges, concluded that he had been *sane* during their commission, fixed the murder at second degree, and sentenced him to 15 years to life.

On 1/15/04, the state appellate court affirmed the judgment against Petition on direct appeal. The California State Supreme Court denied his Petition for Review on 5/19/04.

On 10/13/05, the SCCSC denied Petitioner's habeas petition seeking post-conviction relief. There is no appeal in California from the denial of such a petition. Petitioner instead followed the State's mandated habeas procedures and sought relief via a new petition to the next higher court, but it took him until 2016 to do so. The substantial delay was due to the combination of the following: the prison where he was then incarcerated unlawfully confiscated a critical volume of his trial transcripts, and it was not until 2011 that he was able to replace it; he also became legally blind in 2007 and developed a cardiac ailment in 2009, both of which severely hampered his ability to work on the habeas petition to the appellate court.

On 10/31/16, the appellate court denied the petition without an explanation, and after an *en banc* review the State Supreme Court denied the subsequent petition on procedural grounds (due to untimeliness) on 4/19/17.

Pursuant to 28 U.S.C, § 2254, Petitioner then filed a petition for writ of habeas corpus in the U.S. District Court for the Northern District of California, San Jose division, and demonstrated that his trial counsel was prejudicially ineffective by failing to use evidence counsel possessed that would have completely undermined the prosecution's case.

The district court concluded that the petition was likely procedurally barred from merit review. On 2/01/18, it thus ordered Respondent to submit a "Motion to dismiss [MTD] or notice that motion is unwarranted". Respondent did so on 5/15/18 (MTD). Petitioner followed this with an opposition (Opposition), after which Respondent submitted a reply (Reply).

On 11/14/18, the district court dismissed the petition on procedural grounds (due to untimeliness) and with prejudice (Dismissal). The court also denied Petitioner a certificate of appealability (COA), and the Ninth Circuit Court later denied his ensuing motion for a COA.

STATEMENT OF THE CASE

Perhaps the piece of newly presented material most critical to Petitioner's habeas corpus efforts is that of the so-called "when/what" evidence he provided in the underlying petition: Per the record, Petitioner killed the victim on 9/18/99. On 9/30/99, he gave a set of reasons for his actions ("Set-1" hereafter) to the defense's mental health expert (MHE), reasons that contained no delusions. (the underlying petition [Pet.] at 5.)

On 11/03/00, some 14 months later, Petitioner gave a different set of reasons for the killing ("Set-2") to the same MHE, reasons that now *included* delusions. (*Id.*)

Dr. Douglas Harper was the prosecution's MHE. He testified that, in his expert opinion—beyond a reasonable doubt—Set-2 did not exist at the time of the killing. (*Id.* at 8-9.) The district court misconstrued Dr. Harper's reasons for that conclusion.

First, Dr. Harper agreed with the defense's MHE that Petitioner was suffering from "a bipolar disorder manic type with psychotic features" on 9/30/99. (*Id.* at 6.) Indeed, he opined that Petitioner was in that same state of mind "continuously from at least a few days before September 18 [so, from about 9/16/99] through September 30th." (*Id.* at 7.) He said that, while in that mental state, Petitioner could not "forget" the delusional system (i.e., the overarching theme(s) and key elements of the delusions) operative at the time of the killing or *edit* it out of his communication, i.e., he could not "talk about why" the victim had to die or why the victim was killed without mentioning it, in some fashion. (*Id.*, emphasis added.) The fact, then, that Petitioner *had* spoken, on 9/30/99, about said "why"s and had not mentioned any delusional system while doing so—in *any* fashion—that, Dr. Harper testified, meant that "at the time of the alleged incident it [the delusional system and, hence, the reported delusions themselves] did not exist." (*Id.* at 8-9.) The implication, of course, was that Petitioner had fabricated them, and by 11/03/00, Petitioner had long since recovered from his mental health crisis of 1999, so he *could* have fabricated them and simply claimed on 11/03/00 that they had been operative at the time of the killing, but he had not, and they had been operative.

Disproving Dr. Harper. Unbeknownst to Dr. Harper, there was a Set-0 of reasons for the killing that Petitioner had revealed to trial counsel Gregg Shores on 9/23/99, their first attorney-client meeting, and counsel Shores had in turn memorialized the session in a six-page document. (*Id.* at 10-13.) Unfortunately, counsel never revealed the existence of the document to the trial court.

The 9/23/99 date of the document represents the "when" half of Petitioner's so-called "when/what" evidence supporting Ground One. (*Id.*) The "what" half represents pieces of the document which demonstrate that Set-0 contained the same

reasons as Set-2, while those of Set-1 were completely different. (*Id.*) So, Petitioner had reported the same delusions on 11/03/00 as he had the first time he had discussed the matter, on 9/23/99.

Per Dr. Harper's own foundation, if Petitioner had discussed the critical "why"s at any time between 9/18/99 and 9/29/99, he would have effectively been compelled to give delusions-free reasons for the killing, just as he had given in Set-1 on 9/30/99. The fact that he had divulged the Set-0 reasons within a mere five days of the homicide, when he was unquestionably still manic and psychotic, and definitely incapable of editing, these things demonstrate that the delusions-filled reasons Petitioner reported in Set-0 represented his true state of mind at the time of the killing, again, using Dr. Harper's own expert opinion testimony. The inescapable conclusions are also that: (1) The identical, delusions-filled reasons for the killing Petitioner had reported in Set-2 on 11/03/00 had not been fabricated; and (2) Petitioner *had* been editing on 9/30/99, contrary to Dr. Harper's severely prejudicial expert witness testimony, testimony that allowed Respondent on direct appeal to assert that Petitioner had fabricated his reported delusions and allowed the appellate court itself to affirm the trial court's judgment using the same. (*Id.* at 8-9.)

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT'S ENDORSEMENT OF THE DISTRICT COURT'S BLATANT MISINTERPRETATION/MISAPPLICATION OF THE TRIAL RECORD WARRANTS THE HIGH COURT'S ATTENTION.

Petitioner demonstrates via the following that the district court's *Schlup* inquiry was severely flawed, that he deserved a COA from that court, in the very least, and that the Ninth Circuit Court erred in denying his subsequent motion for a COA:

Since Petitioner's federal habeas petition was denied on procedural grounds, *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000) was controlling. There, the Supreme Court held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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." In denying Petitioner's motion for a COA, the Ninth Circuit Court held that he had failed to satisfy both components of the test. That court erred in so finding.

First, Petitioner clearly satisfied the constitutional claims component of the *Slack* test. Ninth Circuit precedent holds that that reviewing court should have looked solely at whether, for each claim, Petitioner had *facially alleged* the denial of a constitutional right." See, e.g., Lambright v. Stewart, 220 F.3d 1022, 1026 (9th Cir. 2000) [emphasis added]. Petitioner did so. Specifically, he alleged in Ground One that false evidence was used to secure his conviction in violation of his due process rights. Ground Two alleged that trial counsel denied him his right to the effective assistance of counsel. Ground Three alleges that the People committed outrageous acts of misconduct, which violated his due process rights. Ground Four alleged that he is actually innocent and is currently incarcerated due to the introduction of false evidence against him and because of ineffective assistance of counsel (a violation of his 5th, 6th, and 14th Amendment rights). Ground Five alleged that the trial court abused its discretion by misstating the law in violation of Petitioner's 6th and 14th Amendment rights. Ground Six alleged that the use of false evidence to secure a "sane" verdict against him violates his 8th Amendment right against cruel and unusual punishment. Finally, Ground Seven alleged that if not through a single act, then trial counsel provided him with ineffective assistance of counsel through the cumulative effect of his errors, in violation of his 5th, 6th, and 14th

Amendment rights.

Given the foregoing, Petitioner submits that his petition satisfied the constitutional component of the *Slack* test.

The FMJ (Actual Innocence) Exception

To satisfy the procedural component of the *Slack* test, Petitioner needed to show that he qualified for merit review under the FMJ exception to procedural default. Doing so required Petitioner to pass through the so-called *Schlup* actual innocence gateway, i.e., he "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new [or *newly presented*] evidence." (*Lee v. Lampert,* 653 F.3d 929, 938 (9th Cir. 2011) (*en banc*) (quoting *Schlup,* 513 U.S. at 327, 115 S.Ct. 851).) The Ninth Circuit Court held that, "where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the *Schlup* gateway to allow consideration of otherwise barred claims." *Sistrunk v. Armenakis,* 292 F.3d 669, 673 (9th Cir. 2002) (*en banc*) (citing *Carriger v. Stewart,* 132 F.3d 463, 478-79 (9th Cir. 1997) (*en banc*).) Petitioner's newly presented evidence did severely undercut the reliability of the proof of sanity used against him at trial. Indeed, in the "Statement of the Case" section of this petition, he showed how the newly presented "when/what" evidence completely refuted Dr. Harper's expert witness opinion testimony, and, per the Triers of Law and Fact (Petitioner's being a court trial) indicated, the entire case boiled down to expert testimony, with Dr. Harper being the very heart of the prosecution's sanity phase case. Specifically, the court told both trial parties prior to receiving closing arguments that "The focus of the case, I believe, is self-evident. This case boils down to expert opinions. If you don't believe that, then you're not on the same page. That's where the thrust of your arguments should be.") (RT 2088:27-2089:3.)

1.

The District Court's Erroneous Interpretation.

Per the district court, Dr. Harper rendered his [severely prejudicial] opinion testimony against Petitioner "because [Petitioner] seemed able to control his expressions of delusion from one meeting to the next. ..." (Dismissal at 12:12-18.)

Petitioner's foregoing summary of the foundation Dr. Harper used to arrive at his prejudicial conclusion is fully supported by the record; that from the district court

is not. Indeed, the district court's interpretation only makes sense if one first assumes that Petitioner was in the same manic, psychotic state of mind from about 9/30/99 up to and including the 11/03/00 meeting—continuously. Only then (assuming, too, of course, that Petitioner was being truthful about having experienced delusions at the time of the killing) would Petitioner have lacked control and consequently been *compelled*, per Dr. Harper, to report the *same* delusions in Set-1 and Set-2. The district court's interpretation would only have pronounced Petitioner truthful if he had reported Set-1 on both 9/30/99 *and* 11/03/00, or Set-2 on both 9/30/99 *and* 11/03/00.

We know from Dr. Harper himself, however, that Petitioner's mental health crisis lasted only from about 9/16/99 through about 9/30/99. Indeed, per Dr. Harper, he "did not see anything to suggest that [Petitioner] was mentally ill" when the two met on 11/25/00. (Pet. at Ex. A ["Denial on Direct Appeal"] at 16.) So, of course, Petitioner would have had control of himself and his communication on 11/03/00, and he would have been, by definition, devoid of any delusions. If he was being truthful, any delusions he reported on 11/03/00 would merely have been a *recounting* of past ones, e.g., those from the time of the killing.

Contrary to the district court's assertions, then, Dr. Harper's objection to the delusions Petitioner reported on 11/03/00 had nothing to do with Petitioner's ability, or lack thereof, to "control his expressions of delusion from one meeting to the next." Instead, the doctor simply maintained that, if delusions had in fact existed at the time of the killing, Petitioner was in such an altered state of mind on 9/30/99 that, effectively, he would have been compelled to report them in the 9/30/99 meeting, where the conditions for such revelations were ripe.

Dr. Harper's Prejudicial Effect

The district court stated: "As Respondent points out, there is no indication that the sanity verdict turned *solely* on Dr. Harper's opinion." (Dismissal at 13:3-4, emphasis added.) Petitioner has shown that trial court was explicit in stating the opposite.

Firm Control or the Lack Thereof

The district court stated in its Dismissal that "[b]ased on trial counsel's notes, Petitioner asserts that this 'newly presented evidence' indicates that he did not have such a *firm control* of his ability to communicate his delusions, which undermines Dr. Harper's conclusion that Petitioner was not delusional at the time of the murder. (Docket No. 1-4 at 8-9.)" (Dismissal at 12:19-22, emphasis added.) The court misstates the record and the underlying petition itself, for the entire purpose of

REASONS FOR GRANTING THE PETITION

Ground One was to prove the truth—which happens to be the opposite—namely, that Petitioner *was* controlling the communication of his delusions on 9/30/99, the one meeting seized upon by Respondent as incriminating Petitioner. By so doing, Petitioner also disproves that critical part of Dr. Harper's expert opinion testimony, and his foundation of that opinion crumbles.

Recall that it was Dr. Harper, afterall, who insisted that he was certain, beyond a reasonable doubt, that persons in the throes of the mental illness from which Petitioner was suffering on 9/30/99 "do not have the capacity to edit the delusional system out of their communication. It is just not there," he said. (Pet. at 6-7.) The "when/what' evidence proves that Dr. Harper was wrong, that Petitioner had a firm control of his communication, and *was* editing, on 9/30/99, and that the delusions he reported on 11/03/00 were thus *not* fabricated.

2.

The District Court Applied the Incorrect Standard of Review

Per the district court: "[I]t cannot be said that [Petitioner] has met his burden of demonstrating that more likely than not, in light of the new evidence, no reasonable jury would find him *sane beyond a reasonable doubt*." (Dismissal at 13:1-3; emphasis added; citation omitted.) That, however, is the incorrect standard of review. Instead, precedence holds that in the context of an affirmative defense, where the defendant has the burden of proof by a preponderance of the evidence, such as Petitioner's NGI defense, the burden that a petitioner/petitioner has to meet in order to pass through the *Schlup* actual innocence gateway is articulated differently. There, the petitioner "must prove that it is more likely than not that no reasonable juror would have found that he failed to establish *any* of the ... elements of the affirmative defense by *a preponderance of the evidence*." (*Smith v. Baldwin,* 510 F.3d 1127, 1140 n.9 (9th Cir. 2007) (*en banc*), *cert.* denied, 555 U.S. 830, 129 S.Ct. 37, 172 L.Ed.2d 49 (2008), emphasis added.) In the underlying petition, Petitioner does establish all the elements of the NGI affirmative defense specific to California law. (Pet. at liii-34.) Indeed, he demonstrates that, per California precedence, *Duckett* would not have permitted the TOF to lawfully return a "sane" verdict in light of Petitioner's overwhelming evidence to the contrary. (*People v. Duckett* (1984) 162 CA3d 1115; 209 CR 96.) (Pet. at 16-26.)

REASONS FOR GRANTING THE PETITION

3.

The District Court Ignored the Supreme Court's Unequivocal Instructions

In its dismissal order, the district court stated:

> As Respondent points out, there is no indication that the sanity verdict turned solely on Dr. Harper's opinion. On direct appeal, Petitioner argued that he was entitled to a new sanity phase hearing based on several grounds. See *People v. Peets*, No. H024695, slip op. at 1-2 (Cal. Ct. App. Jan. 15, 2004) [*Peets*]; (Mot. Ex. 10 at Ex. A). In rejecting his arguments and affirming the judgment, the state appellate court discussed all the evidence submitted with respect to Petitioner's sanity, which included extensive defense evidence of Petitioner's purported delusions in September 1999. (*Id.* at 4-9.) Furthermore, the evidence submitted by the prosecution included not only Dr. Harper's testimony, but that of *an inmate at the Santa Clara County jail who testified regarding Petitioner's lucid description of the murder and his intent to play crazy" to avoid prison*, **and** *the testimony of a jail official who described Petitioner's behavior at the jail which collaborated [sic] the evidence that Petitioner was simply play[ing] crazy."* (*Id.* at 6-7, 15-16.) As such, the Court is not persuaded that no reasonable juror would have found Petitioner sane beyond a reasonable double [sic] had the jury heard this additional instance of Petitioner mentioning delusions to his attorney. See *Griffin*, 350 F.3d at 961. [*Griffin v. Johnson*, 350 F.3d 956 (9th Cir. 2003).]

(Dismissal at 13:3-18, emphases added.)

The "inmate at the Santa Clara County jail" mentioned refers to prosecution witness, and in-custody informant, Riley Jones. Sub-claim 2.B is replete with newly presented impeachment evidence against him. The sub-claim demonstrates, for instance, that Jones perjured himself—repeatedly. Said evidence also demonstrates, inter alia, that Jones possessed verifiably accurate information about Petitioner's case, information that Petitioner had no way of revealing to him. (Pet. at 43-150.) Petitioner believes that he even succeeds in proving the truth regarding the prosecution's team, namely, that they suborned Jones' perjury. (Pet. at 217-261.)

Similarly, the "jail official" mentioned refers to county jail corrections officer Stanley Kendrick, another prosecution witness. Here, too, Petitioner provides newly

presented impeachment evidence of probative value against the officer. This includes evidence that he had previously assaulted Petitioner and that there was a great amount of impeachment evidence that counsel Shores had, or had ready access to, but never used. (Pet. at 165-181.)

In neither case did the district court consider any of Petitioner's newly presented evidence.

Schlup, however, is clear that determining whether a petitioner/petitioner should be allowed to pass through its actual innocence gateway is a factual matter, requiring a review of *all* the evidence in a case, including that which was not presented at trial. (*Schlup* at 328.) This Circuit Court has itself stated that "[t]he Supreme Court has been unequivocal in its instruction that a habeas court must consider the entire record in a *Schlup* inquiry." (*Corzine v. Baker*, 646 Fed. Appx. 520, 521 (9th Cir. 2016).) and that a habeas court's analysis hinges on its evaluation of "the probative force of relevant evidence that was either excluded or unavailable at trial." (*Sistrunk v. Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002).) The district court, by failing to review Petitioner's newly presented evidence against the two mentioned witnesses, simply ignored the Supreme Court's mandate, thereby conducting a wholly one-sided *Schlup* inquiry, one entirely skewed in Respondent's favor.

Petitioner submits that jurists of reason would not have acted thusly.

4.

Trial Counsel's Notes Constitute Reliable Evidence for *Schlup* Inquiry

The district court stated:

> Respondent first argues that [Petitioner's] self-serving statements made to his attorney hardly qualify as "reliable evidence" showing his actual innocence. (Reply at 4.) Respondent also asserts that hearsay evidence is "particularly suspect" and contrasts it with examples of reliable evidence that meets the actual innocence requirement, i.e., "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *(Id.,* citing *Schlup,* 513 U.S. at 324.)

(Dismissal at 12:23-28.)

Counsel Shores' notes would indeed qualify as a "trustworthy eyewitness account[]," for, since the document itself is not being offered to prove the truth of the statements attributed to Petitioner, only to prove that Petitioner uttered them, we would but need counsel Shores to authenticate the document, for case law deems such evidence nonhearsay. (*People v. Burnham* (1986) 176 CA3d 1134, 1144; 222 CR 630.)

5.

The District Court Was Less Than Impartial

In addition to the district court's bias already noted, there are these: The state appellate court affirmed the trial court's judgment against Petitioner in its slip opinion *People v. Peets*, No. H024695, slip op. at 1-2 (Cal. Ct. App. Jan. 15, 2004). Respondent referenced that slip opinion in his Reply. Below, Petitioner compares that slip opinion, Respondent's Reply, and the district court's Dismissal. The comparison shows that the district court did not obtain the version of the record it used in its *Schlup* inquiry from *Peets*, but from Respondent's *interpretation* of *Peets*, and that in itself demonstrates that the district court was not a just and objective arbiter between Petitioner and Respondent but was biased in Respondent's favor:

First, *Peets* reads: **[Quote A]**

> Dr. Harper also reviewed Dr. Wilkinson's notes from a November 3, 2000 interview of defendant in which defendant described the killing. Dr. Harper observed that in the September 1999 interview, unlike the November interview, "there is no mention of any unusual explanations, no mention of any satanic issues flooding his consciousness or impacting on his emotions. ..." Dr. Harper stated: "I can say that from a clinical perspective, beyond a reasonable doubt, that if the satanic issues were present at the time of the alleged homicide, that would have come out in the interview, would have been mentioned in some fashion in the interview on the 30th of September." He explained that an individual operating under a delusional system does not have "the capacity to edit the delusional system out of their communication." Dr. Harper was asked, "And what isyour opinion in regard to the absence on September 30th, 1999 of any reported delusional reason for killing [the victim]?" Dr. Harper replied, "That at the time

of the alleged incident it did not exist."

(Pet. at Ex. A ["Denial on Direct Appeal"] at 16-17.)

Page 4 of the Reply reads: **[Quote B]**

> Dr. Harper testified that a truly delusional person would not be able to control their communication of those delusions. *See People v. Peets,* 2004 WL 68763, at *10 (Cal. Ct. App. 2004). Dr. Harper therefore found it notable that, although petitioner mentioned delusions during a November 3, 2000 interview with a defense expert, he did not mention delusions during a September 30, 1999 interview with the same defense expert. *Id.* Dr. Harper concluded that, because petitioner seemed able to control his expression of delusions from one meeting to the next, that he was not experiencing delusions at the time of the murder. *Id.*

(Reply at 4:10-17.)

Finally, page 12 of the Dismissal reads: **[Quote C]**

> [T]he prosecution's expert witness Dr. Harper [...] stated that Petitioner did not mention delusions during a September 30, 1999 interview with the defense expert, but that he mentioned delusions over a year later at a November 3, 2000 interview with the same defense expert. (Mot. at 4.) Dr. Harper testified that a truly delusional person would not be able to control their communication of their delusions, but because Petitioner seemed able to control his expressions of delusion from one meeting to the next, that he was not experiencing delusions at the time of the murder. (*Id.*)

(Dismissal at 12:12-19.)

Incorrect Citation. The district court attributes Quote C to page 4 of Respondent's "(Mot.)" i.e., its MTD, but, as indicated, *supra*, the lines are actually from page 4 of Respondent's *Reply*.

REASONS FOR GRANTING THE PETITION

With the district court's citation to the Reply, instead of to *Peets*, we see that the district court never consulted *Peets* directly. It therefore never independently gauged the accuracy of Respondent's version of the information Respondent referenced in *Peets* or judge for itself Respondent's interpretation of that information. The district court simply accepted Respondent's version as gospel! We also see that the district court engaged in cut-and-paste plagiarism, and not even of *Peets*, but of Respondent's *interpretation* of *Peets*:

Example 1:

The *Peets* opinion (1/15/04): See **Quote A**.

Respondent's version (8/20/18): "Dr. Harper testified that a truly delusional person would not be able to control their communication of those delusions." (Reply at 4:10-12.)

The District Court's version (11/14/18): Dr. Harper testified that a truly delusional person would not be able to control their communications of their delusions. ..." (Dismissal at 12:16-17, crediting/trusting Respondent's version of *Peets*, instead of consulting and referencing *Peets* itself.)

The Takeaway. We see that there is little difference between Respondent's version and the district court's, but there is much difference between them and the *Peets* opinion they reference.

And **Example 2**:

The *Peets* opinion (1/15/04): See **Quote A**

Respondent's version (8/20/18): "Dr. Harper concluded that, *because petitioner seemed able to control his expression of delusions from one meeting to the next, that he was not experiencing delusions at the time of the murder. Id.*" (Reply at 4:15-17,

emphasis added.)`

The District Court's version (11/14/18): "Dr. Harper testified that a truly delusional person would not be able to control their communication of their delusions, *but because Petitioner seemed able to control his expressions of delusion from one meeting to the next, that he was not experiencing delusions at the time of the murder.* (*Id.*)" (Dismissal at 12:16-19, emphasis added.)

The Takeaway. Not surprisingly, the resemblance here, too, between Respondent's version and the district court's is uncanny. Most troubling, however, is the fact that, as explained in the "The District Court's Error" section, *supra,* Respondent's interpretation of *Peets*, and the district court's rote acceptance of that interpretation are both utterly, egregiously wrong.

In light of the district court's plain error in misinterpreting/misapplying the trial record, Petitioner maintains that the Ninth Circuit Court committed similarly plain error in denying his motion for a COA.

REASONS FOR GRANTING THE PETITION

II.

CONFLICT AMONG THE CIRCUITS AS TO WHICH, IF ANY, AFFIRMATIVE DEFENSES CONSTITUTE ACTUAL INNOCENCE FOR *SCHLUP* INQUIRY WARRANTS THE HIGH COURT'S ATTENTION.

An affirmative defense is defined as "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiffs or prosecution's claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. Examples of affirmative defenses are duress, ... insanity and self-defense (in a criminal case), -- Also termed plea inavoidance; plea in justification." (*Black's Law Dictionary*, Bryan A. Garner, Eighth Edition, Thomson/ West, p. 451.).

In *Hernandez* the California Supreme Court held that"Insanity is a plea raising an affirmative defense to a criminal charge." (*People v. Hernandez* (2000) 22 C4th 512, 522 [43 Cal Rprt. 2d 509]) In *Skinner(J.)*, the court held that "'It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane. (*People v. Nash* (1959) 52 Cal.2d 36, 50-51; 338 P.2d 416.' (*People v. Kelly* (1973) 10 Ca1.3d 564, 575 [111 CR 171]."

In *People v. Marshall* (1929) CA 224, 228, the court held that "It must be borne in mind that insanity is a complete defense to a criminal charge; that an act committed by an insane person, though otherwise unlawful, is not criminal, and that the law regards such a person as innocent even though he may otherwise have transgressed in a most serious manner. If insane, even though he be convicted, he may by proof of insanity, thus establish innocence." (Emphasis added.) In *People v. Drew* (1978) 22 C3d 333, 344 [149 CR 275], the court clarified that California courts treat a judgment after a finding of insanity as an acquittal. In *Ebberts v. State Board Control of California* (1978) 84 CA3d 329, 334 [148 CR 543], the court held that a crime is not committed when the plaintiff was found not guilty by reason of insanity. In *People v. Phillips* (2000) 83 CA4th 170, 173 [99 CR2d 448] ["California law exempts from criminal responsibility ... the insane."] The United States Supreme Court in Bousley held that "actual innocence" means factual innocence, not mere legal insufficiency. (*Bousley v. United States*, 523 U.S. 614, 623 (1998).) Circuit courts differ on whether a complete affirmative defense to a crime--such as insanity or self-defense shows factual or only legal innocence. The Tenth Circuit in *Ellis v. Hargett*, 302 F.3d 1182 (10th Cir. 2002) held that the requirement of "factual" versus "legal" innocence renders claims of actual

innocence based on affirmative defenses insufficient under *Schlup* [*Schlup v. Delo*, 513 U.S. 298, 314-15; 130 L. Ed. 2d 808; 115 S. Ct. 851 (1995)] (*Hargett*, at 118611.1.) The Tenth Circuit rejected Ellis' actual innocence claim, explaining that Ellis did not claim that he was "factually innocent of shooting" the victim but "that he is legally innocent because his conduct is justified or mitigated by the doctrines of self-defense or heat of passion." (Id.)

In *Finley v. Johnson* ((5th Cir. 2001) 243 F.3d 215) (*Finley*), the court reached a different conclusion, how ever. There, Finley claimed that he was actually innocent of the Texas crime of aggravated kidnapping because he believed his acts were "immediately necessary to avoid imminent harm" to the victim's wife and daughter. (Id. at 220.) Necessity is a complete defense to criminal conduct in Texas. The Fifth Circuit observed that "Finley has pointed to new evidence which is both undisputed and highly probative of his affirmative defense of necessity." (Id at 221.) Noting that an actual innocence claim is "a factual matter," (Id at 220), the Court concluded that "a showing of facts which are highly probative of an affirmative defense which if accepted by a jury would result in the defendant's acquittal constitutes a sufficient showing of 'actual innocence....'".(Id. at 221, emphasis added.)

The Ninth Circuit's *Jaramillo v. Stewart* ((9th Cir. 2003) 340 F.3d 877, 882.) (Jaramillo) also involved a complete affirmative defense to criminal conduct. In his procedurally barred § 2254 petition, Jaramillo claimed he was actually innocent of the Arizona crime of first-degree murder because new evidence showed he acted in self defense, which rendered his conduct noncriminal. (Jaramillo, at pp. 878-883; emphasis in the original.) The Ninth Circuit explained that "'actual innocence' means factual innocence, not mere legal insufficiency," (Id. at 882.) (quoting *Bousley*, 523 U.S. at 623; 118 S. Ct. at 1611.), but concluded that petitioner Jaramillo's claim of justification pursuant to self-defense "corresponds with Schlup's actual innocence requirements, " (Id. at 883.) "Under Arizona law in effect at the time of the offense charged," the court said, "justification was an affirmative defense rendering [Jaramillo's] conduct noncriminal." (Id.)

Likewise, the Seventh Circuit has held that a complete defense of insanity renders a petitioner "factually" rather than "legally" innocent of capital murder. In *Britz v. Cowan* (7th Cir. 1999) 192 F.3d 1101, the Seventh Circuit rejected the State of Illinois' argument that "actual innocence" requires a defaulted habeas petitioner to show that he "didn't kill his victim," and it is conceded that he did. (Id. at 1103.) "This takes too narrow a view," the court said, "as held or assumed in such cases as *In re Minarik*, 166 F. 3d 591, 607 (3d Cir. 1999) [other citations omitted] and not yet the subject of a decision by this court. One can kill yet be innocent of murder. Suppose Britz were the public executioner, prosecuted for the 'murder' of a capital defendant whom Britz had

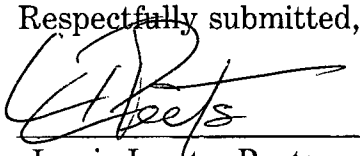
lawfully executed; he would be actually innocent even though he had, as it were, pulled the trigger. It is the same, we think, when the accused murderer has an affirmative defense of insanity. [*Wilson v. Greene*, 155 F.3d 396, 405, (4th Cir. 1998).]. If acquitted on the grounds of insanity, he is actually innocent. Accordingly, petitioner Britz's claim that he was insane at the time of the murder for which he was convicted and sentenced to death, was a cognizable actual innocence claim under Schlup. In another capital case, the Eighth Circuit went farther and held that a defaulted petitioner's claim of innocence is "actual" and not "legal" when the claim negates an essential element of a capital conviction. (*Jones v. Delo*, 56 Fed. 3d 878, 883 (8th Cir. 1995) There, after being convicted of capital murder, petitioner Jones submitted new evidence showing that, at the time he killed his girlfriend, he was incapable of "deliberation," an element of capital murder. (Id. at 882.) With new evidence of Jones' mental aptitude and organic brain disease, medical experts testified that Jones was "incapable of deliberation at the time of the killing." (Id.) Given Jones' "alleged in capacity to form the predicate deliberative intent," the Eighth Circuit rejected Missouri's argument that an inability to deliberate is a claim of legal innocence and explained that "one is ... actually innocence if the State has the 'right' person but he is not guilty of the crime with which he is charged." (Id. at 883.) Accordingly, if Jones could negate his ability to deliberate, "an essential element of the crime for which he was convicted," then his claim would not be "one of mere legal innocence." (Id.)

Petitioner maintains that he has shown that "not guilty by reason of insanity" constitutes actual innocence for *Schlup* inquiry and prays that the High Court agrees and rules accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Louis Ivester Peets

Date: ~~19~~ 22 February 2020