ORIGINAL

19-8656

Case No._____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL JACOBY – PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

TENTH CIRCUIT APPELLATE COURT
APPELLATE NO. 19-1438

PETITION FOR WRIT OF CERTIORARI

Michael Jacoby
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May 27, 2020

QUESTIONS PRESENTED

1. Whether the Petitioner's Fifth Amendment right was violated from the 10th Circuit's application of the actual innocence & miscarriage of justice standard as a full denial of Jacoby's certificate of appealability (COA) and successive §2255. The 10th Circuit's application was is in direct conflict with the 1st, 2nd, 3rd, 6th, 7th, and 9th Circuit standard applied in *Schlup v. Delo* (S. Ct.), *Riva v. Ficco* (1st Circuit), *Rivas v. Fischer* (2nd Circuit), *Reeves v. Fayette* (3rd Circuit), *Cleveland v. Bradshaw* (6th Circuit), *Gomez v. Jaimet* (7th Circuit), and *Griffin v. Johnson* (9th Circuit) which would have granted Jacoby's right to a COA and the filing of a successive §2255.
2. Whether the standard for assessing ineffective assistance of counsel claims, announced in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984), fails to protect the Sixth Amendment right to a fair trial and the Fifth Amendment right to due process when courts can deny relief following perfunctory analysis that does not account for the evidence amassed in a proceeding brought under 28 U.S.C. § 2255, as required by this Court's decision in *Schlup v. Delo*, but rather relies on a trial record shaped by counsel's ineffective representation.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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STATUTE

PETITION FOR WRIT OF CERTIORARI

As set forth by the rules of this Court, review on certiorari is granted only for compelling reasons.

Petitioner pray the Court will find the Tenth Circuit has departed from the accepted and usual course of judicial proceedings when it decided against the holding of *Schlup v. Delo* and ignored Petitioner's newly discovered evidence not presented at trial which was introduced in his successive § 2255 motion. As a result, the Tenth Circuit, in denying Petitioner's application for a certificate of appealability (COA), relied on a trial record shaped by counsel's ineffective representation, and decided an important federal question in a way that conflicts with relevant decisions of this Court. This calls for an exercise of this Court's supervisory power.

While this case certainly represents erroneous factual findings, and this Court rarely grants certiorari on the basis of such, Petitioner pray the Court will find this case even more so represents important questions of law impacting the citizenry in numbers impossible to estimate.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals appears at **Appendix A** to the petition and is reported at; PACER, filed 1/31/2020, case #19-1438, Document #010110298196.

The opinion of the Tenth Circuit District Court appears at **Appendix B** to the petition and is reported at; PACER, filed 9/18/2019, case #1:10-cr-00502-KHV, Document #916 & 917.

JURISDICTION

The 10th Circuit United States Court of Appeals filed its final order on January 31, 2020. Thus, this petition for certiorari would have been timely filed by April 30, 2020.

However, in response to the COVID-19 pandemic, this Court issued an order on March 19, 2020, effectively extending the abovementioned April 30, 2020 deadline by 60 days, or June 29, 2020. According to *Rule 29* of this Court, the petition is timely filed if tendered to the Clerk via the United States Postal Service and postmarked no later than this date. This Court holds jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution Amendment 5, rights of the accused, in all criminal prosecutions, the accused shall have the right to a fair trial and the right to present evidence, *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The United States Constitution Amendment 6, rights of the accused, in all criminal prosecutions, the accused shall have the right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 688 (1984).

STATEMENT OF THE CASE

The Petitioner was charged with submitting fraudulent documents to Firstbank and Citibank alleging he overstated his income, that he did not disclose he was a business partner with the seller, that he lied about borrowing his down payment, and that he did not disclose to Citibank the purpose and recipient of the loan.

The Petitioner was also charged with assisting his co-defendants prepare and submit fraudulent documents to their lenders by creating fraudulent purchase contracts, depositing

money into his co-defendant's bank accounts to receive fraudulently inflated bank balance Verification of Deposits (VOD), influencing appraisal values, and disguising simultaneous close real estate transactions from the lender.

The jury heard numerous testimonial lies and false allegations from 36 government witnesses to support the government's indictment charges against the Petitioner. At trial, the jury was not shown several documents of "newly discovered evidence" that proved the Petitioner's "actual innocence" and would have exposed all the testimonial lies and allegations. All of the following "newly discovered documents" are on file in PACER with the Tenth District Court of Appeals (case #19-1438, document #10703011, filed 12/16/2019). The newly discovered evidence not presented to the jury at trial is as follows:

1. The Petitioner's 2005 and 2006 personal tax returns proving his 2 year monthly net income average of $58,260 [($435,293+$962,957)/24] matched the income amount he stated in his Citibank mortgage application, and was more than the $50,000 per month he stated as income on his Firstbank mortgage application. The jury was not shown any document with any income the Petitioner earned except for the first page of his 2007 personal tax return showing a $152,334 loss and was led to believe the Petitioner overstated his income on his Firstbank and Citibank mortgage applications.

2. The Petitioner's 2007 Schedule D and Form 8824 (part of his 2007 personal tax return) tax deferred income of $1,058,978 ($555,000+$503,978) that was not included in his negative $152,334 2007 personal tax return net income figure listed on page 1. This proves further that the Petitioner did not lose $152,334 in 2007 or overstate his income on his Firstbank and Citibank mortgage applications. The jury was only shown page 1 of

his 2007 personal tax return, and was led to believe he lost $152, 334 in 2007, and overstated his income on his Firstbank and Citibank mortgage applications.

3. The Petitioner's Real Estate Owned Schedule that was in Firstbank's file, proving he did disclose to Firstbank his business partnership relationship with Ed Schultz, the seller of 2163 Beechnut. The jury was not shown this document and led to believe otherwise after numerous testimonial lies from Laura Rogers of Firstbank stating Firstbank had no such document in their files.

4. Money Owed to Jacoby from Ed Aabak Summary (and its supporting documents showing land acquisition expenses from the Petitioner, his business partner Ed Aabak, and their LLC ME Holdings), proving Ed owed the Petitioner $603,391 as of 7/25/7 and that the $300,000 payment the Petitioner received from Ed on 7/26/7 and the $100,000 payment received on 7/27/7 were not borrowed funds the Petitioner used for his 2163 Beechnut down payment as the prosecution alleged to the jury. The jury was not shown any of these documents and heard false testimony which led them to believe the Petitioner lied on his Firstbank mortgage application saying he did not borrow his down payment.

5. The Citibank Underwriting Summary and Initial Advance Options, proving the Petitioner did disclose to Citibank the "purpose" of his loan being a cash-out HELOC and the "recipient" of the $205,000 credit line proceeds was to be Ed Schultz. The jury was not shown any of these documents and heard false testimony which led them to believe the Petitioner was trying to hide from the lender the purpose of his loan and the true recipient.

6. The Colorado Real Estate Commission (CREC) Manual stating the rules and regulations a licensed Colorado Realtor is to follow, when representing a buyer and/or seller as a Transaction Broker, on how to correctly disclose attachments to a purchase contract when a third party to the contract is involved. This proved the Petitioner did not fraudulently misrepresent how the grant documents and its representations were to be disclosed within any purchase contract the Petitioner prepared. The jury was not shown this document, heard numerous false testimonies, and was led to believe the Petitioner created several fraudulent purchase contracts.

7. The 30848 E. 151st Ave. Purchase Contract that listed the grant documents in the attachment section and the Real Estate Investment Disclosure, proving the Petitioner did properly disclose the grant documents within the purchase contract and was not involved in determining the grant amount or its terms. The jury was not shown these documents, heard numerous false testimonies, and was led to believe the Petitioner created a fraudulent purchase contract that did not disclose the grant documents and that he determined the grant amount.

8. The 1065 Ridge Oak Dr. Purchase Contract, the Tara Grant Corporate Statement, the Tara Grant Pledge, and the lender's Underwriting Transmittal Form, proving the Petitioner did properly disclose the grant documents as an attachment to the purchase contract for all parties to see, that the grant documents did disclose the buyer was to receive a grant if approved, and that the lender acknowledged they received the purchase contract and its attachments for their review. The jury was not shown any of

these documents, heard numerous false testimonies, and was led to believe the Petitioner created a fraudulent purchase contract not disclosing the buyer was to receive a grant and that the lender was unaware of it.

9. The Real Estate Investment Disclosure and the CREC Manual, proving the Petitioner was not involved with determining the grant amount or its terms and that he properly performed his duties as a Transaction Broker (according to the CREC Manual) by advising his clients to seek professional and legal advice regarding the grant program. The jury was not shown any of the documents, heard numerous false testimonies, and led to believe the Petitioner was the organizer of a fraud scheme where he controlled and set the grant amount and terms.

10. Co-defendant Mike Macy's 9/15/5 Verification of Deposit (VOD), his 2005 September Bank Statement and copies of 4 checks from 3 deposits he made just prior to receiving his 9/15/5 VOD, proving the Petitioner did not loan Mike money to deposit funds into his bank account prior to him receiving his VOD to fraudulently increase his bank account balance. The jury was not shown any of these documents, heard numerous testimonial lies from Mike Macy, and was led to believe the Petitioner deposited money into Mike's bank account.

11. A fax from the DR Horton building company sales representative Bobbi Gallegos to appraiser Mike Long which listed sales comparables, and Mike's 16382 E. 107th and 16221 E. 106th appraisals that list the "data sources" Mike used to determine his appraised values came from the Builder, MLS, and Public Records. This proves the

Petitioner did not provide the appraiser Mike comparables he used in his appraisals and that the Petitioner had no influence how the appraised values were determined. The jury was not shown these documents, heard numerous testimonial lies from Mike Long, and was led to believe Mike used comparables the Petitioner gave Mike to influence his appraised values.

12. A letter from the 10740 Norfolk mortgage broker and another from the 10746 Memphis, 10600 Norfolk, and 10760 Norfolk mortgage broker to the title company closing agent. These letters prove the lenders and the title closing agents were aware of the simultaneous close transactions, that the properties were being resold for a significantly higher price, and that the sale transactions were non-arm's length. The jury was not shown these letters, heard numerous false testimonies, and was led to believe the lenders and title closing agent were unaware of the simultaneous close transactions and their details.

REASONS FOR GRANTING THE PETITION

In order to show the law has not been properly followed in this case by the 10th District and Appellate Court, an analysis of their final orders is essential. Both courts state that the Petitioner has not provided any newly discovered evidence. He only provided pre-existing evidence that did not show his actual innocence which he knew about prior to filing his § 2255.

The Petitioner's successive § 2255 and Combined Opening Brief and Application for a Certificate of Appealability described 29 pieces of newly discovered evidence not shown

to the jury at trial that proved the Petitioner's actual/factual innocence. The Petitioner went into great detail explaining how these pieces of evidence proved his actual innocence, and how they would have made a difference if shown to the jury at trial. No other evidence was presented at trial that showed the Petitioner had knowledge and prepared the fraudulent documents and activities by his co-defendants and others.

The Petitioner was convicted on piling inference upon inference of numerous testimonial lies and false allegations that would have been proven otherwise if the jury was shown the newly discovered evidence presented in the Statement of the Case section.

In *U.S. v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) (citations and internal quotations omitted), a court should not uphold a conviction obtained by piling inference upon inference. An inference is reasonable only if the conclusion flows from logical and probabilistic reasoning (2019 U.S. Dist. LEXIS 29). The 10th Circuit has stated: "The rule that prohibits the stacking of inference merely indicates that at some point along a rational continuum, inferences may become so attenuated from underlying evidence as to cast doubt on the trier of fact's ultimate conclusion. In other words, the chance of error or speculation increases in proportion to the width of the gap between underlying fact and ultimate conclusion where the gap is bridged by a succession of inferences, each based upon the preceding one. *U.S. v. Summers*, 414 F.3d 1287, 1294-95 (10th Cir. 2005) (internal quotations omitted). See *U.S. v. Neha*, No. CR 04-1677 JB, 2006 U.S. Dist. LEXIS 27274, 2006 WL 1305034, at *2-3 (D.N.M. April 14, 2006) (Browning, J), *aff'd*, 301 F. App'x 811 (10th Cir. 2008) (unpublished). Hence, a court must examine the record to

determine whether a guilty verdict rests on inferences reasonably drawn from the evidence, rather than on 'conjecture' or 'speculation.' *U.S. v. Aponte*, 619 F.3d 799, 804 (8th Cir. 2010). See *U.S. v. Bowers*, 811 F.3d 412, 424 (11th Cir. 2016) (stating that 'reasonable inferences' rather than 'mere speculation' must support a verdict based on circumstantial evidence); *U.S. v. Long*, 905 F.2d 1572, 1576, 284 U.S. App. DC 405 (DC Cir. 1990) (same)."

In *Anaya*, 727 F.3d at 1050, the court found "we will reverse a conviction for insufficient evidence only when no reasonable jury could find the defendant guilty beyond a reasonable doubt." But we will not uphold a conviction "that was obtained by nothing more than piling inference upon inference...or where the evidence raises no more than a mere suspicion of guilt." *Rufai*, 732 F.3d at 1188 (quotations omitted). [2019 U.S. App. LEXIS 46] "A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility." Id. (quotations and brackets omitted).

Any reasonable jurist if shown the newly discovered evidence would have determined a different conviction result. The impact of the jury not seeing this evidence resulted in the Petitioner's conviction and a clear violation of his constitutional rights.

The standard for "actual innocence" is that a Petitioner who was convicted following trial "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found the Petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37, 126 S. Ct. 2064, 2076-77, 165 L.Ed. 2d 1 (2006) (quoting *Schlup*, 513 U.S. at 327, 115 S. Ct. at 867). "To be credible," a gateway

innocence claim requires "new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence- that was not presented at trial." *Schlup*, 513 U.S. at 324, 115 S. Ct. at 865. However, the court's analysis "is not limited to such evidence." *House*, 547 U.S. at 537, 126 S. Ct. at 2077. Rather, the court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." Id. 547 U.S. at 538, 126 S. Ct. at 2077 (internal quotation marks omitted). Then, "based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *House*, 547 U.S. at 538, 126 S. Ct. at 2077 (quoting *Schlup*, 513 U.S. at 329, 115 S. Ct. at 868). If the Petitioner can demonstrate that, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt, then he has met his burden of showing "actual innocence" and the court may consider any and all defaulted claims on the merits. *House*, 547 U.S. at 537, 126 S. Ct. at 2077.

The threshold requirement for applying the actual innocence standard is new evidence which supports the Petitioner's innocence. The Petitioner's newly discovered evidence presented to the 10th Circuit District and Appellate Court met this criteria exactly as stated in *House* and *Schlup* and the cases noted below. The 10th Circuit did not apply this standard. Appeals for the 1st, 2nd, 3rd, 6th, 7th, and 9th Circuits concluded otherwise. In these Circuits, petitioners can satisfy the actual innocence standard's new evidence requirement by offering "newly presented" exculpatory evidence, meaning evidence not presented to the jury at trial. See *Gomez v. Jaimet*, 350 F.3d 673, 679-80

(7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003); and *Reeves v. Fayett*, 897 F.3d 154 (3rd Cir. 2018). More recently, the Courts of Appeals for the First, Second, and Sixth Circuits have similarly suggested {897 F.3d 162} that actual innocence can be shown by relying on newly presented-not just newly discovered-evidence of innocence. See *Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 543, 546-47 (2nd Cir. 2012).

Those courts that define "new evidence" to include evidence not presented at trial find support in *Schlup*. In announcing the standard for a gateway actual innocence {2018 U.S. App. LEXIS 14} claim, the *Schlup* Court stated that a federal habeas court, after being presented with new, reliable exculpatory evidence, must then weigh "all of the evidence, including ...evidence tenably claimed to have been wrongly excluded or to have become available only after the trial" to determine whether no reasonable juror would have found the petitioner guilty. 513 U.S. at 327-28. The reference to "wrongly excluded" evidence suggests that the assessment of an actual innocence claim is not intended to be strictly limited to newly discovered evidence- at least not in the context of reaching an ineffective assistance of counsel claim based on counsel's failure to investigate or present at trial such exculpatory evidence, as was the case in *Schlup*. In addition, in articulating the new, reliable evidence requirement, the Supreme Court stated that the petitioner must "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." 7 *Id*. At 324. Moreover, the Court used the phrase "newly presented evidence" in the context of

discussing witness credibility assessments {2018 U.S. App. LEXIS 15} that may occur as part of the actual innocence gateway analysis. *Id.* At 330. When considered in the context of the Court's other statement about weighing all evidence-including not only evidence unavailable at trial but also evidence excluded at trial-these references to evidence not presented at trial further suggest that new evidence, solely where counsel was ineffective for failing to discover or use such evidence, requires only that the evidence not be presented to the factfinder at trial. Indeed, among the new evidence presented by the petitioner in *Schlup* was an affidavit containing witness statements that were available at trial, *see id.* at 310 n.21, but the Supreme Court did not discuss the significance of the evidence's availability nor reject the evidence outright, which presumably it would have done if the actual innocence gateway was {897 F.3d 163} strictly limited to newly discovered evidence. *Schlup* therefore strongly suggests that new evidence in the actual innocence context refers to newly presented exculpatory evidence.8. Indeed, in a subsequent decision, the Supreme Court cited *Schlup* for this very proposition, stating that "'[t]o be credible,' a claim of actual innocence must be based on reliable evidence {2018 U.S. App. LEXIS 16} not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Schlup*, 513 U.S. at 324).9

The approach and rulings of the 1st, 2nd, 3rd, 6th, 7th, and 9th Circuits is consistent with *Schlup*. Moreover, it recognizes that "the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325. Indeed, "the conviction of an innocent person [is] perhaps the most

grievous mistake our judicial system can commit," and thus, the contours of the actual innocence gateway must be determined with consideration for correcting "such an affront to liberty." *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152, 154 (3rd Cir. 2017). The limited approach these circuits adopt to evaluate new evidence to support an actual innocence gateway claim, where that claim is made in pursuit of an underlying claim of ineffective assistance of counsel: (1) ensures that reliable, compelling evidence of innocence will not be rejected on the basis that it should have been {2018 U.S. App. LEXIS 19} discovered or presented by counsel when the very constitutional violation asserted is that counsel failed to take appropriate actions with respect to that specific evidence: and (2) is consistent with the Supreme Court's command that a petitioner will pass through the actual innocence gateway only in rare and extraordinary cases. *Schlup*, 513 U.S. at 324.10

As the previous section has shown, not only is the 10th Circuit's final orders factually incorrect in its assessment of the Petitioner's successive § 2255 and Combined Brief and Application for Certificate of Appealability, the newly discovered evidence-as defined by this Court in *Schlup v. Delo*- failed to be presented to the jury because of trial counsels' ineffective assistance.

Both the 10th Circuit District and Appellate Court claim that the evidence against the Petitioner was "overwhelming." However, the only overwhelming aspect of this case is the Respondent's aversion of truth and the complete lack of specific evidence they can point to that a jury could reasonably consider to support such "overwhelming" guilt. This should give immediate pause to any rational finder of fact, especially in light of the

newly discovered evidence. The Petitioner's 29 pieces of newly discovered evidence not presented at trial, expounded in the Statement of the Case section, represent only a fraction of the newly discovered evidence and analysis of such presented in his successive § 2255. The Petitioner suggest that motion, along with his subsequent Combined Brief and Application for Certificate of Appealability, meet the "substantial showing of the denial of a constitutional right" standard of 28 U.S.C. § 2253(c)(1)(A)(2).

Indeed, the final order denial from the 10th Circuit District and Appellate Court make it clear they unlawfully applied a factual basis without any consideration of the Petitioner's newly discovered evidence-contrary to this Court's decision in *Schlup v. Delo*. Therefore, the denial is based entirely on facts contained in a trial record shaped by counsel's ineffective representation.

CONCLUSION

The 10th Circuit District and Appellate Court standard and application of "newly discovered evidence not presented at trial" did not support *Schlup v. Delo* and disregarded the Petitioner's newly discovered evidence not presented at trial altogether. This was in direct conflict with the 1st, 2nd, 3rd, 6th, 7th and 9th Circuits on how they applied their standard of "newly discovered evidence not presented at trial" which did support *Schlup v. Delo, Riva v. Ficco, Rivas v. Fischer, Reeves v. Fayette, Cleveland v. Bradshaw, Gomez v. Jaimet*, and *Griffin v. Johnson*. The 10th Circuits application of this standard prejudiced the Petitioner and resulted in the denial and violation of his 5th and 6th amendment rights.

The Petitioner pray this Court, in light of the foregoing reasons, would grant this petition for certiorari and redress all claims at such time.

Respectfully submitted,

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May 27, 2020