No. 20-5633

IN THE

SUPREME COURT OF THE UNITED STATES

Darren M. Rowe — PETITIONER
(Your Name)

vs.

ORIGINAL

Harold W. Clarke — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Darren M. Rowe
(Your Name)

12352 Coffeewood Drive
(Address)

Mitchells, Virginia 22729
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the district court committed legal error when it determined that my newly presented evidence does not qualify for consideration under the actual innocence gateway standard articulated in Schlup v. Delo, 513 U.S. 298, 329 (1995)?

2. Whether the district court committed legal error when it evaluated the record and made its finding based on an improper standard?

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:

RELATED CASES

- Rowe v. Clarke, No. 7:18-CV-00383, U.S. District Court for the Western District of Virginia. Judgment entered Sep. 6, 2019.

- Rowe v. Clarke, No. 19-7384, U.S. Court of Appeals for the Fourth Circuit (petition requesting certificate of appealability). Judgment entered March 24, 2020.

- Rowe v. Clarke, No. 19-7384, U.S. Court of Appeals for the Fourth Circuit (petition for rehearing en banc). Judgment entered on May 26, 2020.

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JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 24, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 26, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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. § 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

The following provisions of the United States Constitution are involved: U.S. Const. Amends. VI, XIV. The test of said provisions are attached hereto as Appendix "

STATEMENT OF THE CASE

I. On February 21, 2013, around 10:55 p.m., Amanda Fitzgerald ("Fitzgerald") and I were abruptly awakened by O'Bryan Johnson ("Johnson"), the alleged victim. Johnson woke me and Fitzgerald up by pounding on the doors and the windows of Fitzgerald's apartment, all while yelling for me to come outside. My daughter, who was four years old at the time, was also awakened and startled by Johnson's actions, to the point where she began crying.

Filled with hot blood, I immediately rushed to put my pants and shoes on to go outside to confront Johnson for instilling fear in my daughter and making her cry. As I made my way through the apartment to go outside, Fitzgerald and I heard a loud noise coming from our parking area. When Fitzgerald and I looked through the apartment window, we saw Johnson jumping on the hood and roof of my car. In that very moment, not only was I filled with rage from Johnson scaring my young daughter and making her cry, but even more anger was added to my emotional state of mind from seeing Johnson vandalize my car.

I continued my way outside to confront Johnson. As I made my way outside, however, Johnson ran to his car and proceeded to drive out of the apartment complex. I immediately ran to my car and followed Johnson to a nearby gas-station; which was located about (30) thirty seconds away from Fitzgerald's apartment. As I was driving, I got my firearm from my glove compartment and put it in my pocket. Once I pulled into the gas-station, I instantaneously jumped out of my car and kicked the front passenger window of Johnson's car.

Johnson immediately jumped out of the driver's seat of his car and aggresively charged towards me. While charging at me, Johnson reached in the side of his waistband as if he was grabbing a weapon. I instantly drew my firearm. After seeing the firearm, Johnson momentarily paused, but then continued to charge at me; while erratically screaming "shoot me n****a." In a state of fear, I fired one shot towards Johnson. I was later arrested and charged with aggravated malicious wounding and the use of a firearm in the commission of a felony.

On April 18, 2013, at my preliminary hearing, the prosecutor allowed Johnson, the state's only witness, to

testify. Johnson testified, reiterating several times, that there had been no "beef" between himself and I, on or prior to the night of the incident. R. (Preliminary Hearing Transcript ("P.H."), pp. 9, 10, 13). Johnson went on to testify that he never went to Fitzgerald's apartment, in addition to denying that he caused damage to my car, on the night in question. (P.H., pp. 16, 17).

Around early September 2013, I retained Amy Harper ("Harper") to represent me throughout my trial and sentencing phases. On September 16, 2013, I pled Not Guilty to both charges.

On October 15, 2013, I met with Harper for the first time to discuss my version of events, where I expressed my innocence on the charges that I was facing. On November 22, 2013, Harper met with the prosecutor to execute the Discovery.

On December 7, 2013, I met with Harper for a second time, where she informed me that the prosecutor offered me a plea-agreement. Then, without conducting any other investigations outside of the Discovery, Harper told me to take the offered plea-agreement because the prosecutor's "evidence was overwhelming and a finding on the aggravated malicious

wounding charge was inevitable." (Harper's Affidavit).

I continued to express my innocence on the charges, explaining to Harper that the shot was fired in, what I believed to be, some kind of self-defense. Harper repeatedly advised me that self-defense was not a viable defense to the charges. As a result of Harper's advice, that I had no defenses and that, had I gone to trial, a finding of guilt was inevitable, I reluctantly accepted the plea-agreement on Feb. 26, 2014.

In late June 2014, just days before my sentencing hearing, Harper interviewed Fitzgerald for the first time because she believed that Fitzgerald would be a valuable witness for me at sentencing. On July 2, 2014, Fitzgerald testified at my sentencing hearing, describing what she witnessed moments prior to the shooting. I was later sentenced to (13) thirteen years of active incarceration with the Virginia Department of Corrections.

Harper never advised me of the heat of passion defense, nor did she ever interview Fitzgerald prior to telling me to accept the plea-agreement. Had Harper done so, I would have never accepted the plea-agreement, and would have continued to trial

Under my original plea of Not Guilty.

II. On August 3, 2018, after exhausting my state collateral remedies, I filed a pro se petition for a federal writ of habeas corpus. I asserted the claim, among others, that my trial counsel was ineffective for failing to interview Fitzgerald, an eyewitness who could establish my innocence on the underlying charges. I used the actual innocence gateway standard under Schlup v. Delo, 513 U.S. 298, 329 (1995) because the AEDPA statute of limitations, regarding my federal habeas petition, had expired.

On September 6, 2019, the District Court concluded that my petition was untimely because I did not meet the threshold requirement for Schlup's actual innocence gateway, and it denied relief. The District Court also denied a certificate of appealability.

I immediately filed a petition to the Court of Appeals for the Fourth Circuit, requesting a certificate of appealability, which was denied on March 24, 2020.

I then filed a petition for rehearing en banc with the Court of Appeals, which was denied on May 26, 2020.

I now timely submit this petition for Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE PETITION

1. Whether the district court committed legal error when it determined that my newly presented evidence does not qualify for consideration under the actual innocence gateway standard articulated in Schlup v. Delo, 513 U.S. 298, 329 (1995)?

The district court made an erroneous conclusion when it determined that my newly presented evidence does not qualify for consideration under Schlup's actual innocence standard; arguing that my new evidence must be "newly discovered." (District Court's opinion). The district court's conclusion is in error because it is in conflict with this Court's ruling in Schlup. All Schlup requires is that my new evidence is reliable and that it was never presented at trial. Schlup, 513 U.S. at 324, 115 S.Ct. 851.

The "newly discovered" threshold that the district court uses in its argument is only a requirement for equitable or statutory tolling; it is not, however, a requirement for Schlup's actual innocence gateway. In McQuiggin v. Perkins, 569 U.S. 383, 386 (2013), this Court explained that the threshold diligence requirement for equitable or statutory tolling does not apply when a court is considering whether evidence is new for the purposes of Schlup's actual innocence inquiry. The only

thing that should be considered regarding the new evidence is the unexplained delay in presenting the evidence. McQuiggin, 133 S.Ct. at 1935. Thus, no bar exists to the reviewing court evaluating whether the evidence is strong enough to establish my actual innocence, as long as the evidence was genuinely not presented to the trier of fact.

Furthermore, nothing in Schlup indicates that there is a limitation on the new evidence having to be newly discovered in order for it to be considered. In fact, all of Schlup's newly presented evidence, for his actual innocence claim, was always available to him throughout his criminal proceedings. Although it was available, however, the newly presented evidence that Schlup relied on for his actual innocence claim was not presented at trial because of his counsel's ineffective representation - counsel failed to conduct his own interviews with any of the potential witnesses - which is the same ineffectiveness of counsel that I have faced here in my case.

This Court held that an actual innocence claim under Schlup "requires petitioner to 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." Schlup, 513 U.S. at 324.

Here, I have supported my allegations of constitutional error, for my actual innocence claim, with an affidavit from Fitzgerald, an eyewitness, detailing the events leading up to the shooting involving me and Johnson. The district court had no credibility issues with Fitzgerald's affidavit, and her testimony was never presented at trial. Therefore, the district court's conclusion was erroneous, and the court of appeals was in error for not granting a certificate of appealibility on this issue because my newly presented evidence does qualify, and can be considered for the purposes of Schlup's actual innocence gateway.

2. Whether the district court committed legal error when it evaluated the record and made its finding based on an improper standard?

The district court evaluated my actual innocence claim and erroneously made its finding based on an improper standard, or in any event misapplied the actual innocence standard articulated in Schlup. The district court found that "from the totality of evidence, reasonable jurors **could** find [me] guilty of

aggravated malicious wounding." (District Court's opinion) (emphasis added). The district court's finding is in error because it focused its assessment of the record on whether any rational juror **could** have convicted; which is in conflict with this Court's ruling in Schlup.

Here, the district court made its finding based on whether the trier of fact simply had the power to convict me. In contrast, the actual innocence standard of Schlup "requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors **would** do." Schlup, 513 U.S. at 329-331 (emphasis added). This Court held that "the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion," where "the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." Id. Therefore, under a proper application of the Schlup standard, the district court should have considered the record and made a probabilistic determination about what reasonable triers of fact are likely to do, instead of what they could do.

In order to succeed on an actual innocence claim under Schlup, I must show that "in light of new evidence, it is more likely than not that no reasonable

juror would have found [me] guilty [of aggravated malicious wounding] beyond a reasonable doubt." Schlup, 513 U.S. at 327. Under Virginia law, the element that distinguishes the class 2 felony of aggravated Malicious wounding from the class 6 felony of unlawful wounding is malice. Therefore, in order to overcome the aggravated malicious wounding charge, my new evidence only needs to persuade a jury that I did not commit the act with malice. And to do so, a heat of passion defense can be used to mitigate aggravated malicious wounding down to unlawful wounding when it can be reasonably inferred from the evidence that the petitioner acted in the heat of passion, or if the evidence as a whole raises a reasonable doubt that the petitioner acted maliciously.

Here, my newly presented evidence, Fitzgerald's affidavit, significally undermines the testimony of Johnson, the state's only witness. Johnson testified at my preliminary hearing that he never came to Fitzgerald's apartment, and that he never vandalized my car on the night in question. However, not only does Fitzgerald's testimony contradict Johnson's testimony by placing Johnson at the apartment on the night in question, but Fitzgerald's testimony describes how Johnson reeked havoc at the apartment. Fitzgerald's testimony describes how Johnson was beating on the doors

and windows of the apartment; shows everyone being awakened out of their sleep; describes Johnson shouting for me to come outside; places my four year-old daughter in the apartment; describes how my daughter was in a state of fear and crying; describes Johnson vandalizing my car; shows me reacting to Johnson's actions immediately; and it shows me being deaf to the voice of reason - when Fitzgerald begged and yelled for me not to go outside, and how I didn't listen.

Fitzgerald's affidavit provides conclusive proof of my innocence on the crime of conviction because her testimony establishes that my heat of passion was invoked by Johnson, and it also discredits Johnson's testimony, which would ultimately impeach the state's only witness. Thus, Fitzgerald's sworn testimony would likely cause any reasonable juror to lend credence to my assertion that I acted in the heat of passion upon Johnson's provocation, instead of it being a random act derived from malignity of heart. Because, at the end of the day, if Johnson never instilled fear into my four year-old daughter, making her cry, I would have never been filled with rage to where the furor brevis controlled in the first place.

In sum, the district court's conclusion was

erroneous, and the court of appeals was in error for not granting a certificate of appealibility on this issue because the district court evaluated the record under an improper standard. Had the district court not assessed my actual innocence claim through an improper lens and committed a significant legal error, my actual innocence claim would be shown proven because no juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would have voted to convict me of aggravated malicious wounding once it learned that I was solely acting in response to Johnson's provocation. Therefore, under a proper application of Schlup, I would be allowed to overcome the AEDPA's statute of limitations; which, in turn, would enable the district court to consider the merits of my otherwise untimely claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 20, 2020