No. 20-7646

IN THE

SUPREME COURT OF THE UNITED STATES

KENNIS EARL GATSON — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KENNIS EARL GATSON
(Your Name)

Michael Unite 2664 FM 2054
(Address)

Tennessee Colony, Tx. 75886
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

DID THE FIFTH CIRCUIT ERR IN DEFERRING TO THE DISTRICT COURT FINDING THAT PETITIONER'S SCHLUP V DELO, "EXCEPTION" TO OVERCOME THE PROCEDURAL BAR,WAS NOT MET?

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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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

[ ] 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[x] is unpublished.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[x] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

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

The date on which the United States Court of Appeals decided my case was JULY 31, 2020.

[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 _____.

[ ] 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

U.S. CONST.,AMEND. VI

In all criminal prosecutions,the accussed 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 confronted with the witnesses against him...,and to have **assistance of counsel for his defence...**

U.S. CONST.,AMEND. XIV

...nor shall any state deprive any person of life,liberty, or property,without due process of law;nor deny to any person within its jurisdiction the **eual protection of the laws.**

STATEMENT OF THE CASE

Petitioner was charged with aggravated sexual assault with a deadly weapon, however,the complaining witness did not identify petitioner before,during or after the trial. Two prior felony convictions were alleged for the enhancement of punishment. A jury found petitioner guilty sentenced petitioner to seventy-five years confinement. Petitioner did not testify and no witness testified petitioner committed the assault.

On may 30,2012,the Fifth District Court of Appeals affirmed the judgment. On Cotober 24,2012 the Texas Court of Criminal Appeals refused petition for discretionary review .

Petitioner filee a Motion for forensic DNA testing on the 25th day of June 2013,which was granted by the trial court.Testing was completed with results excluding petitioner as a contributor to the DNA in question.

On September 26,23,2014;March 31,

2015;May 17,20,2016 the results were completed. On March 15,2018,four years after the first test results and (22) months after the last test results, the trial court signed Findings on DNA testing.

On September 11,2013 petitioner filed a State writ of habeas corpus, claiming;Actually Innocent and trial counsel was ineffective.Petitioner claimed that DNA evidence[semen] did not contain dna of the petitioner,but an unknown male,and had trial counsel not been ineffective,petitioner would have been found not guilty,of a sexual assault as alleged in the indictment.

On March 21,2018 the Texas Court of Criminal Appeals denied the petition without written order on the findings of the trial court,six days after the trial court signd the findings of the DNA testing.

Petitioner filed a federal writ of habeas corpus on April 13,2018. The petition was denied with prejudice

on April 29,2019,holding a Procedural bar as to petitioner's Actual Innocence claim.

Petitioner filed for a certificate of appealability challenging the district court refusal to consider an Actual Innocence claim that was procedurally barred in state court;Ineffective assistance of counsel;and hold an evidentiary hearing.

On July 31,2020 the United States Court of Appeals for the Fifth Circuit denied petitioner's motion for a COA, claiming Petitioner did not make "a substantial showing of the denial of a constitutional right",or show"that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong".

Petitioner did not file a motion for rehearing,making this petition due on or before, October 29,2020. However, an order from the court on March 19,2020,has extended the filing 150 days from the lower courts order.

REASONS FOR GRANTING THE PETITION

THE FIFTH CIRCUIT IMPROPERLY DEFERRED TO THE DISTRICT COURT DECISION

Petitioner alleged actual Innocence dve to Ineffective Assistance of Trial counsel,with new evidence to prove petitioner's innocnece. Petitioner was found guilty of oral sexual assault in largepart upon circumstantial evidence. The omitted DNA results of semen found on items left behind by the perpetrater and oral swabs of the complaining witness,would have proved petitioner did not commit the sexual assault as alleged in the indictment.

The Fifth Circuit relied on a procedural default,"fairly presented" to exhauust state court remedies,but significantly failed to consider petitioner's fundamental miscarriage of justice exception,Atual Innocence.

Did the Fifth Circuit err in deferring to the District court finding that petitioner's Schlup v. Delo,513 U.S.

298(1995),"EXCEPTION" to overcome the procedural bar,was not met?

The United States Supreme Court has held that,absent a showing by the prisoner of "cause and prejudice", a federal court may not ordinarily avoid several types of procedural bar-including the bar imposed with respect to "successive or abusive" claims in a second or subsequent petition and reach the merits of the prisoner's federal constitutional claims. The Supreme Court,however,has also recognized that the "cause and prejudice" requirmeent has an "actual innocnce" exception, sometimes known by other names such as the "fundamental miscarriage of justice exception".

In **Murray v. Carrer** (1986)477 U.S. 478,91 L Ed 2d 397,106 S Ct 2639,the Supreme Court held that,in order to invoke this exception, a federal habeas corpus petitioner is required to show that a constitutional violation has "probably" resulted in the conviction

of one who is actually innocent. See also **Schlup v. Delo** 513 U.S. 298 (1995).

Further, in form the Great writ is simply a mode of procedure,its history is inextricably intertwined with the growth of fundamental rights of personal liberty. A District Court shall entertain an application for writ of habeas corpus if there is an absence of available state corrective process or circumstance exist that render such process ineffective to protect the rights of the petitioner see 28 U.S.C. 2254 (B)(i)(ii).

STATE HABEAS PETITION

If petitioner were to take his Actual Innocence claim,due to ineffective trial counsle back to the state at this time,the court would simply hold petitioner to Tex.Crim.P. Code Ann. art. 11.07§ 4. "A court may not consider the merits of a subsequent application for habeas relief after final disposition of an initial application challenging the same conviction".

ACTUAL INNOCENCE EVIDENCE
AVOIDING PROCEDURAL BAR

Actual innocence,if proved serves as a gateway through which a petitioner may pass wheter the impediment is a procedural bar or expiration of the statute of limitations. Petitioner must meet the threshold requirement by persuading a district court that,in light of the new evidence, no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt.

TRIAL EVIDENCE

In the state's opening,they asked the jury, "if they could find defendant guilty of sexual assault,without any evidence to prove he commited a sexual assault". The state produced evidence that showed petitioner was at one point in the complaining witnesses **roommates bedroom** (fingerprints on a beer can).The fingerprints did not show when petitioner was in the roommates room. Trial counsel knew petitioner

was in the roommates room dirnking beer with the roommate months before the assault.

The state also produced fingerprints on a knife blade.Again trial counsel knew that petitioner had left his knife in the roommates room months before the assault.

The complainant testified that she talked to the man that assaulted her for a "little while" before the assault (RR vol. 4 page 16 line 14-17). The complainant also testified she took her assailant in her roommates room(RR v. 4 page 20 line 11). The complainant testified that her assailant made her perform oral sex for a long period of time,(RR v. 4. P.21 line 17-19). The complainant testified her assailant did everything he could to make certain that he didn't have his fingerprints on anything in the house by wipeing stuff off(RR v.4 P. 29 Line 1-4). The complainant testified that her assailant only drank

one beer (RR v. 4 P. 29 Line 7).However, the state proved the house was littered with trash and old empty beer cans (RR v. 4 P. 29 Line 9-25), the complainant testified over and over again that she preformed oral sex on her assailant many times. The complainant testified she looked at her assilant outside her door before the assault,with her glasses on (RR V. 4 P. 43-44) and she could not identify the petitioner at trial,(RR V. 4 P. 86 Line 23),as being the person that made her perform oral sex.However, the state in their need to prove a sexual assault askd the complainant, "and just to go over for leqal purposes,the defendant did penetrate your mouth with his penis;is that right? yes(RR v. 4 P. 55 Line 22-25).

The complainant testified she had seen her assailant when he was on her door with the porch light on. She looked at him through a peephole and after she opened the door she

looked at him and realized she did not know him(RR v. 4 P. 60). She never claimed he had on a mask a hat or had a knife. The complainant testified that when the assailant kicked the front door she was hit by the door and lost her glasses (RR v. 4 P. 63 Line 15-17). The complainant testified when she was in her car she did not have her glasses on and could not see faces, (RR v. 4 P. 75 Line 10-13). During the assailant trying to get away with the complainant and her property,in the complainants car, the assailint had a wreck.Atlest four or five people was at the accident(RR v. 4 P. 81 Line 4). However, the assailant just walked away(RR v. 4 P. 81 Line 20). The police checking the neighborhood found someone and asked the complainant if she recognized the person,(with no glasses) and she said no(RR v. 4 P. 43).

Trail cousnel knew that semen from the assailant was found on items in

the states exhibits and oral swabs taken from the complainat and did not have them tested before trial to see if petitioner was a contributor.

NEW EVIDENCE

Petitioner filed a chapter 64 motion with the trial court,that was granted. Some of the state's evidence was tested for the first time by the Texas Department of Public Safety,namely mouth swab,oral swabs,oral rinse swabs,and swabbing of oral smear slides,ALL from the complainant. The results "excluded" petitioner as a contributor.

FEDERAL WRIT

Magistrate Judge (Ramirez) claims "the fact that no DNA from petitioner, was found in the victim's mouth,was presented at trial" See findings,page 16 ¶ 2.However, this is incorrect, which is evident by the trial court ordering the oral swabs tested in a chapter 64,after trial.

Judge Remirez also claims that petitioner does not specify the DNA

evidence that demonstrates petitioner is actually innocent. This belief is unsound,because in the same page Judge Remirez admits ther is DNA evidence that proves a "unkown male" committed the offense and that a bedsheet from the complainants bed did not contane petitioner's DNA not even one epithelical cell.

Sperm on a kit cap was not petitioner's DNA,the sheet from the bed were the assault took place,did not have any of petitioner's DNA on it,oral swabs from the complainant excluded petitioner as the assailant. The question to judge Ramirez was not whether petitionwer was prejudiced at trial because the jurors were not aware of the new evidnce, but whether ALL the evidence,considered together, proved the petitioner was actually innocnet of the sexual assault.

A habeas petitioner must show by clear and convincing evidence that no reasonable juror would have conv-

icted him or her in light of new evidence. Bcause punishment of an innocent man or woman violates the due process clause of the United States Constitution,an applicant is entitled to relief if he or she can prove by clear and convincing evidence to a court,in the exercise of its habeas corpus jurisdiction,that a jury would acquit him or her based on his or her newly discovered evidence.

To be eligible for actual innocence reliec,an applicant must "unqestionably establish" his or her factual innocence through newly dicovered evidence. In habeas cases,a prototypical example of "actual innocene" in a colloquial sense is the case wher the state has convicted the wrong person of the crime. An actual innocence claim must be accompanied by new affirmative evidence of the applicant's innocence.

Every pice of evidence the state usd against the petitioner did not prove he commited the sexual assault.

The complainant testified she did not know petitioner and she cannot say petitioner assaulted her. Petitioner has presented evidence to teh courts that prove he was not a contributor to DNA taken from the sexual assault,and petitioner is innocent and trial counsel should have tested the states evidence, to present the results to the jury.

GRANTING A COA

A petitioner seeking COA need only demonstrate "a substantial showing of teh denial of a constitutional right. 28 U.S.C. § 2253(c)(2) **Slack v. McDaniel** 529 U.S. 473,(2000).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The federal habeas court held,the state court's application of **Strickland v. Washington** 466 U.S. 668,(1984)was not unreasonable,petitioner fails to show that counsel's representation fell below objective standards of rereasonableness or that the defense was prejudiced as a result of counsel's representation,"relying on the presumptive correctness of the state court's

factual findings."

> **REVIEW**-The factual findings of the district court are reviewed for clear error.The legal conclusions of the district court are reviewed de novo by this Court.
>
> **STANDARD**-A petitioner who seeks to overturn his conviction on the ground of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence. **James v. Cain**, 56 F.3d 662,667(5thCir.1995).

In order to find **Strickland** prejudice,the Court need not find that it is more likely than not that the defendant would have been acquitted absent the ineffective assistance of counsel. As the U.S. Supreme Court put it in **Williams(Terry)** v. **Taylor**, 529 U.S. 362, 405-406(2000).

"If a state court were to reject a prisoner' claim of ineffective assistance of counsel on the ground that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different,that dicision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed'

to our clearly established precedent because we held in **Strickland** that the prisoner need only demonstrate a 'reasonable probability that...the result of the proceeding would have been different."

In the case at hand trial counsel knew of DNA evidence that could prove petitioner did not committ a sexual assault and counsel failed to have that evidence tested and placed the results before the jury.The Court should ask its self if the state had DNA evidence to prove a sexual assault was committed by petitioner would they have not placed it before the jury,then trial counsel should be held to the same standard,when evidence proved petitioner did not committ a sexual assault.

Counsel failed to investigate the owner of the DNA evidence before trial.In Strickland the presumption,all but vanishes when as in the instant case,the records discloses that counsel's over all representation of

the law in relation to the facts of the case,was inaccuurate. Ex parte **Griffin**, 607 S.W. 2d 15-17(Tx.Crim. App. 2005).

GRANTING REVIEW

Conventional notions fo finality in criminal litigation cannot be premitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

A due process denied in the proceeding leading to conviction is not restored just because the state court declines to adjudicate the claimed denial on the merits. A variat of this argument is that if the state caourt declines to entertain a federal defense,because of a procedural default then the prisoner's custody is actually due to the default rather then to teh underlying constitutional infringment,so that he is not in custody in violation of fedral law. **Douglas**

v. **Jeannette** 319 U.S. 157,63 S.Ct. 877,87 L Ed 1324.In this case the only relevant substantive law is federal-the VI and XIV Amendments. State law appears only in the procedural framework for adjudicating the substantive federal question. Manifest justice to an accused person requires only that he have an opportunity to correct errors that may have led to an unfaire trial.The orderly administration of justice requires to even a criminal case some day come to an end. **Larson** v. **United State**, 5th Cir., 275 F 2d 673. The privilege of the writ of habeas corpus shall not be suspended,unless when in cases of rebellin or invasion,then public safety may require it. If there is no state remadies available,then a federal habeas would lie,for it is not simply a question of state procedure and there is no truly adequte state ground, when a state court of last resort

closes the door to any consideration of a claim of denial of a federal right. Young v. **Ragen**, 337 U.S. 235, 238 69 S Ct 1073,1074,93 L Ed 1335 28. U.S.C § 2106 authorizes the court to vacate as well as reverse,affirm or modify,any judgment lawfully brought before it for review.

This case is the same as Schlup, petitioner's claim is accompanied by an assertion of constitutional error at trial the ineffective assistance of trial counsel.

Because the Fifth Circuit Court of Appeals has truncated the scope of granting a COA,this Court must grant certiorari. This case illustrates the fact the Fifth Circuit Court of Appeals is out of step with this Court in its consideration of **Schlup v. Delo** 513 U.S. 298(1995).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenni Lee Tay

Date: January 21st 2021