No. 20-8164

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL MOSLEY, PETITIONER

v.

JOHN RICH, WARDEN, RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, despite having an alibi, the Petitioner was convicted of Murder in the First Degree, based entirely on circumstantial evidence, and sentenced to life without parole. There was no direct evidence, eyewitness or confession against him. After trial, he was the first inmate in New York to ever have a 440.10 Hearing conducted based on freestanding Actual Innocence and vast amounts of Ineffective Counsel.

The State Court found that he did not prove his innocence by "clear and convincing evidence", and that all of his lawyer's decisions were "based on trial strategy". The questions presented to this Court for review are:

Regarding Actual Innocence:

1. In this wholly circumstantial case where the Petitioner has alibi, and after trial presents: 1) substantial new exculpatory witnesses and evidence showing that two other men actually committed the crime, 2) new forensic experts who proved that the prosecutor and her experts misrepresented the ONLY evidence connecting the Petitioner to the crime, and 3) new fact witnesses and evidence proving that the prosecutor's unsupported claims of motive, opportunity and consciousness-of-guilt were completely false and fabricated, does all of this new credible and compelling evidence, combined with the alibi, constitute a "truly persuasive showing of actual innocence" pursuant to Herrera v Collins sufficient to warrant freestanding habeas relief?

2. Did the District Court commit error in not reviewing Petitioner's Actual Innocence claim under the Schlup v Delo "gateway" standard, in order to review two Ineffective Counsel claims it found to be procedurally defaulted, so that ALL of counsel's errors, ALL of the evidence and the credibility of the trial witnesses could be considered as a whole and re-weighed, in order to ensure that a Constitutional violation did not result in the conviction of an innocent man?

Regarding Ineffective Counsel:

3. Does defense counsel violate the requirements of Strickland by failing to present any of the substantial exculpatory witnesses or evidence showing that two other men actually committed the crime, where his decision not to present it was not based on strategic reasons, but was based on his "mistaken belief" that all of the exculpatory witnesses lied in order to get deals for themselves, and on his "legal misunderstanding" that he had to prove the two men's guilt to the jury?

4. When defense counsel in an entirely circumstantial case is indisputably given ADVANCE NOTICE that his primary defense will likely be unsuccessful because the prosecutor is presenting experts who's conclusions are adverse to the defendant and will directly contradict his testimony and innocent explanation for the only evidence connecting him to the crime, does counsel have "a duty" under Strickland to at least consult with an expert in order to make an informed decision as to whether he can challenge the State's experts' conclusions, corroborate the defendant's testimony, or support the defense he is presenting?

5. Is Due Process and the Confrontation Clause of the 6th Amendment violated when jurors make "quite a reaction" to a prosecutor's impermissible inference to the jury that a non-testifying eyewitness saw the defendant at the crime scene, and is counsel ineffective for failing to object to or correct this critical misstatement and Constitutional violation, when he admittedly knew it was false?

6. Was counsel ineffective for knowingly allowing the prosecutor to present false and unsupported claims of motive, opportunity and consciousness-of-guilt, when he had available witnesses and evidence that clearly proved the prejudicial claims were false and fabricated?

7. Are a defendant's 5th and 14th Amendment rights violated when the police impermissibly use a court-ordered search warrant for his palm prints as a ploy in order to seize and interrogate him without proper Miranda warnings, and is counsel ineffective for failing to even try to suppress the defendant's statements on these Constitutional grounds?

8. Was counsel Ineffective for failing to bring it to the Judge's attention that the Petitioner had refused to answer police questions during the interrogation, because his previous lawyer had legally advised him not to answer any questions about the crime, or to, at least, ask for limiting instructions for the Petitioner's attorney-advised silence, so that an adverse inference for his silence could be avoided?

9. Was counsel ineffective for allowing the prosecutor to directly violate this Court's rules announced in Doyle v Ohio and Griffin v California, by eliciting testimony from a police officer that the Petitioner invoked his right to counsel and his right to silence AFTER he was given Miranda warnings, and then inviting the jury to infer guilt based on the Petitioner exercising his rights AFTER arrest, exercising his right to a jury trial instead of answering police questions, and for following the legal advice of his prior lawyer?

10. Since this was an entirely circumstantial case, where the jury deliberated for two days and asked for read-backs regarding physical evidence that EXCLUDED the Petitioner, did the cumulative effect of all of counsel's errors deprive the Petitioner of his Constitutional right to the effective assistance of counsel and Constitutional right to a fair trial?

11. Was the State Court's decision contrary to, or an unreasonable application of, this Court's precedent, or an unreasonable determination of the facts in light of the evidence presented, pursuant to 28 USC §2254(d) (1) & (2)?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The Orders of the Second Circuit Court of Appeals denying my application for a Certificate of Appealability and Petition for Rehearing are not reported (A 50-51). The decision of the Northern District Court is reported as Mosley v Rich 2020 WL 3128530 (NDNY 2020)(A 33-49). The decision of the N.Y. Appellate Court affirming my conviction is reported as People v Mosley 155 AD3d 1124 (3rd Dept 2017) (A 23-31).

JURISDICTION

The Second Circuit denied my application for a COA on December 30, 2020, and then denied my timely Petition for Rehearing on February 23, 2021. I filed a timely petition for a writ of certiorari on May 13 , 2021. This Court has jurisdiction pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 5th, 6th and 14th amendments to the Constitution, which respectively provide that "in all criminal prosecutions, the accused shall enjoy..." the right to be free from self-incrimination; the right to the assistance of counsel; the right to confront witnesses; and "No State shall deprive any person of life, liberty or property, without due process of law." This case also involves 28 USC §2254 (d) and (e), which are reprinted in the Appendix (A 52-53).

STATEMENT OF THE CASE

I AM COMPLETELY INNOCENT OF THIS CRIME. I have been sentenced to spend the rest of my life in prison for a crime I did not commit, so, PLEASE, just take the time to actually review all of the new exculpatory evidence in my case. I have an alibi, which was my mother's 50th birthday, and have now produced new exculpatory witnesses and evidence that proves two other men really committed this crime; new forensic experts who not only corroborated my trial testimony, but who also proved that the prosecutor and her experts misrepresented the only physical evidence; and new fact witnesses who proved that the prosecutor's motive, opportunity and consciousness-of-guilt claims were completely false and made-up. None of the witnesses or evidence

was presented to the jury. This was an entirely circumstantial case, with no eye-witness, confession or direct evidence against me, and none of my DNA or prints was found on any of the murder weapons found at the scene. Additionally, there was two locations of unknown blood DNA admixed with the victims' blood, an unknown bloody palm print, and an unknown bloody boot print found at the scene, which all EXCLUDED me as a match. Had my lawyer done any type of investigation and presented all of the witnesses and evidence that I did after trial, I would have been acquitted.

INTRODUCTION

In 1999 and 2000, I was buying, selling and using drugs provided by Sam Holley. During that time, we became friends, I met his family and friends, and we sometimes hung out or went places together. In January of 2001, my wife, then girlfriend, Kathleen Kalendek, told me to change my life or I couldn't see our kids. On February 1, 2001, I moved 45 minutes away to my mother's house. While there, I stopped drinking and doing drugs, cut my hair short and shaved my face, then joined a gym with my mother and lost 30 pounds. I also got a full-time job with the State at SUNY Albany in the Paint Shop, completed an 8-week drug and alcohol program, and re-acquired my driving license. From October of 2001 to February of 2002, I built a house addition on my mother's rental property on nights and weekends (A 54-95).

In October of 2001, while helping a friend fix his car, I saw Sam walking down the street. I hadn't seen him in 8-9 months and gave him a ride to his new apartment. We talked about where I had moved to and what I was doing with my life. When I dropped him off, I told him that I would stop by once in awhile, since I drove right past his apartment on my way home from visitation with one of my kids. From October 2001 to January of 2002, I stopped and saw Sam approximately 4-6 times (A 96-106).

THE CRIME

On January 24, 2002, I left work at 4:00 PM, picked my son up at the baby sitter's and took him to the Gorge, which is a small public park, so he could go snowboarding on the hill there. When we were there, I fell while snowboarding and sustained small

scrapes and abrasions to my right hand. When we left, I stopped outside of Sam's apartment, which was right next door to the Gorge, and talked to Sam for a couple of minutes, while he and my son made fun of me for falling. I told Sam I was taking the next day off from work to buy my mother a birthday gift. Since I wouldn't be working, he asked if I could give him a ride to Court in the morning.[1] I told him "Yes" and then brought my son home to his mother, Kathleen Kalendek. While there, she cleaned and wrapped the injuries on my hand. I then left, drove to my mother's and sat on the porch with my parents until 10:00, and went to bed (A 107-130).

The next morning, January 25, 2002, which was my mother's 50th birthday, my mother woke me up at 5:45 AM, like she did every weekday, me and my father wished her a happy birthday, and we all had coffee and talked before they left for work. I then took the bandages off my hand, took a shower and got dressed. Even though the injuries on my hand weren't completely healed, I didn't put more bandages on, because my mother only had small band-aids. I then left around 9:00 AM to give Sam a ride and look for my mother's present (A 131-138).

When I got to Sam's, I knocked on the door and it opened. I saw Sam and his girl-friend, Arica Schneider, laying on the floor covered in blood. I shook both of them to see if they were alive, and then heard a noise coming from the bedroom, where I found a ringing phone under the mattress. I had never seen a dead body before, and knowing that Sam was a drug dealer and member of the 'Bloods', I became scared and left without calling 911. Also, even though I had been clean and sober for a year, I was worried that the police would think I had something to do with it, because of my past drug use and drug dealings with Sam, or that the police would put my name in the news as a person that possibly knew or saw something (A 139-154).

The next day, Sam's half-brother, Tremaine Hill, who was involved in the drug business with Sam, found the bodies, searched the apartment, took money, drugs and clothing, dropped the stuff off at a friend's apartment, and then notified the police of the dead bodies (A 155-162).

The evidence showed that Sam was on the phone at 1:07 AM, so they had been killed between then and 8:00 AM, when Arica didn't show up for work (A 163-65).

THE INVESTIGATION

After a 5-year investigation, Terry Battiste and Bryan Berry, who were members of a gang that robbed drug dealers, were indicted for the crime, based on an eyewitness who identified Battiste at the crime scene, two witnesses who testified that Battiste and Berry had conducted surveillance on the victims' apartment just prior to the murders in preparation of robbing Sam, and three witnesses who testified that Battiste and Berry made inculpatory admissions to them regarding the murders. These same witnesses resulted in Battiste and Berry being Federally indicted, convicted and sentenced to 79 months for violating the Hobbs Act, in a series of home invasions of other drug dealers (A 166-197).

Just prior to their trial, my DNA, through probation, was found to match DNA found on the bedsheet at the crime scene. On May 13, 2010, the police told me that my DNA was at the scene, but not where it was located. At that time, I had been coaching youth wrestling and Pop Warner football for 8 years. Nobody in the small town that I lived and coached in knew anything about my past lifestyle and drug use, so rather than get involved and have my name in the news, I didn't tell the police that I found the dead bodies. I also didn't tell them I found the bodies, because the news had repeatedly said that all of the witnesses or their family members had been assaulted or threatened by Battiste and Berry, and I didn't want my wife or kids in danger. I did tell the police that in 1999 and 2000 I was using drugs given to me by Sam, but had stopped using drugs and moved away a year before the crime, and then had run into Sam and saw him a few times before his death (A 198-208).

After I left the police officers, I called my lawyer, Kevin Engle, who was representing me on a pending DWI case, and told him about the DNA and that the police were questioning me about the murders. He told me not to answer any more questions, because DNA was tricky, and to call him if the police tried to question me again. I

then called my wife and repeated some of the legal advice that my lawyer had given to me. Unbeknownst to me, the police were recording my phone calls (A 209-214).

On June 14, 2010, the police came to my place of work with a court-ordered search warrant for my palm prints, told me I had to go with them, and placed me in the back of a police car. When we got to the police station, they made me turn off my cell phone and, instead of bringing me to the Fingerprint Room to execute the search warrant, they took me to an interrogation room and conducted a 1 1/2 hour taped interrogation. Since my lawyer had told me not to answer questions, I repeatedly refused to answer any questions regarding the crime or my DNA, repeatedly told them that I wasn't involved in the crime, and repeatedly told them that I wanted to go to trial instead of answering their questions. I also asked to end the interrogation and leave, but was told "No". After they gave me Miranda warnings, I invoked my right to a lawyer and my right to silence (A 215-407)

My right palm print was found to match a 2-inch by 2-inch partial palm print at the scene with traces of blood in it.[2] The indictment against Battiste and Berry was dismissed, without prejudice, and I was charged with the murders.

THE SUPPRESSION HEARING

My lawyer tried to suppress my statements from the June 14th interrogation on the ground that I was in custody, due to the police environment. However, Inv. Gordon testified that I AGREED to go with them, that I WILLINGLY spoke to them, and that I was NEVER in custody. My lawyer never questioned him about the fact that he seized me with a court-ordered search warrant, that I wasn't given proper Miranda warnings before the interrogation, that I refused to answer questions because my prior lawyer had advised me not to answer questions, or that I specifically asked to end the interrogation and leave, but was told "No" (A 408-411).

Due to these facts being omitted, the Judge denied suppression, because he gave "full credence" to Inv. Gordon's testimony and found that "the defendant willingly spoke with or accompanied the Investigators and was never in custody" (A 412).

However, the Judge did rule that the prosecutor was precluded from making any mention of a prior domestic dispute between me and my wife, Kathleen Kalendek, and then upheld that ruling twice during trial (A 413-434).

TRIAL

The prosecutor's theory was that I snuck out of my mother's house in the middle of the night, drove 45 minutes to Kathleen Kalendek's, snuck into her apartment, got her keys and took her car without waking her or the kids, drove to the victims' apartment and killed them for refusing me drugs, then drove back to Kathleen Kalendek's and dropped off her keys and car without waking her, and drove back to my mother's and snuck back in without waking her, my father or the dog, all before 5:45 AM when my mother woke me up on her 50th burthday. According to the prosecutor, this is when I killed the victims and left the physical evidence at the scene (A 435-36).[3]

A. THE PHYSICAL EVIDENCE AND SNOWBOARDING

My blood on the bedsheet and partial palm print was the only evidence connecting me to the crime, and were, therefore, the most critical issues at my trial. Since I had an alibi, if I could prove that the physical evidence occurred AFTER the crime when I found the victims, then the jury would have no choice but to acquit me. But, if the prosecutor convinced the jury that the physical evidence occurred DURING the crime, they would have no choice but to find me guilty. Therefore, the single most important question for the jury in deciding my guilt or innocence was WHEN the physical evidence occurred.

In opening statements, my lawyer told the jury that the evidence would show that the physical evidence occurred AFTER the crime when I found the victims, and that the blood on the bedsheet was due to me touching it with my hand that had unhealed snowboarding injuries from the day before the crime (A 437-442).

The prosecutor, lacking any eyewitness, confession or direct evidence, sought to show that her theory of events was true, by claiming that my blood on the bedsheet was FRESH DRIPS from a knife wound sustained DURING the crime, and that the mere

"COLOR" of the blood in my partial palm print was scientific proof that it occurred DURING the crime.

In order to support this theory, the prosecutor presented the following: 1) in opening statements, the prosecutor told the jury that my blood on the bedsheet was "drops" of blood (A 443), 2) a serologist testified, on 10 separate occasions, that my blood was "isolated drips" and "isolated droplets", and then showed the jury her hand-drawn Lab Notes, on an 8-foot projection screen, where she had my blood labeled as "isolated drips" (A 444-459), 3) a crime scene expert testified that it would have been easy for me to cut my hand on a slippery blood-covered knife while stabbing the victims, and that she had worked on murder cases with that happening (A 460-62), and 4) the medical examiner testified that a typical cut would not be "dripping" blood the next day (A 463-65).[4]

In my defense, my mother testified that I was at home all night, and that she woke me up at 5:45 AM on January 25, 2002, which was her 50th birthday. She also said that I had a bandage on my hand when I came home at 7:00 PM the night before, and that I told her it was from falling while snowboarding with my son (A 466-476).

I testified that I was innocent of the crime, that the palm print was from shaking the blood-covered victims to see if they were alive and then touching the wall, and that the blood on the bedsheet "was not a drip", but was from me touching it with my hand that had the unhealed snowboarding injuries from the day before (A 477-485).

On cross-examination, the prosecutor specifically claimed that I could not have injured my hand snowboarding, because there was "no snow" on the ground that day, that I really cut my hand on a slippery blood-covered knife while stabbing the victims, that I left "drops" of my blood from the knife wound on the bedsheet, and that I left my palm print DURING the crime when I leaned on the wall while stabbing the victims (A 486-491).

In rebuttal, the prosecutor, claiming that snowboarding was part of my alibi, called a forensic meteorologist and police officer to contradict my snowboarding

testimony (A 492-93). The meteorologist testified, on 10 separate occasions, that the Gorge was an "open and exposed" area, and that there was "NO SNOW" on any open and exposed areas, specifically "at the Gorge on January 24, 2002" (A 494-506).

The police officer testified that the Gorge WAS NOT a public park, that he's never seen anyone sledding there, that the hill is "very dangerous" because anyone going down the hill would go "over the edge" at the bottom, and that he would "absolutely not" take his 7-year old child snowboarding there (A 507-512).

The prosecutor then, claiming that the Gorge was a "material place", asked, and was granted, permission for the jury to leave and visit the Gorge (A 513-15).

In summation, the prosecutor told the jury that my testimony and innocent explanation for the physical evidence could not be true, because science and her experts proved otherwise. Specifically, she claimed 1) that I couldn't have injured my hand snowboarding, because the meteorologist had testified that "there was no snow on the ground", 2) that my blood on the bedsheet "was not from touching" like I said, but was "drips...meaning blood that dripped down free-flowing", like the serologist testified, and 3) that the blood on the bedsheet could not have been due to snowboarding injuries from the day before the crime, like I said, because the medical examiner "told you that a typical cut is not going to still be bleeding the next day". The prosecutor then completely misrepresented the medical examiner's testimony regarding the timing of the palm print, by telling the jury that he had testified that the mere "COLOR" of the blood in the palm print was scientific proof that it occurred DURING the crime (A 516-528).

Even though the physical evidence was the most critical issue in deciding my guilt or innocence, my lawyer called no experts to challenge the People's experts' conclusions, and no fact witnesses to corroborate my testimony of snowboarding and injuring my hand. This left the jury to either believe my seemingly self-serving testimony or that of four forensic experts.

B. THE PROSECUTOR'S CLAIMED MOTIVE, OPPORTUNITY AND CONSCIOUSNESS-OF-GUILT EVIDENCE

Since there was no direct evidence against me, the prosecutor urged the jury to conclude, based on the unsupported testimony of two police officers, that I had motive and opportunity to commit the crime, and that during the investigation, I displayed a consciousness-of=guilt. Regarding motive, the prosecutor claimed that I was leading a drug-addicted life, that I had no money to pay rent and was evicted, and that I killed the victims because Sam refused me drugs (A 529-537).

Regarding opportunity, the prosecutor claimed that I lived close to the crime scene in Joslyn Apartments with Kathleen Kalendek,[5] that I used her car in the commission of the crime and a witness saw it at the scene, and that a non-testifying eyewitness saw me at the crime scene (A 538-555).

Regarding consciousness-of-guilt, the prosecutor, while showing the jury a photo of Arica's dead body, told the jury that I intentionally injured my own hand, so that my palm wouldn't match a bloody palm print found on Arica's back (A 556-565).

Even though these claims were unsupported, they severely hurt my credibility and alibi. Although my lawyer had Kathleen Kalendek and Robbie Palmer available as witnesses to refute these false claims, he called neither of them. Even though he was given documents to prove the police were lying, he used none of them.

C. THE JUNE 14th INTERROGATION

Since my lawyer never brought it to the Judge's attention that I refused to answer questions because my prior lawyer had advised me not to, and failed to suppress my statements on the ground that I was seized with a court-ordered search warrant, taken into custody and interrogated without proper Miranda warnings, the entire recorded interrogation was played for the jury. This not only allowed the jury to hear me repeatedly refuse to answer questions, but to also hear the police repeatedly say that they thought I was guilty, that my credibility will be destroyed when the jury hears that I refused to answer their questions, and that they thought I was trying to make up a false alibi with my mother (A 226-407).

D. MY POST-MIRANDA INVOCATION OF RIGHTS AND POST-ARREST SILENCE

On her direct case, the prosecutor, in direct violation of this Court's rule announced in Doyle v Ohio 426 US 610 (1976), elicited testimony from a police officer that I invoked my right to a lawyer and my right to silence AFTER he gave me Miranda warnings, and that I was arrested because I refused to answer questions and asked to end the interrogation (A 566-69). During cross-examination, the prosecutor forced me to testify about my legal consultation and advice, my post-arrest silence, and me exercising my right to a jury trial instead of answering police questions (A 570-78). In closing statements, the prosecutor, in direct violation of this Court's rules announced in Doyle and Griffin v California 380 US 609 (1965), invited the jury to find me guilty based on me exercising my rights AFTER arrest, for exercising my right to a jury trial instead of answering questions, and for following the legal advice of my prior lawyer (A 579-588).

My lawyer never objected on Constitutional grounds, never asked for limiting instructions for my attorney-advised silence, and the Judge gave no curative instructions for any of these clear Constitutional errors.

E. ALL OF THE WITNESSES AND EVIDENCE AGAINST BATTISTE AND BERRY

Even though Battiste and Berry were previously indicted for this crime, none of the witnesses or evidence against them was ever presented to my jury. After the prosecutor conceded in opening statements that Battiste and Berry were conducting surveillance on Sam just prior to the murders in preparation of robbing him (A 589), my lawyer then told the jury that the two men were "falsely accused" and "innocent", and that all of the witnesses against them were "scoundrels and bottom-feeders" who all "lied" in order to get deals for themselves (A 590-603).

F. DELIBERATIONS

The jury asked for two reasbacks regarding 2 bloody hand smears with unknown blood DNA admixed with the victims' blood, which excluded me as a donor, and an unknown bloody palm print found next to one of the victims, which excluded me as a match

(A 604-611). After two days of deliberations, the jury found me guilty of First Degree Murder.

G. SENTENCING

At sentencing, the Judge was going to allow me to present a pro se 330.30 Motion in open Court, but my lawyer, without reading it, told me not to submit it (A 612-620). I did, however, give a statement in open Court, where I maintained my innocence and told the Judge that my conviction was an injustice (A 621). The Judge then sentenced me to life without parole (A 622).

POST-CONVICTION

After trial, I submitted a pro se 440.10 Motion based on Actual Innocence and Ineffective Counsel, which County Court summarily denied (A 1-5). In a consolidated appeal, the Appellate Division affirmed my conviction, but reversed the summary denial of my 440.10 Motion and ordered a hearing. (A 6-13). The N.Y. Court of Appeals then denied Leave to Appeal and a Motion for Reconsideration (A 14-15).

In November of 2015, eight days of hearings were held for my 440.10 Motion. At the Hearing, I presented 2 new forensic experts, 4 new fact witnesses, 1 new exculpatory witness and transcripts of testimony from 4 other exculpatory witnesses, and over 30 pieces of new evidence, all of which was never presented to my jury. The new witnesses and evidence not only proved my innocence and that much of the People's case was false and misrepresented, but also showed who really committed this crime.[6] The prosecutor only called my lawyer, who had to testify under subpoena.

A. SNOWBOARDING, MY HAND INJURY AND THE PHYSICAL EVIDENCE

Regarding snowboarding and my hand injury:

1) A forensic meteorologist testified that the State's meteorologist was "wrong" and that he "strongly disagreed" with the meteorologist's conclusions, because there "definitely" was snow "at the Gorge...on January 24, 2002" (A 623-25).

2) Kathleen kalendek testified that she bought our son a snowboard for Christmas, that she personally saw me and Cody return from snowboarding on January 24, 2002,

and that she personally cleaned and wrapped the injuries on my hand (A 626-639). She also testified that, contrary to Officer Fountain's testimony, she has taken our children and a friend snowboarding and sledding at the Gorge, that there isn't any "No Trespassing" signs, there was already sledding tracks on the hill, and that it is not dangerous to go sledding there (A 640-44).

3) Dennis Caldwell Testified that he and his friends, as teenagers, have sledded at the Gorge. He also said that he took photos of the Gorge and crime scene after it snowed, in order to show that snow could be present at the Gorge but not at the crime scene, and that there was sledding tracks in the snow already (A 645-658).[7]

Regarding the prosecutor's claim that I cut my hand on a knife:

1) A forensic blood spatter expert testified that if I had really cut my hand on a knife DURING the crime, my blood would have been all over the scene (A 659-660).

2) Wilma Mosley and Kathleen Kalendek both testified that I did not have any knife wounds or lacerations on my hands (A 661-64).

3) A doctor's note from just days after the crime, February 1, 2002, states that I "fell 1 week ago snowboarding" and that I had a "swollen knuckle". There is no mention of knife wounds, lacerations or scabs (A 665).

4) Just before trial, the police examined my hands for any old scars and took photographs, but found no evidence of any scars from knife wounds (A 666-68).

Regarding the prosecutor's claim that my blood on the bedsheet was "drips": A forensic blood spatter expert testified that the People's serologist "was not a blood spatter expert" and in classifying my blood as "isolated drips" and "isolated droplets", she used terms that were not recognized in the scientific community of bloodstain pattern analysis. He also testified that it was scientifically impossible for my blood on the bedsheet to be "drips" (A 669-680).

Regarding my partial palm print: A forensic blood spatter expert testified that it was wrong for the prosecutor to claim that the blood on the victims would have been dry by the time I found them, because the blood would have remained wet and sticky

for hours, and that it was wrong for the prosecutor to claim that the mere "COLOR" of the blood in the palm print was proof that it occurred DURING the crime, because it is scientifically impossible to age blood by its color (A 681-84).

Regarding my trial testimony:

1) The forensic blood spatter expert testified that my testimony of shaking the blood-covered victims to see if they were alive, and then touching the wall, was "consistent" with the palm print evidence, and that my testimony of touching the bed with a pre-existing hand injury was "consistent" with the blood evidence (A 682-85). He also testified that the blood evidence found at the scene was NOT consistent with the prosecutor's theory that I cut my hand on a knife DURING the crime and dripped blood onto the bedsheet (A 686).

2) The forensic meteorologist testified that my testimony of snowboarding on January 24, 2002, was "consistent" with the weather evidence from that day (A 687).

My trial lawyer testified that even though the physical evidence was the biggest problem for me, and that in order to believe my testimony and innocent explanation, it was "necessary" for the jury to believe that I injured my hand while snowboarding on January 24, 2002, he NEVER consulted with any experts and it "didn't occur" to him to consult any in order to challenge the People's experts' conclusions, or to corroborate my testimony (A 688-693). He then tried to say that he didn't call a blood spatter expert, because he had "no idea" that the prosecutor was going to claim that I cut my hand on a knife and dripped blood onto the bedsheet,[8] and that he didn't call a meteorologist, because, until rebuttal, he had "no prior notice" and "didn't know" that the weather was going to be an issue or that the prosecutor was calling an expert to contradict my snowboarding testimony (A 694-99). However, he was impeached with the fact that he received, PRIOR TO TRIAL, the crime scene expert's report, wherein she theorized that I cut my hand on a knife DURING the crime, and the serologist's Lab Notes, wherein she concluded that my blood on the bedsheet was "isolated drips" (A 700-08). He was also impeached with the fact that

he received PRIOR NOTICE, via e-mails from Wilma Mosley, that the prosecutor was calling a meteorologist and was going to claim "there would not have been enough snow for snowboarding" (A 709-716). However, my lawyer ignored these warnings, by responding "Thank you for the advance notice. Sounds like one less witness we have to call" (A 715). Also, the record clearly shows that the prosecutor told my lawyer that "weather is an issue in this case" (A 717).[9]

My lawyer then testified that even though Kathleen Kalendek told him, PRIOR TO TRIAL, that she personally saw me return from snowboarding on January 24, 2002, and had personally cleaned and wrapped the injuries on my hand, he didn't call her as a witness. He said it was a "strategic" decision not to call her, because the prosecutor could have used a prior domestic dispute between me and Ms. Kalendek to hurt my credibility (A 718-20).[10] However, the record clearly proves that the Judge had precluded the prosecutor from mentioning the domestic dispute, and had upheld that decision twice during trial (A 721-740). Also, despite my lawyer's alleged "strategic" reasoning, he personally elicited testimony from me, twice, regarding the very domestic dispute that he didn't want the jury to hear about (A 741-42).

B. THE PROSECUTOR'S FALSE MOTIVE, OPPORTUNITY AND CONSCIOUSNESS-OF-GUILT CLAIMS

I testified that I was not leading a drug-addicted life at the time of the crime, that I worked full-time during the day and then built a house addition on nights and weekends from November of 2001 to February of 2002, and that I did not live close to the crime scene and was never evicted. I also said that I gave my trial lawyer sequentially dated building receipts, work records and before and after photos of the house addition that I built, in order to support my trial testimony (A. 743-771).[11]

Kathleen Kalendek testified that 1) I never lived in Joslyn Apts. and was never evicted for not paying rent, 2) I did not use her car on the night of the crime, 3) I was not leading a drug-addicted life and had been clean and sober for a year, and 4) that I worked full-time during the day and remodeled a house on nights and weekends. She told all of this to my lawyer PRIOR TO TRIAL, and provided him with

documents to prove the police were lying, but he didn't call her as a witness or use any of the documents (A 772-803).

Documented evidence proves that the "white male" that the eyewitness saw was short with "strawberry blond hair". I am 5' 10" with dark brown hair. Also, the unredacted mugshot of me that the prosecutor said was from the time of the crime, was really from 2 years earlier when my appearance was completely different. E-mails prove that jurors made "quite a reaction" to the prosecutor's comments about a non-testifying eyewitness seeing me at the crime scene and my unredacted mugshot (A 804-812).

Robbie Palmer testified that I did not intentionally injure my hand AFTER the police asked me for my palm prints, but that he personally saw me accidentally hurt my hand on a roofing job 10 DAYS BEFORE the police ever asked me for my palm prints, and that the injury was just a couple of "small punctures". He also said that he told all of this to my lawyer, but wasn't called as a witness (A 813-827).

A police-recorded phone log proves that I was working on a roofing job with Robbie Palmer on May 4, 2010. A police affidavit from May 17th states that I injured my hand on a roofing job and that the injuries were superficial with "no blood or scabs". The palm print card proves that the injuries were only a couple of small puncture wounds from the nails on the roof, not anything from a "cheese-grater", like Inv. Gordon and the prosecutor claimed (A 828-833).

Kathleen Kalendek testified that she introduced Mr. Palmer to my lawyer and told him that I hurt my hand on a roofing job with him (A 834-37).

My lawyer openly admitted that he "was aware" of the prosecutor's theories of motive, opportunity and consciousness-of-guilt, that Kathleen Kalendek gave him documents to prove the police were lying, and that Ms. Kalendek told him that I did not use her car on the night of the crime. He then went on and claimed, again, that it was "strategic" not to call Ms. Kalendek because of the domestic dispute, and because "the fact that she may have been able to testify whether or not Michael Mosley drove her car was not hugely significant". He then admitted that he knew

Robbie Palmer was available to refute the prosecutor's claim that I intentionally injured my own hand, but he didn't use him (A 838-42). My lawyer then admitted that he didn't know what year my mugshot was taken, and that he knew I looked nothing like the white male described at the scene. When asked why he didn't object to the prosecutor's misrepresentation to the jury that it was me the non-testifying eye-witness saw, he simply stated "If I didn't object, I didn't object" (A 843-45).

C. NEW EXCULPATORY WITNESSES AND EVIDENCE

Since Battiste and Berry were originally charged with this crime, my lawyer repeatedly told me and my family that he was interviewing and calling all of the witnesses against them (A 846-859). However, as the record shows, no witnesses, no evidence, or even any arguments, pointing to Battiste and Berry's guilt was ever presented to my jury, in order to raise a reasonable doubt as to my guilt. Instead, my lawyer said that the two men were "falsely accused" and "innocent", and that all of the witnesses against them were "scoundrels and bottom-feeders" (A 860-873).

At my Hearing, I presented all of the evidence against the two men that my lawyer ignored, failed to investigate, and failed to present at trial, as follows:

Lester Crandall had to testify under subpoena, because Battiste had threatened him in the past and he feared for his safety (A 874-78). In fact, every witness against Battiste and Berry was threatened or feared for their safety (A 879-881). Lester Crandall testified that Battiste made inculpatory admissions to him about the crime, that he was part of a gang that robbed drug dealers, and that he used his wife's car to drive two other men to the crime, but that he stayed in the car during the crime. Battiste also told him that nobody was worried about their DNA being found, because they all wore gloves and masks. Battiste then told him that he failed a lie-detector test and that he was worried that someone saw him surveilling the victims' apartment in his wife's car. Mr. Crandall also said that he testified against Battiste at the Federal and State grand juries and Pre-trial Hearings, that he received no deals, and that he specifically refused any part of the $10,000 reward (A 882-85).

My lawyer admitted that he received and reviewed the entire State file against Battiste and Berry (A 886-89). The relevant portions are as follows: 1) an eye-witness, Theresa Pitcher, saw 3 black men in a 4-door green car at the crime scene, with Battiste being the driver. She also testified that she received no deals for her testimony (A 890-901), 2) Linda Rings provided police with a statement, where she said that her friend, Laura Billings, saw 3 black men leaving the scene in a green car (A 902), 3) an FBI report shows that Battiste's wife, Tara Pompey, owned a 4-door green car and took it off the road shortly after the crime (A 903-04), 4) an FBI report shows that Battiste told Lester Crandall that he was worried that someone saw him surveilling the victims' apartment in his wife's car (A 905-06), 5) an FBI report shows that Battiste, while being questioned, asked if he could still be charged with murder if he was only the driver. When told "yes", he asked for a lawyer (A 907-08), 6) Maria Rodriguez told police that Battiste's wife threatened and bribed her to make up a false alibi for Battiste (A 909-912), 7) Alyson Boyd testified, twice, that he conducted surveillance on the victims' apartment with Battiste and Berry just prior to the murders, but got arrested before the murders and left town. He also said that Berry made inculpatory admissions to him about the crime (A 913-953), 8) Wesley Reed testified that he was a member of "The Stickmen" with Battiste and Berry, that they had robbed other drug dealers, and that they all conducted surveillance on the victims' apartment before the murders, but he was arrested and in jail at the time of the murder. He said that after the murders, Berry said that "if the bitch wouldn't have moved, this never would have happened", and that Berry threatened to kill his brother if he talked to the police. He also said that he received no deals for his testimony (A 954-972), 9) Izel Dickerson told police that Berry admitted that he and Battiste were involved in the crime. He said that even though he was offered a deal to testify, he refused it and got the maximum sentence (A 973-978), 10) Gary Gordon, the lead Investigator, testified that he was unaware of any deals given to Izel Dickerson, and that Mr. Dickerson was credible,

because he relayed details of the crime given to him by Berry that only someone involved with the crime would know (A 979-80), 11) John Riegert, the lead Detective, testified that he was unaware of any deals given to the witnesses. He said that he had a concrete case against Battiste and Berry, that he was convinced of their guilt, and that the unknown DNA on the bedsheet did not mean they didn't commit the crime (A 981-998), 12) Dan Hanlon, the prosecuting ADA, testified that he reviewed every single document in the case against Battiste and Berry, and he didn't indict them until he was convinced of their guilt. He said even though all of the witnesses against them were unrelated to each other, they all gave consistent details, were all credible, and none of them received any deals (A 999-1047), 13) Lester Crandall testified that Battiste told him that he used his wife's car during the murders, but was just the getaway driver, and that he failed a lie-detector test (A 1048-1055), 14) Battiste and Berry both failed lie-detector tests (A 1056-1061), 15) the unknown blood DNA that was admixed with the victims' blood in Items 39 A & B was never compared to Battiste or Berry (A 1062-64).

At the Hearing, Kieth Christianson, my trial lawyer's investigator, testified that my lawyer never asked him to interview any of the witnesses against Battiste and Berry. He said that my lawyer never asked him for a report outlining his investigations, and that he only worked about 8 hours on my murder case (A 1065-69).

My trial lawyer testified that he read all of the police reports and testimony in the State's file, but that neither he nor his investigator questioned any of the witnesses, including the only eyewitness. He said that he didn't present a defense based on Battiste and Berry's guilt, because he couldn't prove their guilt to my jury, and that he didn't call any of the witnesses at my trial, because they all "lied" in order to get deals and would be "unreliable" (A 1070-1083). This is despite the fact that there is absolutely no legal basis for him to think that he had to prove their guilt to my jury, and that the record proves the witnesses received no deals and were all deemed credible by the police and prosecuting ADA

(A 979-1047). Also, Judge McAvoy of the Northern District Court found no evidence of any deals (Battiste v Dept of Justice 2009 WL 308429 [2009])(A 1084-1094).

D. OTHER INSTANCES OF INEFFECTIVE COUNSEL

I also proved that my lawyer personally violated my Constitutional right to a public trial, by excluding my family members from the courtroom during two days of jury selection (A 1095-1108), personally lied to me and the Judge, so I wouldn't submit my pro se 330.30 Motion at sentencing (A 1109-1127), and also allowed the prosecutor to use a cryptic tattoo on my hand as propensity evidence, after telling me that the prosecutor couldn't mention the tattoo (A 1128-1132).

STATE COURT DECISIONS

County Court found that I did not prove my innocence by clear and convincing evidence, and that I was not denied effective assistance of counsel (A 16-22).

On appeal, the Appellate Court found that 1) all of my lawyer's decisions were "based on trial strategy", 2) his failure to present any experts wasn't ineffective, because his cross-examination was "organized and effective", 3) failing to call 3rd-party culpability witnesses was "strategic" because the witnesses were "potentially unreliable" and would "reflect poorly" on me, and 4) his failure to suppress my statements wasn't error, because I "voluntarily spoke with police and never invoked [my] right to counsel". Regarding Actual Innocence, the State Court, while acknowledging that my new evidence and witnesses refuted the People's witnesses and theories, found that "much of the evidence presented was also presented to the jury", and did not prove my innocence (A 23-31).

The New York Court of Appeals then denied my application for Leave to Appeal (A 32).

THE DISTRICT COURT'S DECISION

On habeas review, the District Court credited all of my lawyer's testimony, found that his decisions were strategic and unchallengeable, and that the record supported the State Court's conclusions. It also found that 2 of my Ineffective Counsel claims

were procedurally barred. Regarding Actual Innocence, the District Court found that the State Court's factual determinations of my Actual Innocence claim were not reviewable in Federal habeas proceedings, and that my freestanding claim didn't satisfy the "extraordinarily high" standard of Herrera (A 33-49).

The Second Circuit then denied my request for a Certificate of Appealability, and my timely Petition for Panel Rehearing (A 50-51).

SUMMARY OF ARGUMENT

I DID NOT COMMIT THIS CRIME, and was denied my Constitutional right to a fair trial, due to all of my lawyer's inexplicable errors. My lawyer unreasonably failed to investigate and support the defense he presented to the jury, and, even though he had PRIOR NOTICE that the prosecutor was calling experts to contradict my testimony and innocent explanation for the only evidence connecting me to the crime, he NEVER EVEN CONSIDERED consulting with any experts in order to make an informed decision as to whether he could challenge the People's experts' conclusions or corroborate my testimony. Even though he "was aware" of the motive, opportunity and consciousness-of-guilt claims that the prosecutor was going to make, my lawyer never presented any of the known witnesses and evidence in his possession that clearly refuted these false claims. My lawyer allowed the prosecutor to elicit testimony from a police officer that I invoked my rights AFTER I was given Miranda warnings, and then tell the jury that my post-arrest silence and request for a jury trial were evidence of guilt. Not only did my lawyer fail to corroborate any of my testimony or challenge any of the prosecutor's unsupported theories, but he inexplicably failed to present any exculpatory witnesses, evidence, or even any arguments, showing that two other men committed this crime, not because of strategic reasons, but due to his "mistaken beliefs" and "legal misunderstandings".

I have now presented all of the witnesses and evidence that my lawyer failed to present, which all clearly proves my innocence and warrants this Court's consideration of my freestanding Actual Innocence claim. Even if this Court refuses to

answer this question, the District Court was still in error for not reviewing my Actual Innocence claim under the Schlup "gateway" standard, in order to review the two Ineffective Counsel claims that were found to be procedurally defaulted.

The denial of my claims was contrary to, and involved an unreasonable application of, this Court's precedent, and was an unreasonable determination of the facts in light of the evidence presented, pursuant to 28 USC §2254(d) (1) and (2).

ARGUMENT

I AM COMPLETELY INNOCENT OF THIS CRIME. I have an alibi for the time of the crime and have now presented more than enough new evidence to support a "truly persuasive showing of Actual Innocence" to warrant habeas relief under Herrera. My lawyer's inexplicable failure to present any of this evidence caused the jury not to believe my alibi and resulted in my wrongful conviction. Yet, due to the lower Court's unreasonable application of the law and facts, my conviction and life sentence stand.

POINT I. INEFFECTIVE COUNSEL

It is clearly established that counsel must thoroughly investigate the defense he chooses to present the jury, and that his failure to discover and present evidence to support that defense "cannot be justified as a tactical decision" if the decision not to present the evidence was not based on a "reasonable investigation" (Wiggins v. Smith, 539 US 510, 522-23 [2003]).

Additionally, when "the core" of the People's case is their experts' conclusions regarding "the only evidence" linking the defendant to the crime, then "'the only reasonable and available defense strategy REQUIRED consultation with experts or introduction of expert evidence'" (Hinton v Alabama 571 US 263, 273 [2014]; quoting Harrington v Richter 562 US 86, 106 [2011]). This is such a case.

A. COUNSEL'S FAILURES REGARDING SNOWBOARDING AND THE PHYSICAL EVIDENCE

The most critical question for the jury in deciding my guilt or innocence was whether the physical evidence occurred DURING the crime, like the prosecutor said, or AFTER the crime, like I said. If the jury believed that the physical evidence

occurred DURING the crime, they would have no choice but to convict. Therefore, my lawyer's most important duty was to corroborate my testimony and innocent explanation for the physical evidence. His duty to investigate was heightened, here, since he was given ADVANCE NOTICE that the prosecutor was calling experts who's conclusions were in direct contradiction to my testimony and that of my only alibi witness. However, as the record proves, not only did my lawyer fail to consult with or call any experts to corroborate my testimony, but due to him not consulting with any experts, he was unable to challenge ANY of the adverse conclusions of the People's experts, or the false and prejudicial claims made by the prosecutor.

Even though my lawyer specifically testified that he NEVER CONSIDERED consulting with experts, and that "it didn't occur" to him to consult any in order to challenge the People's experts or corroborate my testimony, the State Court found his decision not to present any experts was "based on trial strategy". Even though my new experts specifically testified that the People's experts were "wrong" in their conclusions and that my testimony was "consistent" with the weather and physical evidence, the State Court found that I wasn't prejudiced, because my lawyer's cross-examination was "organized and effective". These conclusions are contrary to this Court's precedent, and an unreasonable application of Strickland.

Firstly, the primary concern is not whether he presented experts, but whether the investigation supporting his decision not to present experts was "itself reasonable" (Wiggins 539 US at 523). Here, "the court did not conduct an assessment" of whether the investigation supporting his decision not to present any experts was reasonable (id at 327). My lawyer specifically said that he NERVER investigated the physical evidence and didn't consult any experts. Therefore, his decision not to present any experts was not an "informed decision" based on a "reasonable investigation" and cannot be considered strategic. "As a result", the State Court's conclusion that his decision not to present any experts was strategic, "despite the fact that counsel based his alleged choice on...an unreasonable investigation, was...objectively

unreasonable" and "reflected an unreasonable application of Strickland"(id. at 327-28).

Secondly, it was also unreasonable for the State Court to find my lawyer's decision strategic, because "despite repeated questioning, counsel never offered, and no evidence supports, any tactical rationale" (Andrus v Texas 140 SCt 1875, 1883 [2020]). Again, my lawyer specifically said that he NEVER conducted an investigation of the physical evidence or consulted any experts. Therefore, his decision not to present experts "cannot be justified as a tactical decision" (id.).

Thirdly, it is well-settled that when a lawyer is put "on notice" and "well aware" of the evidence the prosecutor intends to use against a defendant, counsel "has a duty" to conduct a "reasonable investigation" of that evidence (Rompilla v Beard 545 US 374, 375 [2005]; Andrus 140 SCt at 1882). Here, the record proves, and my lawyer admitted, that he received PRIOR NOTICE that the crime scene expert had theorized that I cut my hand on a knife DURING the crime, that the serologist concluded that my blood on the bedsheet was "DRIPS" of blood, and that the prosecutor was calling a meteorologist to prove there was "NO SNOW". Knowing that the experts' conclusions were going to contradict and be adverse to my testimony "'would have led a reasonable attorney to investigate further' Wiggins 539 US at 527. Yet counsel disregarded rather than explored, the multiple red flags" (Andrus 140 SCt at 1883). Making this error even more egregious is the fact that, since my lawyer knew what the experts were going to say, he was put "on notice" that my primary defense of alibi "likely would be ineffective", because, if my blood on the bedsheet was from a knife wound sustained DURING the crime, then my alibi couldn't be true (Rompilla 545 US at 395). Since he knew what "the prosecution intended to introduce" it was "objectively unreasonable" for the State Court to conclude that my lawyer "could reasonably decline to make any effort" to investigate the physical evidence (id. at 389-90).

Fourthly, this Court has held that where, as here, defense counsel affirmatively selects a theory of defense and relies upon it throughout the case, his failure to

investigate and support that theory is "unreasonable" (Wigins 539 US at 356; Porter v. McCollum 558 US 30, 32 [2009]). Here, my lawyer told the jury in opening statements that the evidence would show that the blood on the bedsheet was from snowboarding injuries on my hand; had my only alibi witness testify that she saw the snowboarding injuries on my hand; had me testify that the blood was due to snowboarding injuries; and then told the jury in summation that the blood was from snowboarding injuries. However, because he never consulted an expert or investigated his own defense, he was unable to support any aspect of this defense, which left the prosecutor's theory that there was "no snow" for snowboarding, that I cut my hand on a knife DURING the crime, and DRIPPED FRESH BLOOD on the bedsheet, as the only theory that was supported by any expert testimony. The State Court's conclusion that it was somehow "strategic" for my lawyer not to investigate or support his own theory is "an unreasonable application of Strickland", because "a decision not to investigate...does not reflect reasonable professional judgment" (Wiggins 539 US at 533-34).

Lastly, not only did my lawyer fail to consult with or call any experts in order to challenge the People's experts' conclusions, but he also inexplicably failed to call Kathleen Kalendek to corroborate my testimony. Ms. Kalendek is the ONLY witness with first-hand direct knowledge that I went snowboarding on January 24, 2002, and returned with a hand injury, which she personally cleaned and wrapped. This failure to call Ms. Kalendek is especially egregious, because, as will be further explained in this brief, not only was she a critical witness who was necessary to corroborate my snowboarding testimony, but she was also the ONLY witness with direct knowledge that I did not drive her car on the night of the crime, and never lived in Joslyn Apts. or was ever evicted for not paying rent. She also supported my testimony that I was clean and sober at the time of the crime, and building a house addition on nights and weekends. My lawyer specifically said that he didn't call her because the prosecutor could have used the prior domestic dispute to hurt my credibility.

However, the record clearly proved that the Judge had precluded the prosecutor from mentioning the domestic dispute, and upheld that ruling twice during trial. Therefore, my lawyer's decision not to call her as a witness was "unreasonable" and "cannot be considered strategic", because his decision "was not based on strategy, but on counsel's mistaken belief" (Kimmelman v Morrison 477 US 365, 385 [1986]; Williams v Taylor 529 US 362, 395 [2000]; Hinton 571 US at 273)(failures were not based on strategy, but on "mistaken beliefs").

Additionally, the State Court "based its conclusion, in part, on clear factual errors" (Wiggins 539 US at 528), as follows:

1) The State Court found that "there was inadequate time to find an expert after the People submitted a meteorologist's testimony on rebuttal". However, the record, and my lawyer's own admissions, proves that he had ADVANCE NOTICE, via e-mails from Wilma Mosley, that the weather was going to be "an issue", and the prosecutor was "calling an expert" and going to claim "there was not enough snow for snowboarding". 12

2) The State Court found that my lawyer got the People's meteorologist to "concede that snow could be present on sheltered surfaces" and that "he could not definitively state how much snow was on the ground in the Gorge the evening before the victims were murdered". Both of these finding are clearly erroneous.

Firstly, when the meteorologist said that snow could be on sheltered surfaces, he was specifically referring to "under a canopy of trees or up underneath an overpass or overhang of a building", not the Gorge, which is "open and exposed" (A 1133-34).

Secondly, NOWHERE in the meteorologist's testimony did he EVER say that he didn't know how much snow was on the ground "the evening before the victims were murdered". He specifically said, 10 separate times, that there was "NO SNOW" on the ground on January 24, 2002, which was the evening before the crime (A 1135-1148).

3) The State Court found that "trial counsel did not call defendant's wife to testify because he believed that her testimony could been overshadowed by evidence of a domestic violence incident perpetrated by the defendant". However, I have

already proven that the Judge had precluded the domestic dispute from being mentioned, and had upheld that ruling twice during trial.

4) The State Court found that there was no error regarding the palm print, because the medical examiner "did not opine as to the timing of the palm print and his explanation leaves that question unresolved". However, my claim was that THE PROSECUTOR committed the error, by misrepresenting the medical examiner's testimony in summation, in order to claim that the mere "COLOR" of the blood in my palm print was scientific proof it occurred DURING the crime, and that my lawyer was ineffective for failing to correct this critical misstatement of physical evidence.

The State Court specifically relied on these incorrect findings in order to hold that my lawyer's decisions were "based on trial strategy". I have proven by "clear and convincing evidence" (28 USC 2254[e][1]) that these findings were incorrect, and reflect "an unreasonable determination of the facts" (28 USC 2254[d][2]). "This partial reliance on erroneous factual findings further highlights the unreasonableness of the State court's decision" (Wiggins 538 US at 528).

After all of these erroneous factual findings, the State Court then found that I wasn't prejudiced by my lawyer's failure to call any experts, because his cross-examination was "effective". However, the record clearly proves that his failure to consult with or call any experts resulted in him being unable to challenge or contradict ANY of the People's experts' conclusions.

Specifically, the record proves that 1) he NEVER EVEN CHALLENGED the serologist's qualifications to give expert testimony as a blood spatter expert. Had he done so, it would have been shown that she had no training in bloodstain pattern analysis and was not qualified to give testimony as a blood spatter expert. So, her testimony, on 10 separate occasions, that my blood was "drips", and her hand-drawn diagram with my blood labeled as "drips", would not have been seen or heard by my jury, or would have, at least, been shown to be unreliable, 2) not only did he fail to challenge the serologist's qualifications, but he NEVER EVEN TRIED to contradict her testimony

that my blood was "drips", 3) he NEVER EVEN TRIED to contradict the crime scene expert's testimony that I cut my hand on a knife DURING the crime, 4) even though he tried to contradict the meteorologist's testimony, he was NEVER able to get him to change his ultimate conclusion that there was "NO SNOW" at the Gorge, and 5) he allowed the prosecutor to misrepresent the physical evidence and claim that the "COLOR" of the blood in the palm print was proof that it occurred DURING the crime.

Due to my lawyer's completely inadequate cross-examination, the People's theory of the only physical evidence went unchallenged, which resulted in me and my alibi witness looking like liars, and the prosecutor being able to tell the jury that my testimony COULD NOT BE TRUE, because her experts proved otherwise (A 516-528).

The prejudice that resulted from my lawyer's failure to consult or call any experts is clearly reflected in the State Court's decision, where it found that:

> "After hearing evidence from the medical examiner, an expert serologist, crime scene analyst and meteorologist, the jury rejected defendant's explanation that he discovered the victims bodies the morning after they had been murdered, that he was bleeding from a hand injury he suffered while snowboarding the evening before at the Gorge located in Troy, and that his blood transferred onto the victims' bedsheet as he attempted to move the mattress to retrieve a hidden cell phone." (A 27)

It's also reflected in the District Court's decision, where it found that "the physical evidence presented at trial was sufficient to support Mosley's conviction", and that the prosecution's "theory of the case prevailed with the jury" (A 41).

Even the media and the People's meteorologist knew how "CRITICAL" it was for my lawyer to corroborate my testimony of snowboarding and injuring my hand (A 1149-51).[13]

This Court has held that "criminal case will arise where the only reasonable and available defense strategy REQUIRES consultation with experts or introduction of expert testimony" (Harrington 562 US at 788), and that when "the core of the prosecution's case" depends on its experts' conclusions regarding THE ONLY EVIDENCE connecting the defendant to the crime, "effectively rebutting that case REQUIRED a competent expert on the defense side" (Hinton 571 US at 273). This is such a case.

This Court has clearly explained that the key inquiry for prejudice purposes is the difference between what was actually presented at trial and what competent counsel could have presented (Rompilla 545 US at 393; Sears v Upton 561 US 945, 956 [2010]), and that "if there is a reasonable probability that...an expert would have instilled in the jury a reasonable doubt as to [defendant's] guilt", then the defendant "was prejudiced by his lawyer's deficient performance and is entitled to a new trial" (Hinton 571 US at 276).[14]

Here, my new experts specifically said that 1) the People's experts were "wrong" in their conclusions, 2) the serologist "was not a blood spatter expert" and used terms that weren't accepted in the scientific community of bloodstain analysis, 3) the prosecutor misrepresented the physical evidence, 4) there was no evidence that I cut my hand on a knife during the crime, and 5) my testimony was consistent with the blood and weather evidence. Also, Kathleen Kalendek completely corroborated my testimony of snowboarding and injuring my hand.

Due to my lawyer failing to present these witnesses, my jury was FALSELY allowed to believe that 1) I lied about snowboarding and injuring my hand, 2) I really cut my hand on a knife DURING the crime, 3) my blood on the bedsheet was FRESH DRIPS from the knife wound, 4) the COLOR of the blood in my palm print was scientific proof that it occurred DURING the crime, and, most critically 5) my only alibi witness lied about seeing a snowboarding injury on my hand and, therefore, must have also lied about my alibi.

Had my lawyer presented the jury with forensic experts and Kathleen Kalendek, who all corroborated my testimony and refuted every false claim and theory presented by the prosecutor, "taken as a whole, might well have influenced the jury's appraisal [of my credibility and innocence], and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome'" (Rompilla 545 US at 393; quoting Strickland 466 US at 694).

However, since the State Court completely discounted the testimony of Kathleen

Kalendek and my new experts, and never considered how their testimony would have effected my jury, its conclusion that I wasn't prejudiced by my lawyer's failure to investigate the physical evidence, or present the new witnesses, "was unreasonable" (Porter 588 US at 455)(State Court's prejudice conclusion was unreasonable, because it failed to consider new evidence and unreasonably discounted the effect of the new expert's testimony). Here, as in Porter, "there exists too much...evidence that was not presented to now be ignored...which is sufficient to undermine confidence in the outcome" (id.).

Again, I have an alibi, and the whole outcome of my trial depended on whether the jury believed that the physical evidence occurred DURING the crime or AFTER the crime. No competent lawyer, KNOWING the People's experts were going to testify adversely to me, would fail to investigate the physical evidence, fail to consult or call any experts, fail to call critical fact witnesses, and fail to even try to challenge the qualifications and conclusions of the State's experts.

B. FAILURE TO CALL CRITICAL FACT WITNESSES

No reasonable lawyer would ever KNOWINGLY allow the prosecutor to make false and prejudicial claims that 1) I was leading a drug-addicted life at the time of the crime and killed the victims for refusing me drugs, 2) I lived close to the crime scene and was evicted for not paying rent, 3) I used Kathleen Kalendek's car on the night of the crime and a witness saw it at the scene, 4) a non-testifying eyewitness saw me at the scene, and 5) I intentionally injured my own hand so it wouldn't match a bloody palm print on the victim's back. However, that is exactly what my lawyer did. Even though he had available witnesses and evidence to refute these false claims, he didn't call any of the witnesses or use any of the evidence.

My lawyer admitted HE KNEW the prosecutor was going to claim that I intentionally injured my own hand, and that Robbie Palmer was available to refute that claim, but he didn't call him. Since no explanation was given for this failure, it "cannot be justified as a tactical decision" (Andrus 140 SCt at 1883).

My lawyer then admitted that Kathleen Kalendek told him, BEFORE TRIAL, that I was not leading a drug-addicted life, that I did not live close to the crime scene, and that I did not drive her car on the night of the crime. He then admitted that she gave him documents to prove the police and prosecutor were lying, but he didn't use them. He claimed, again, that it was "strategic" not to call her because of the domestic dispute, and because it "was not hugely significant" if I was driving her car. I have already proven that his decision not to call her in order to corroborate my snowboarding testimony was not reasonable or strategic, because the Judge had precluded the use of the domestic dispute, but how any competent lawyer would not use available impeachment evidence to show that two critical police witnesses lied, or think it "was not hugely significant" for the prosecutor to tell the jury that I used Kathleen Kalendek's car DURING the crime, is mind-boggling.

My lawyer also testified that, even though he knew I looked "nothing like" the white male described at the scene, he didn't object or correct the prosecutor's misrepresentation to the jury that it was me the non-testifying eyewitness saw at the scene. Making this error even more egregious is the fact that the Confrontation Clause of the 6th Amendment and the Due Process Clause of the 14th Amendment prohibit a prosecutor from using out-of-court statements against a defendant. Yet, my lawyer, when asked why he didn't object to this Constitutional violation, simply stated that "If I didn't object, I didn't object".

The State Court failed to make one single finding of fact regarding any of these errors by my lawyer. I have clearly proven that the police and prosecutor's claims were false, that my lawyer knew they were false, and that he failed to use known witnesses and evidence to show the claims were false. This Court has held that a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the jury" (US v Agurs 427 US 97, 103 [1976]). Here, my jury was indisputably affected by the false claims, because they made noticeable "reactions" to the prosecutor's false claim that a non-testifying eyewitness saw me

at the scene (A 804-812), and then were given specific instructions that they could consider the prosecutor's false claims of motive in order to "support a finding of guilt" (A 1152). Allowing a jury to falsely believe that I was leading a drug-addicted life, that I was evicted because I had no money for rent, and that I killed the victims because they refused me free drugs, was "extremely prejudicial" because jurors give "much weight" to evidence of a motive (House 547 US at 540).

C. COUNSEL'S FAILURE TO SUPPRESS THE JUNE 14th INTERROGATION ON CORRECT GROUNDS

My lawyer could have suppressed my statements on the ground that I was seized with a court-ordered search warrant, taken involuntarily to the police station, and then interrogated without proper Miranda warnings (Dunaway v New York 442 US 200, 207 [1979]). He also could have suppressed on the ground that my statements were taken in violation of my 5th Amendment rights, because the interrogation was outside the specific scope of the search warrant, they were testimonial in nature, and I was NEVER told that my statements could be used against me (Estelle v Smith 451 US 454 [1981]). He then failed to ask for limiting instructions for my attorney-advised silence. These failures "bespeak ineffectiveness" (Kimmelman 477 US at 385).

D. FAILURES REGARDING MY POST-MIRANDA INVOCATION OF RIGHTS AND POST-ARREST SILENCE

The 5th and 14th Amendments prohibit a prosecutor from eliciting testimony or making mention that a defendant invoked his right to counsel or his right to silence AFTER receiving Miranda warnings, and Due Process is violated when the prosecutor invites a jury to infer guilt based on a defendant exercising a specific right (Doyle 426 US at 617; Griffin 380 US at 609).

These Constitutional errors require little explanation, because the record CLEARLY PROVES that the prosecutor elicited testimony from a police officer that I invoked my right to a lawyer and my right to silence AFTER I was given Miranda warnings, that I was cross-examined about my post-arrest silence, my choice to go to trial instead of answering questions, my consultation and legal advice from my lawyer, and that the prosecutor, in closing statements, then invited the jury to infer guilt

based on me exercising my rights, and my post-arrest silence, all while my lawyer sat idle (A 566-588).

These Constitutional errors require relief, because this Court has held that "Doyle rests on the 'fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial'" (Wainwright v Greenfield 474 US 284, 291 [1986]), which is exactly what occurred here.

Even though this was a clear record-based Constitutional error, the State Court never made any mention of my post-Miranda invocation of rights or my post-arrest silence, and, instead, found that I did not invoke my right to counsel DURING the interrogation. However, this claim has nothing to do with my statements DURING the interrogation, only the prosecutor's improper use of my silence and invocation of rights AFTER I was given Miranda warnings and arrested.[15]

I have proven by "clear and convincing evidence" that this was an unreasonable determination of the facts by the State Court (Wiggins 539 US at 528).

E. THE FAILURE TO PRESENT EVIDENCE SHOWING THAT TWO OTHER MEN COMMITTED THE CRIME

It is a denial of Due Process to prevent a defendant from presenting evidence that shows someone else committed the crime (Chambers v Mississippi 410 US 284 [1973]). There, it was the Judge who precluded the exculpatory evidence. Here, it was my own lawyer who prevented me from showing the jury that two other men committed this crime. His decision not to present any of the exculpatory witnesses was not based on any type of strategy after a reasonable investigation, but on his "mistaken belief" that all of the witnesses received deals for their testimony and wouldn't be credible, and his "legal misunderstanding" that he had to prove the other men's guilt to my jury. As will be shown, neither reason can be considered strategic.

My lawyer specifically testified that he NEVER questioned any of the exculpatory witnesses before deciding not to call them at trial, and that he didn't call them at trial, because 1) they wouldn't be credible because they all "lied" in order to get

deals, and 2) he couldn't prove Battiste and Berry's guilt to my jury. The State Court credited my lawyer's testimony and found that his decision "was based on trial strategy", because the witnesses were "potentially incredible".

Firstly, the State Court's "principal concern" was supposed to be "whether the investigation supporting counsel's decision...was itself reasonable" (Wiggins 539 US at 522). This Court has clearly explained that "counsel has a duty to conduct reasonable investigations" (Strickland 466 US at 690), and that routine preparation "involves the location and interrogation of potential witnesses" (Taylor v Illinois, 484 US 400, 415 [1988]). Here, my lawyer said that he didn't question any of the witnesses before deciding not to call them at trial. In Schlup v Delo, 513 US 298 (1995), counsel did the exact same thing. There, as here, he was provided with transcripts and testimony from exculpatory witnesses who indicated that someone else committed the crime. Counsel testified, also as here, that he didn't question any of the exculpatory witnesses, and that he didn't call them at trial, because they were "unreliable" and " would not be credible". In reviewing his pre-trial investigation, this Court stated that "In fact, counsel apparently failed to conduct personal interviews with any of the potential witnesses to the crime" (id. at 311), and that if these witnesses were found to be credible "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict" (id. at 331). Here, the record clearly proves that these witnesses were deemed credible by a Federal and State grand jury, the police, the prosecuting ADA, and by Judge McAvoy. "Clearly, 'the known evidence would have led a reasonable attorney to investigate further'" and question these exculpatory witnesses, in order to make an "informed decision" as to whether or not to call them at trial (Andrus 140 SCt at 1883; quoting Wiggins 539 US at 527).

Secondly, it is well-settled that counsel's decision "cannot be strategic" if it's based on "mistaken beliefs" or "legal misunderstandings" (Kimmelman 477 US at 385; Williams 529 US at 395; Hinton 571 US at 274). Here, the exculpatory witnesses, the

police, and the prosecuting ADA, all testified that the witnesses received no deals, and Judge McAvoy found no evidence of any deals. Therefore, my lawyer's decision not to present the exculpatory witnesses was based on his "mistaken belief" that all the witnesses "lied" in order to get deals, and cannot be considered strategic. Also, there is absolutely no legal basis for my lawyer to think he had to prove Battiste and Berry's guilt to my jury, so his decision cannot be considered strategic, because it was based on his "legal misunderstanding". His duty is to raise a reasonable doubt regarding my guilt, which showing the jury that two other men committed the crime would have easily done (House 547 US at 554; Schlup 513 US at 331). In fact, a defense based on Battiste and Berry's guilt would have forced the prosecutor to DISPROVE their guilt, which would have been impossible, because the police and prosecutor had all testified that they were "convinced" of their guilt.

Making this error even more egregious is the fact that not only did my lawyer fail to present any of the exculpatory witnesses, or even make any arguments that the two men were responsible for the crime, but he, based on no evidence whatsoever, inexplicably told my jury that Battiste and Berry were "falsely accused" and "innocent", and that all of the witnesses against them were "scoundrels and bottom-feeders" who "lied" in order to get deals. These claims by my own lawyer effectively took away any reasonable doubt and left me as the only person the jury could consider as guilty. This is an entirely "circumstantial case", so, had my lawyer presented the jury with all of the "substantial evidence pointing to a different suspect...it is more likely than not that no juror viewing the record as a whole would lack reasonable doubt". Especially since I also "called into question" the only physical evidence connecting me to the crime (House 547 US at 554)(new experts and exculpatory witnesses "cast considerable doubt on his guilt").

E. THE CUMULATIVE EFFECT OF MY LAWYER'S FAILURES

I have an alibi for the time of the crime. The only reason it wasn't believed by the jury is because my lawyer failed to corroborate ANY part of my testimony and

that of my only alibi witness, and failed to refute or even challenge ANY part of the State's theories. "Taken as a whole", my lawyer's 1) failure to EVEN CONSIDER consulting or calling any experts in order to corroborate my testimony regarding the only physical evidence, even though "materials prepared by an...expert well before trial" had put him "on notice" that the experts' testimony was going to contradict and be adverse to my innocent explanation, 2) his failure to call critical fact witnesses or use evidence in his possession in order to "rebut...critical evidence", 3) his failure to suppress my statements on the ground that I was seized with a court-ordered search warrant, taken into custody, and interrogated without proper Miranda warnings, or bring it to the Judge's attention that I refused to answer questions because I was legally advised not to, 4) his failure to object to the impermissible use of my post-Miranda invocation of rights and post-arrest silence, and 5) his egregious failure to present any witnesses, evidence or arguments showing that someone else committed this crime, "cannot be justified" and completely denied me of my Constitutional right to the effective assistance of counsel and my Constitutional right to a fair trial (Andrus 140 SCt at 1883-84).

Even though my lawyer failed to present any of the witnesses and evidence that I did after my trial, the jury still deliberated for 2 days and asked for read-backs regarding physical evidence that EXCLUDED me as a match (Parker v Gladden 385 US 363 [1966])(jurors deliberating for 26 hours indicated a "difference among them as to the guilt of the petitioner" [id at 365]). On direct appeal, without the benefit of all the new witnesses and evidence, the State Court still found that "a different result would not have been unreasonable" (A 9). This is proof that I was prejudiced and, had the jury heard all of my new witnesses and evidence, "no reasonable juror would have lacked reasonable doubt" (House 547 US at 554; Porter 558 US at 454-56).

POINT II. ACTUAL INNOCENCE

I am asking this Court 1) to finally hold that a freestanding claim of Actual Innocence is cognizable in Federal habeas proceeding and to announce a standard of

review, and 2) whether the District Court was in error for not reviewing my Actual Innocence claim under the Schlup "gateway" standard in order to review the two Ineffective Counsel claims that it found were procedurally barred.

A. FREESTANDING ACTUAL INNOCENCE[16]

I have presented the quantity and quality of "convincing proof of innocence" that this Court has hinted could be sufficient to establish a freestanding claim of Actual Innocence under Herrera (House 547 US 555).

This Court's holding in House should be controlling in my case, because the facts of his case are "materially indistinguishable" from the facts of my case (Williams, 529 US at 406). Both of us were convicted of murder based on entirely circumstantial evidence, and during trial 1) both of our prosecutor's told the jury that the blood evidence occurred DURING the crime, 2) both of our prosecutor's told the jury that injuries on our hands occurred DURING the crime, 3) both of our prosecutor's told the jury that we used our girlfriend's car DURING the commission of the crime, 4) both of our prosecutor's told the jury that we had motive and opportunity to commit the crime, and 5) both of our prosecutor's told the jury in closing statements that science proved our guilt.

After trial, both of us were given Actual Innocence and Ineffective Counsel Hearings. At our Hearings, 1) both of us presented experts who proved that the blood evidence presented at trial was misrepresented, and that the blood occurred AFTER the crime, not DURING, 2) both of us presented witnesses who proved that our hand injuries occurred BEFORE the crime, not DURING, 3) both of us presented witnesses who proved that the prosecutor's motive claims at trial were false, 4) both of us presented witnesses and evidence showing that someone else committed the crime, and that the alternate suspects had confessed to the crime, had motive to commit the crime, had been plotting to commit the crime, and had attempted to construct a false alibi, and 5) both of our lawyers admitted to not using evidence in their possession to undermine the People's case.

After our Hearings, both of our Court's found that 1) our testimony was not credible, 2) our witnesses supporting 3rd-party culpability were not credible, and there was no physical evidence from the alternate suspects found at the scene, 3) our new experts did not prove that we were factually innocent, and 4) there was still some remaining evidence to support our convictions.

On certiorari, this Court reversed and granted House relief on his Schlup "gateway" claim of Actual Innocence. This Court concluded that, since it was an entirely circumstantial case, if the jury had been presented with the new forensic expert challenges to the only blood evidence, presented with the fact that House had no motive, and presented with the new evidence showing that someone else could have committed the crime, "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt" (House 547 US at 554).

After granting relief on House's Schlup claim, this Court then concluded that, even though House had "cast considerable doubt upon his guilt", he fell short of the showing of proof needed to support a freestanding claim of innocence, because "some aspects of the State's case...still support an inference of guilt", such as the victim's daughter hearing a man with a deep voice like his, House taking a strange walk at night during the time of the crime, and House trying to concoct a false alibi. Here, there is no remaining aspect of the State's case remaining.

Not only did I present the same kind of new evidence that resulted in House's relief, but, unlike House, who concocted a false alibi, I have an actual alibi for the time of the crime and, also unlike House, who had some remaining circumstantial evidence showing he had an opportunity to commit the crime, I have effectively proven as FALSE the prosecutor's unsupported claims that I lived close to the crime scene, that I drove my girlfriend's car during the commission of the crime, and that a non-testifying eyewitness saw me at the crime scene.

This is a completely circumstantial case, with no eyewitness, direct evidence or confession against me. I have an alibi, which was my mother's 50th birthday, and it

has never been discredited or shown to be false. I have presented substantial new witnesses and evidence showing that two other men really committed the crime. I have presented new forensic experts who not only corroborated every aspect of my trial testimony and innocent explanation for the only physical evidence, but also clearly proved that the People's experts were wrong in their conclusions, that the prosecutor misrepresented the physical evidence, and that the People's serologist wasn't even qualified to give testimony as a blood spatter expert. I presented new witnesses and evidence that clearly proved the prosecutor's motive, opportunity and consciousness-of-guilt claims were completely false and made-up. I also presented clear proof that the jury was impermissibly allowed to consider my post-Miranda invocation of rights and my post-arrest silence as evidence of guilt, that the jury made noticeable "reactions" to the prosecutor's false claim that a non-testifying eyewitness saw me at the scene, and that jurors were given specific instructions that they could consider the prosecutor's false motive in order to "support a finding of guilt".

Additionally, none of my DNA or fingerprints were found on any of the murder weapons found at the scene; there was two locations of unknown blood DNA admixed with the victims' blood, which EXCLUDED me; there was an unknown bloody palm print next to one of the victims, which EXCLUDED me; there was an unknown bloody bootprint next to one of the victims, which DID NOT match my boots; there was an unknown gun found at the scene, which was logged under a different case (A 1153-1166).

I testified for 2 days at my trial. Even without the benefit of any expert or fact witnesses to corroborate my testimony, I was never impeached or shown to be lying, and the jury still deliberated for two days and asked for read-backs regarding the physical evidence that EXCLUDED me as a match. There is no escaping the fact that I would have been acquitted if the jury was presented with my new witnesses and evidence, because, without any conclusive physical evidence, without a motive, without opportunity, without an eyewitness, without a confession, and without any

direct evidence, no rational juror could or would have had any legal or factual basis for convicting me beyond a reasonable doubt. Add to that the fact that I have an uncontroverted alibi and the substantial evidence showing that two other men really committed this crime, and that those men were surveilling the victims, had confessed to the crime, and attempted to fabricate an alibi, this Court should have no doubt that I was wrongly convicted and am serving someone else's life sentence.

My jury never saw or heard any of the new witnesses or evidence (Porter 558 US at 454-55; House 547 US at 554), which, as a whole, represents a "truly persuasive showing of actual innocence" sufficient to warrant freestanding habeas relief (Herrera 506 US at 417; House 547 US at 555).

This Court has stated that "comity and finality...'must yield to the imperative of correcting a fundamentally unjust incarceration'" (House 547 US at 518), and that the "concern about the injustice that results from the conviction of an innocent person has long been at the core of the criminal justice system" (Schlup 513 US at 325). However, those words have no real meaning if an innocent man unjustifiably remains in prison due to the Federal courts beings precluded from reviewing claims of freestanding Actual Innocence, just because this Court refuses to decide whether freestanding claims are cognizable on Federal habeas review. I have presented more proof of innocence that House or Schlup, and respectfully ask this Court to answer the question left open in Herrera, in order to end this miscarriage of justice.

B. THE SCHLUP "GATEWAY" CLAIM OF ACTUAL INNOCENCE

Even if this Court doesn't decide whether a freestanding claim is cognizable on habeas review, the District Court was still in error for not reviewing my Actual Innocence claim under the Schlup "gateway" standard, in order to review my procedurally barred Ineffective Counsel claims. In Schlup, this Court held that a "credible and compelling" claim of innocence can provide a "gateway" for a procedural barrier to habeas review. Like Schlup, my claim of innocence "depends critically on the validity of [my] Strickland...claims" (id 513 US at 315). However,

the District Court specifically found that two of my Ineffective Counsel claims were procedurally barred, without first considering whether my new evidence satisfied the Schlup "gateway" standard, in order to excuse the procedural bar.

Had the District Court reviewed my claim under Schlup, it would have been able to correctly consider ALL of my lawyer's errors "taken together" (Andrus 140 SCt at 1882), and consider "all of the evidence" to assess the likely impact on my jurors (House 547 US at 538). It would have also been able to consider the credibility of the trial witnesses (Schlup 513 US at 330).[17] Instead, the District Court reviewed my claim under the prohibited Jackson standard (House 547 US at 538), and specifically held that it was "precluded from re-weighing the evidence or assessing the credibility of the witnesses" (A 40-41). The Schlup "gateway" standard ensures that no innocent man is convicted due to a Constitutional error (Schlup 513 US at 316), and should be applied to my case.

CONCLUSION

I DID NOT COMMIT THIS CRIME, but due to all of my lawyer's proven errors, I was wrongfully convicted and sentenced to spend the rest of my life in prison. I have now presented all of the expert witnesses, fact witnesses, exculpatory witnesses, and vast amounts of documented evidence that my lawyer failed to present, which all corroborated my testimony and innocent explanation for the only physical evidence, refuted the prosecutor's false theories, and proved my innocence.

Therefore, the petition for a writ of certiorari should be granted.

Dated: May 13, 2021

Respectfully submitted,

Michael Mosley, 11A3334
Petitioner, Pro Se

FOOTNOTES

1. Sam had Court on the morning of January 25, 2002, because he was arrested for driving without a license on the night before. When he was arrested, he gave a false name and told the officer there was "a hit" out on him from 'The Bloods', because he testified against some gang members in NYC (A 1167-1171).
2. The Department of Justice had originally found that my palm print was negative to the one found at the scene (A 1172-73).
3. My lawyer never called Ms. Kalendek at trial to debunk this theory, but she did refute it at my Actual Innocence Hearing.
4. The average person understands that "DRIPS" of blood only occur at the time of an injury. The words "DRIPS" and "DROPS" of blood were used against me a total of 22 times at my trial, in order for the prosecutor to convince the jury that I cut my hand on a knife DURING the crime and DRIPPED FRESH BLOOD. It wasn't discovered until after trial that it was scientifically impossible for my blood on the bedsheet to be drips. The 3rd and 9th Circuits have held that Due Process is violated when flawed expert testimony is presented at trial (Han Tak Lee v. Houtzdale 798 F3d 159 [3rd Cir. 2015]; Giminez v. Ochoa 821 1136 [9th Cir. 2016]).
5. Joslyn Apartments is approximately 1.5 miles from the crime scene.
6. I had 4 forensic blood spatter experts offer their assistance, but the Judge only allowed County funds for one of them (SR 0124-0202)
7. This testimony and evidence not only corroborated my testimony, but directly contradicted the prosecutor's claim that there COULD NOT be snow at the Gorge, because photos of the crime scene from the time of the crime didn't have any snow in them (A 1174).
8. Even though my lawyer testified that he had "no idea" that the prosecutor was going to claim that the blood on the bedsheet was due to me cutting my hand on a knife during the crime, until she said it in her closing statement, the record proves that he specifically told the jury, in his closing statement, which was before the prosecutor's, that "the DA wants you to believe that Mike was in there stabbing people and cut himself on a knife and that's why his blood in there" (A 1175).

9. The People's meteorologist didn't testify until May 27th. The e-mails were sent to my lawyer on the very first day of trial, May 9th, and on May 23rd. Then, on May 25th, the prosecutor told him that the weather was "an issue" and she was contesting the existence of snow at the Gorge. This contradicts my lawyer's claim that he had "no prior notice" that the weather would be an issue at my trial (A 714-17).

10. My lawyer also told Kathleen Kalendek that she wasn't needed at trial because "nobody was going to care if I was snowboarding" (A 1176-77).

11. In conjunction with each other, my time cards, work records, sequentially timed and dated building receipts, and the before-and-after photos of the house addition I built, prove that from September 2001 to February 2002, I worked every day from 7:30 AM to 4:00 PM, then driving 45 minutes away to build a house addition on nights and weekends. This clearly contradicts the police and prosecutor's claim that I was buying and selling drugs at the time of the crime and leading a drug-addicted life.

12. Again, the People's meteorologist didn't testify until May 27th. The record proves that my lawyer had ADVANCE NOTICE on May 9th, May 23rd, and May 25th (A 714-717).

13. The importance of the weather, snowboarding and my hand injury, cannot be overstated. In total, 35 pages were specifically dedicated to questioning me about the weather, snowboarding and my hand injury; 29 pages were specifically dedicated to questioning my alibi witness about the weather, snowboarding and my hand injury; 2 full days of rebuttal witnesses were specifically dedicated to the weather and snowboarding; a special request for the jury to leave the courthouse and visit the Gorge was approved; 17 pages of my lawyer's closing statement was specifically dedicated to the weather, snowboarding and my hand injury; and a total of 10 pages of the prosecutor's closing statements was specifically dedicated to the weather, snowboarding and my hand injury. Obviously, this was a CRITICAL issue at my trial.

14. If the jury believed that I lied about snowboarding, then they could conclude that me and my mother both lied about a snowboarding injury on my hand, and that I must have really cut my hand on a knife DURING the crime, like the prosecutor said, and, therefore, that me and my mother must have also lied about my alibi.

15. I have 2 separate and distinct claims in my petition. Firstly, my lawyer failed to suppress my statements on the correct grounds, ask for limiting instructions for my attorney-advised silence. Secondly, he failed to object to the prosecutor's impermissible use of my post-Miranda invocation of rights and my post-arrest silence.

16. I was the very first inmate in New York State to have a 440.10 Hearing conducted based on freestanding Actual Innocence.

17. This new evidence would have shown the jury that Inv. Gordon and Det. Riegert deliberately lied, when they testified that 1) I was buying and selling drugs at the time of the crime and leading a drug-addicted life, 2) I lived close to the crime scene in Joslyn Apts. and was evicted shortly after for not paying rent, and 3) I intentionally injured my own hand, and that it was "oozing fluid" and looked like I took a "cheese grater" to it. It also proved that Inv. Gordon lied, when he testified that I "agreed" to go with him to the police station on June 14th.