No. 22-7036

In The Supreme Court Of The United States

Michael Lawrence Cassidy - Petitioner

Vs.

Ricky D. Dixon, Secretary,
Florida Department Of Corrections - Respondent

On Petition For A Writ Of Certiorari To
The Eleventh Circuit Court Of Appeals

Petition For A Writ Of Certiorari

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Questions Presented

Mr. Cassidy raised a claim of actual innocence to excuse the untimeliness of his § 2254 petition, relying upon his military documents not presented at trial to undermine the credibility of the alleged victim. The District Court denied the petition as untimely, but granted a certificate of appealability ("COA") on issues unrelated to actual innocence. Petitioner filed a motion to enlarge the COA to include actual innocence with the Eleventh Circuit Court of Appeals. In denying his request, Circuit Judge Barbara Lagoa found (1) that since Petitioner's evidence was known at the time of trial, then it was not "new" to support a claim of actual innocence, and (2) that he failed to make a substantial showing of the denial of a constitutional right. As such, this case presents two questions for this Court's consideration:

1. If a habeas petitioner seeks to expand a previously granted COA on a petition that was denied for procedural reasons, is it necessary for him to make another, separate showing of the denial of a constitutional right?
2. For a habeas petitioner raising actual innocence under *McQuiggin v. Perkins,*[1] to by-pass the AEDPA's 1 year statute of limitations, does the "new evidence" rule articulated in *Schulp v. Delo,*[2] require the evidence to be newly discovered after trial, or can the petitioner rely upon evidence known about at the time of trial, but was not presented to the jury due to the ineffective assistance of counsel?

[1] 569 U.S. 383 (2013)
[2] 513 U.S. 298 (1995)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Cassidy respectfully petitions for writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals on denying his request to enlarge the COA.

Opinions Below

The following opinions and orders below are pertinent here, all of which are unpublished, but are reprinted in the appendix ("appx") to this petition: Eleventh Circuit Court of Appeals Order denying enlargement of COA Appx. A; U.S. District Court of Northern District of Florida Order granting COA Appx. B; U.S. Supreme Court denying § 2254 petition as being untimely Appx. D; and First Judicial Circuit Court, in and for Okaloosa County, Florida, Order granting in-part and denying in-part Mr. Cassidy's postconviction motion Appx. F.

Statement of Jurisdiction

1. On December 12, 2022, Eleventh Circuit Judge Barbara Lagoa denied Petitioner's request to expand the COA.

2. This Court had jurisdiction under 28 U.S.C. § 1254(1) to review by certiorari the decision of a circuit judge to deny a request for COA. Accord *Hohn v. United States,* 529 U.S. 236 (1998).

3. This Court's jurisdiction is also being invoked prior to a final judgment of the Eleventh Circuit Court of Appeals upon Petitioner's appeal from the District Court's dismissal of his § 2254. See 28 U.S.C. § 2101(e).

4. Pursuant to Supreme Court Rule 11, this Court should exercise its jurisdiction and deviate from the normal appellate practice because the issues herein are of great public importance to warrant this Court's immediate determination. Specifically, this case presents two questions about appellate review standards for enlarging a COA, as well as the "new evidence" rule for Actual Innocence claims.

5. Should the Court decline to address Petitioner's actual innocence claim at this stage, and the Eleventh Circuit does grant his appeal, there is a substantial risk that Petitioner will lose the actual innocence exception to those claims that are, not just time barred, but

procedurally defaulted from state court proceedings. Specifically, the Circuit Judge's opinion on Mr. Cassidy's actual innocence claim will stand as the law of the case, unless this Court intervenes.

Statutory And Constitutional Provisions Involved

28 U.S.C. § 2253(c)(1) provides that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from (A) the final order in a habeas corpus proceeding...".

28 U.S.C. § 2253(c)(2) provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

14th Amendment, section 1, provides in-part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law...

Statement Of The Case

Petitioner Michael Cassidy was convicted by a Florida jury of three counts of sexual battery in 2012. He was sentenced to 35 years in prison, followed by 15 years of probation. Florida's First District Court of Appeal affirmed the convictions and sentences on direct appeal. *Cassidy v. State,* 130 So.3d 229 (Fla. 1st DCA 2014).

In state postconviction proceedings, Mr. Cassidy raised several claims of ineffective assistance of counsel. of importance here was his claim that his attorney had evidence, prior to trial that he was outside the state during the time period alleged in Count 3. After holding an evidentiary hearing, the trial court found Petitioner's counsel had rendered constitutionally ineffective assistance on that specific issue. Appx. F. The court entered an order vacating Count 3,[3] resulting in an amended judgment being entered on October 10, 2017. Mr. Cassidy appealed from the denial of the remainder of his claims. The appellate court affirmed the denial and issued its mandate on March 7, 2019. *Cassidy v. State,* 263 So.3d 749 (Fla. 1st DCA 2018).

[3] The vacating of count 3 simultaneously removed the 15 years probation.

On March 6, 2020, Petitioner filed his initial § 2254 petition, and subsequently amended it. To address the question of timeliness of the petition, Mr. Cassidy asserted that (1) the 2017 amended judgment restarted the 1 year time limitation period, and (2) he was actually innocent[4] of the charges, and that his evidence demonstrates that the alleged victim and another state witness testified untruthfully to at least one allegation,[5] thereby undermining their credibility. Appx. E at 20-21.

Respondent filed a motion to dismiss the petition as untimely. Among their arguments for dismissal was that Petitioner's evidence was not newly discovered as both he and his counsel had it in their possession at the time of trial. Thus, the Respondent reasoned, Mr. Cassidy could not suffice the new reliable evidence to establish a claim of actual innocence under *Schlup.*

Petitioner replied to this argument by pointing out that the majority opinion in Schlup held that the evidence need only to have not been presented at trial. He further argued that the Respondent's logic

[4] Petitioner's actual innocence claim rests upon the independent constitutional violations e raised in grounds one and two of his amended petition.

[5] This would be ground two of the petition - the *Giglio* violation - which resulted in the denial of due process under the 14th Amendment. Accord *Giglio v. United States,* 405 U.S. 150 (1972)

contradicts the holding of *McQuiggin*, in which the Court found that the timing of discovery of evidence for actual innocence affects its reliability, not its applicability. He concluded that he made a *prima facie* showing of actual innocence to warrant evidentiary testing of his evidence.

The magistrate judge's first report and recommendation found Mr. Cassidy's petition to be timely by one day. She did not address the actual innocence claim. Respondent objected to the magistrate's recommendation, and the district court sided with the Respondent by dismissing the petition as untimely. Appx. D. Like the magistrate judge, the district court did not address Petitioner's actual innocence claim. Id. Mr. Cassidy timely filed a rule 59(e) motion to alter or amend the judgment. He specifically raised the court's failure to address his actual innocence claim. The district court denied the motion, again without addressing the actual innocence issue.

Petitioner filed a notice of appeal, along with an application for a COA on three issues - including his claim of actual innocence. The magistrate judge evaluated Mr. Cassidy's petition for COA, and found that jurists or reason could debate the court's procedural ruling, Appx.

C at 3-6; and that jurists of reason would find the petition states one or more valid claims of denial of constitutional rights, Id. at 6-8. She recommended that a COA should be granted on two issues; however, she did not address the actual innocence issue. See Appx. C generally. The district court adopted the magistrate's COA recommendations, and issued a COA on those two issues. Appx. B.

On February 21, 2022, Petitioner filed a motion to enlarge the COA to include actual innocence with the Eleventh Circuit Court of Appeals. On December 12, 2022, Circuit Judge Barbara Lagoa denied Mr. Cassidy's request. Appx. A. The four page order found that (1) reasonable jurists would not debate the merits of his claim, because (2) his evidence was not "new" since it was known about at the time of his trial; and (3) he failed to make a substantial showing of the denial of a constitutional right. Id. at 4.

Petitioner now seeks certiorari review of the Circuit Judge's Order.

Reasons for Granting the Writ

Summary of the Arguments:

Petitioner Cassidy petitions this Honorable Court to review the decision of the Eleventh Circuit Court judge in denying his request to expand the COA to include his claim of actual innocence as a gateway against the untimeliness of his § 2254 petition. Judge contends that the decision was based on a misapplication of the COA inquiry, and involves a misunderstanding of the "new, reliable evidence" rule for actual innocence claims. Consequently, the order is tantamount to a summary judgment of Petitioner's claim, conflicts with other circuit courts on similar matters, and will likely result in a miscarriage of justice if not corrected. As such, this Court should accept jurisdiction and quash the order below.

Standard of Review for Issuance of a COA:

In order for a COA to be granted, a petitioner has to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This substantial showing "includes showing that reasonable jurists could debate whether... the petition should have been resolved in a different manner or that the issues presented were adequate to

deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)(internal quotations omitted).

When a petition is dismissed on procedural grounds - such as untimeliness (as is the case here) - a petitioner must show both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Gonzalez v. Thaler,* 565 U.S. 134, 181 L.Ed.2d 619, 630 (2012)(citing *Slack*, 529 U.S. at 484).

This Court has emphasized that COA inquiry "is not coextensive with a merits analysis." *Buck v. Davis,* 580 U.S. 100, 115 (2017). Rather, "the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. (citing *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003)).

Because 28 U.S.C. § 2253(c)(2) "speaks only to when a COA may issue - upon a substantial showing of the denial of a constitutional right" - then "it would be ... strange if, after a COA has [been] issued, each court of appeals...were...to revisit the threshold showing and

gauge" the "substantial showing" on its own terms. *Gonzalez*, 565 U.S. 134, 181 L.Ed.2d at 631-32. To do so undermines the very premise of a COA and the authority of a district court to issue a COA; an appellate court could quash a COA based on its own view that an applicant failed to make the substantial showing of the denial of a constitutional right because the COA issuer failed to explicitly sate such a showing was made. Cf. *Gonzalez*, 565 U.S. 134, 181 L.Ed.2d at 630. (finding the failure to indicate which issue a petitioner had made a substantial showing of the denial of a constitutional right does not deprive a court of appeals of the power to adjudicate the appeal).

I. The Circuit Judge's analysis misapplied the proper COA inquiry after a COA had been issued

Since Mr. Cassidy's petition was dismissed for being untimely - a procedural ruling - he had to show both that reasonable jurists would find it debatable whether the district court's procedural ruling was correct, and whether the petition states a valid claim of the denial of a constitutional right. *Jiminez v. Quarterman,* 555 U.S. 113, 118 n. 3 (2009)(citing *Slack,* 529 U.S. at 484). The magistrate judge found that the Petitioner satisfied both prongs. Appx. C at 6, 8. The district court adopted the magistrate's report and recommendation for a COA, and

accordingly, granted Mr. Cassidy a COA. Appx. B at 2. Thus, for an enlargement of COA, it can be presumed that both prongs are met based on the granting of a COA.

In the denial order, the circuit judge found that "although the district court did not specifically address Cassidy's actual innocence claim, reasonable jurists would not debate the merits of his claim."[6] Appx. A at 4. But this finding misapplies the extent of a COA inquiry. As this Court stated in *Buck,* the COA inquiry "is not coextensive with a merits analysis." *Buck,* 580 U.S. at 115. What the COA inquiry asks is if reasonable jurists could disagree with the district court's ruling or whether the issues presented are adequate to deserve encouragement to proceed further. Id. (citing *Cockrell,* 537 U.S. at 327).

The crux of Petitioner's actual innocence claim is that the alleged victim and her mother testified untruthfully at trial about the accusations surrounding events, and the prosecutor knew the testimony was untruthful. Mr. Cassidy's evidence not only proved that he was outside the State during the time period charged in Count 3, but also

[6] This determination was predicated upon Petitioner's evidence was known about at the time of trial, and thus, was not "new" for an actual innocence claim. But this reasoning misconstrues the "new evidence" rule articulated in *Schlup,* and conflicts with the Third Circuit's decision in *Reeves v. Fayette SCI,* 897 F.3d 154 (3rd Cir. 2018). See Points II and IV below.

demonstrates that the prosecutor's complicitness in the untruthful testimony: the date range for Count 3 matched exactly with Mr. Cassidy's deployment dates (January 2-30, 2005). This was abnormal because the Prosecutor's normal practice for alleging a particular date range is to go from the first of the month to the first of another month. The fact the dates matched exactly was not by random chance, nor for a charge where the alleged victim and her mother provided the most compelling testimony of all three accusations. In a case where there is not an iota of direct evidence of guilt,[7] and the only evidence of a crime comes from the lips of the alleged victim, how is it not material for a fact-finder to know that, on at least one of the accusations, her testimony was not credible? How else can a person demonstrate their innocence in a case such as this but by showing the accuser lacks credibility on the remaining accusations, given the proof that one accusation did not occur.

[7] There was, however, circumstantial evidence of some guilt introduced at trial. As part of his reply to the Respondent's motion to dismiss, Petitioner submitted an affidavit with exhibits to rebut the prosecution's argument that Mr. Cassidy exhibited guilt for those charged offenses. Petitioner asserted that he did do inappropriate things with the alleged victim when she was 18 (taking nude photos of) to which he felt remorse for. That is the guilt he demonstrated during the phone calls. But guilt for an immoral, yet legal, act should not equate to guilt for a criminal act.

But the issue here is not whether Mr. Cassidy is, in fact, innocent. Nor, is it whether his evidence is sufficiently reliable to meet the *Schlup* standard to excuse the time bar. Rather, the question is whether reasonable jurists could conclude that the issue is "adequate to deserve encouragement to proceed further" or that the court's resolution of the claim is debatable. *Cockrell*, 537 U.S. at 327 To that question, Petitioner avers that some members of this Honorable Court should find that he has met this standard to have been granted a COA, based upon their own experiences with false accusations,[8] and in light of Petitioner's evidence (without an evidentiary hearing).

As for the second prong - the question of whether the petition states a valid claim of the denial of a constitutional right - the circuit judge's order conflicts with the magistrate judge's finding. Compare Appx. A at 4 with Appx. C at 7-8. Particularly so, where Petitioner's actual innocence claim rests upon the *Giglio* violation alleged in ground

[8] Petitioner does not mean to disrespect any member of this Honorable Court. He only wishes to show the similarities between his case with those of the confirmation hearings of both Justices Clarence Thomas and Bret Kavanough. Both men had faced accusations, unsupported by any direct evidence, to which they maintained their innocence and vehemently denied the accusations ever occurred. In such cases, the triers of fact must rely upon the credibility of those testifying. In both of these Justices' cases, their triers of fact (the U.S. Senate) had enough reasonable doubt as to the accusations that they confirmed both men to this Honorable Court's bench. At this stage, Petitioner is not saying he has established reasonable doubt as to his other two convictions, only that his issue - his actual innocence claim as supported by his evidence - is sufficiently debatable to have warranted a COA.

two of his petition as well as the prosecutor's complicitness in eliciting false testimony alleged in ground one. Both grounds assert that these errors deprived Mr. Cassidy due process of law under the 14th Amendment, and rendered his trial fundamentally unfair. See Appx. E at 6-11.

Because Mr. Cassidy was seeking only to expand the COA to include actual innocence, the proper inquiry was whether reasonable jurists could disagree with the district court's ruling: that the petition should be dismissed as untimely. In context of an actual innocence claim, the circuit judge should have applied this Court's rationale in *McQuiggin* to the case. That is, an untimely first federal habeas petition alleging a gateway actual innocence claim is not subject to the modified version of the miscarriage of justice exception under 28 U.S.C. 2244(b)(2)(B) and 2254(e)(2). *McQuiggin*, 569 U.S. at 396-97. Instead, the circuit judge subjected Petitioner's claim to the modified miscarriage of justice exception under 2244(d)(1)(D) by finding the evidence was not "new" since "his records were available at the time of his trial, as he admitted that he provided them to counsel." Appx. A at 4 (citing to *McQuiggin,* 569 U.S. at 386, 399; and *Schlup*, 513 U.S. at 330).

II. The Circuit Judge misapplied the "new evidence" rule of Schlup

The order below found that the evidence was not "new" to support Petitioner's claim of actual innocence because it was known about at the time of trial. Appx. A at 4. But this finding is erroneous as it misconstrues *Schlup's* holding, as well as *McQuiggin*'s holding for an untimely first federal habeas petition alleging actual innocence as a gateway.

In *Schlup*, this Court plainly stated that:

> ...a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - **that was not presented at trial.**

Id., 513 U.S. at 324 (emphasis added). The *Schlup* Court did not hold that such evidence must be newly discovered after trial - only that it was not presented at trial. In *McQuiggin*, this Court found that the timing of discovery of the evidence affects its reliability, not its applicability. The *McQuiggin* Court stated that an "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing" of actual innocence. Id., 569 U.S. at 399.

Petitioner presented his evidence in a timely state postconviction motion alleging ineffective assistance of counsel. The state court found counsel ineffective, and vacated Mr. Cassidy's conviction and sentence for Count 3. Appx. F at 4-5, 9. The mandate from the state appellate court was issued on March 7, 2019. At that time, Petitioner retained an attorney to file his habeas petition; however, said attorney did not find sufficient grounds for pursuing § 2254 petition and notified Mr. Cassidy in February 2020. Despite the short-notice, Petitioner filed his § 2254 petition - under the Respondent's own assertion - 26 days late. That is a far cry from the 11 year delay in *McQuiggin.*

The Petitioner's contention that for a first habeas petition alleging actual innocence, the "new evidence" rule is evidence not presented at trial. *Schlup,* 513 U.S. at 324. This interpretation is supported by a majority of circuit court's,[9] including the First,[10] Second,[11] Third,[12] Sixth,[13] Seventh,[14] and Ninth[15] circuits.

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[9] The circuit judge's order appears to follow the Eighth Circuit's opinion in *Armine v. Bowersox,* 238 F.3d 1023, 1028 (8th Cir. 2001) that "evidence is new only if it was not available at trial and could not have discovered earlier through the exercise of due diligence" (internal citations and quotations omitted). See also *Calloway v. Sheriff,* 2022 U.S. App. LEXIS 12283 (11th Cir. 2022)

[10] See *Riva v. Ficco,* 803 F.3d 77, 84 (1st Cir. 2015)

[11] See *Rivas v. Fischer,* 687 F.3d 514, 543, 546-47 (2nd Cir. 2012)

[12] See *Reeves,* 897 F.3d at 163-64.

[13] See *Cleveland v. Bradshaw,* 693 F.3d 626, 633 (6th Cir. 2012)

[14] See *Gomez v. Jaimet,* 350 F.3d 673, 679-80 (7th Cir. 2003)

This Court should accept jurisdiction to clarify the "new, reliable evidence" rule for a claim of actual innocence, whether it is evidence simply not presented at trial, or whether it must be newly discovered. See Point III below.

III. There is a split among the Circuit Courts as to what constitutes "new evidence" for a claim of actual innocence

As discussed above, there is a split among the Circuit Courts as to the precise meaning of "new evidence" to support a *Schulp* claim. That is, whether the evidence was simply not presented at trial, accord *Schulp*, 513 U.S. at 324; or whether it must be newly discovered as held by the Eighth Circuit in *Armine*,[16] as well as the Circuit Judge[17] in the order below. Petitioner urges this Court to resolve the split in favor of the mitigating of circuit courts which held the evidence to be "newly presented," accord *Griffin* and *Reeves* supra.

In *Griffin*, the Ninth Circuit considered what evidence constitutes "new evidence" for a *Schulp* claim. *Griffin*, 350 F.3d at 961-62. The *Griffin* Court started with the majority opinion in *Schulp*, finding that multiple "passages in Justice Stevens's majority opinion suggest that a

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[15] See *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003)

[16] The Eighth Circuit reaffirmed its *Armine* holding in *Barton v. Stange*, 959 F.3d 867, 872 (8th Cir. 2020)

[17] See e.g. *Calloway v. Sheriff*, 2022 U.S. App. LEXIS 12283 (11th Cir. 2022)

habeas petitioner may pass through the *Schulp* gateway without 'newly discovered' evidence if other reliable evidence is offered 'that was not presented at trial.'" *Griffin*, 350 F.3d at 961 (quoting *Schulp*, 513 U.S. at 327-28). The *Griffin* Court also observed Justice O'Connor's separate concurring, in which she discussed the evidence, as being newly discovered, in order to have a *successive* habeas claim heard on the merits. Id. at 962 (citing *Schulp*, 513 U.S. at 332). The *Griffin* Court, relying upon other Ninth Circuit cases,[18] concluded "that habeas petitioners may pass *Schulp*'s test by offering 'newly presented' evidence of actual innocence." *Griffin*, 350 F.3d at 963.

In *Reeves*, a case similar to Petitioner's situation, the Third Circuit considered "(1) whether the evidence Appellant relied on...constitutes new evidence and (2) whether Appellant's evidence satisfied the actual innocence standard." Id., 897 F.3d at 159 (internal quotations and alterations omitted). In district court proceedings, the appellant raised a claim of ineffective assistance of counsel for failing to investigate and present exculpatory evidence. Reeves conceded that his petition was untimely, but argued that he had shown actual innocence

[18] See e.g. *Majoy v. Roe*, 296 F.3d 770 (9th Cir. 2002); and *Sistrunk v. Armenakis*, 296 F.3d 669 (9th Cir. 2002)

to excuse the procedural bar. The magistrate judge found that the evidence Reeves relied upon for his actual innocence claim did not qualify as new evidence because it was available to him and his attorney at the time of his trial. The magistrate judge concluded that Reeves failed to demonstrate actual innocence to overcome the time bar, and the district court adopted the magistrate judge's recommendation to dismiss Reeves's petition as untimely. The district court also denied a COA for Reeves. Id.

The Third Circuit, in its analysis of this Court's precedents on actual innocence, recognized that the Court has not explicitly defined "new evidence," and that there is a split among the Circuits as to whether it means newly discovered - as with the Eighth Circuit - or evidence not presented at trial - as held by the Seventh and Ninth Circuits. Id. at 161-62. The Third Circuit's evaluation first focused on the wording of the *Schulp* decision. The *Reeves* Court observed that the *Schulp* Court's:

> ...reference to "wrongly excluded" evidence suggests that the assessment of an actual innocence claim is not intended to be strictly limited to newly discovered evidence - at least not in the context of reaching an ineffective assistance of counsel claim based on counsel's

> failure...to present such exculpatory evidence, as was the case in *Schulp*. In addition, in articulating the new, reliable evidence requirement, the Supreme Court stated that the petitioner must "support his allegations of constitutional error with new reliable evidence... that was not presented at trial."

Reeves, 897 F.3d at 162 (quoting *Schulp*, 513 U.S. at 324, 27-28). The Third Circuit also noted that "the Supreme Court did not discuss the significance of the evidence's availability nor reject the evidence outright, which... it would have done if the actual innocence gateway was strictly limited to newly discovered evidence." Id. at 162-63. Thus, the *Reeves* Court concluded that *Schulp* stood on the proposition that the "new evidence in the actual innocence context refers to newly presented exculpatory evidence." Id. at 163 (citing *Calderon v. Thompson,* 523 U.S. 538, 559 (1998)).

Finally, the *Reeves* Court pointed out the absurdity that would result if the Eighth Circuit's interpretation was correct:

> [S]ay that a petitioner was convicted of a murder, and the prosecutor had withheld a videotape depicting a different person committing the crime. Further assume the tape was not revealed until years after the trial. That petitioner could invoke the actual innocence gateway to pursue this *Brady* due process claim because the evidence was newly discovered. Now, assume the

> same videotape was produced to trial counsel, but counsel did not present it to the jury. Under *Armine*, that petitioner would be forced to concede that the evidence was not new because it was available at trial, and he would be foreclosed from seeking relief under the actual innocence gateway.

Reeves, 897 F.3d at 164. That hypothetical scenario is Petitioner's current reality: he is barred from pursuing his *Giglio* due process claim - or any other constitutional violation - under the actual innocence gateway because his attorney had this evidence at the time of trial, but failed to present it to the jury.[19]

Petitioner does acknowledge that the "newly discovered evidence" standard has a place for claims of actual innocence - for second or successive § 2254 petitions which are governed under the provisions of § 2244. But that is not applicable here - this is Mr. Cassidy's first habeas petition. Accord *McQuiggin,* 569 U.S. at 396-97.

Lastly, and for the sake of the principle of "Rule of Law," this Court should accept jurisdiction to clarify the "new evidence" rule under *Schulp.* Especially so, where there is inconsistent applications of the "new evidence" standard across the Circuit Courts, with each Circuit's

[19] Petitioner's situation is even more absurd given that the state court had found counsel was ineffective with respect to this evidence. See Appx. F at 4-5

application dependent upon its own interpretation of this Court's precedent, and in light that if Mr. Cassidy had filed his habeas petition in the Third Circuit Court of Appeals, he would have been entitled to evidentiary hearing on his actual innocence claim under that Court's *Reeves* holding. Simply put, rule of law should mean consistency in the application of the law.

IV. The Circuit Judge's Order is a Summary Judgment of Petitioner's Actual Innocence Claim

Notwithstanding the circuit judge's misapplication of the "new evidence" standard for actual innocence claim, her order is tantamount to a summary judgment of Mr. Cassidy's actual innocence claim. Such a determination has been disapproved of by this Court.

In *House v. Bell,*[20] this Court re-emphasized what a *Schulp* inquiry entails:

> ...that [a] habeas court must consider "all the evidence," old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that govern at trial."

Id. 547 U.S. at 538 (quoting *Schulp*, 513 U.S. at 327-28). The Court reiterated that:

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[20] 547 U.S. 518 (2006)

> [b]ecause a *Schulp* claim involves evidence the trial jury did not have before it, the[n] the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record...[i]f new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial."

Id., 547 U.S. 538-39 (quoting *Schulp*, 513 U.S. at 330).

This assessment of the evidence employs a different standard from that of a motion for summary judgment. In the latter, the "court does not assess credibility or weigh the evidence, but simply determines whether there is a genuine factual issue for trial." Id., 547 U.S. at 559-60 (citing *Schulp*, 513 U.S. at 332). Whereas, the "[a]ssessing [of] the reliability of new evidence ... is a typical fact finding role, requiring credibility determinations and a weighing of the 'probative force' of the new evidence in light of 'the evidence of guilt adduced at trial.'" Id. Thus, this Court has found that an actual innocence inquiry requires "more than simply check[ing] whether there are factual issues for trial." Id.

But it is Chief Justice John Robert's separate opinion in *House* that provides the clearest command that actual innocence claims should not be resolved by summary judgment:

> The point in *Schulp* was not simply that a hearing was required, but why - because the District Court had to assess the probative force of the petitioner's newly presented evidence by engaging in fact finding rather than performing a summary judgment - type inquiry.

House, 547 U.S. at 560 (citing *Schulp*, 513 U.S. at 331-32).

Because there was no fact finding done in the proceedings below, so as to determine the probative force of Petitioner's newly presented evidence of actual innocence in relation to the evidence of guilt, then the circuit judge's order stands as a summary judgment of his claim of actual innocence. Such an inquiry is inappropriate when there is a substantial risk of wrongfully convicting and incarcerating an innocent person. Especially in light of this evidence having previously demonstrated that the accusations in Count 3 were unfounded.

Therefore, this Court should accept jurisdiction and vacate the order below, and remand for proceedings consistent with this Court's precedents governing the inquiry into claims of actual innocence.

V. Petitioner will be barred from raising actual innocence again under the doctrine of collateral estoppel, should he prevail on appeal below

Petitioner contends that should the Court decline to accept his case, and he prevails on appeal in the Eleventh Circuit Court of Appeals,[21] then he will likely be precluded from raising actual innocence for claims that, while filed on a timely petition, are procedurally defaulted.[22] That is because the circuit judge's decision below will be the law of the case with respect to Mr. Cassidy's claim of actual innocence, regardless of the errors in the judge's order. Thus, collateral estoppel will bar Petitioner from relitigating his claim of actual innocence. Thus would result in a miscarriage of justice because Mr. Cassidy is actually innocent of the offenses he has been accused of, convicted for, and incarcerated on.

Therefore, this Court should accept jurisdiction and clarify whether a claim of actual innocence can survive collateral estoppel.

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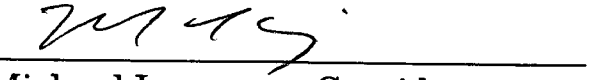
[21] In the event that Petitioner succeeds on appeal with the appellate court finding his 2017 amended judgment to be a new judgment, it would restart the 1 year statute of limitations period. Such a finding would render Mr. Cassidy's § 2254 petition to be timely filed by one day.

[22] Even with a timely petition, at least three claims are procedurally defaulted as they were not raised in accordance with Florida's postconviction procedures.

Conclusion

Petitioner prays that this Honorable Court grant writ of certiorari to review the order of the circuit judge below, and address the issues presented herein.[23]

Respectfully submitted,



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[23] Petitioner stresses that he is not asking the Court to address the merits of his actual innocence claim, or whether his evidence meets the demanding standards of *Schulp* (i.e. sufficiently reliable) - he is only asking the Court to address those issues raised herein: the COA, the "new evidence" rule for an actual innocence claim, and collateral estoppel doctrine as a barrier to actual innocence.