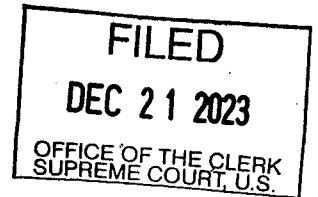


No. 23 - 6684



IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY EARL RIDLEY TYCOON — PETITIONER
(Your Name)

VS.

THOMAS L. WILLIAMS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Anthony Earl Ridley Tycoon, #0117475
(Your Name)

P.O. Box 2
(Address)

Lansing, Kansas 66043-0002
(City, State, Zip Code)

(913) 272-3235
(Phone Number)

QUESTION(S) PRESENTED

1. Did the U.S. district Court contravene the requirement of 28 U.S.C. § 2254 (b) and (d):
 - A. When a State Prisoner failed to use an available state remedy - i.e., a Procedure for properly briefing issues on appeal - but the state appellate Court, nevertheless considered the ineffective assistance of counsel issue on the merits, is the U.S. district Court foreclosed from asserting the doctrine of Procedural default in a federal habeas Proceeding?
 - B. Assuming that the state appellate Court's action precludes the U.S. district Court from asserting the doctrine of procedural default in the federal habeas Proceedings, may the Petitioner submit the findings of the state appellate Court and assert the Presumption of Correctness which 28 U.S.C. § 2254 (d) gives to factual findings by a State trial Court?
 - C. If the Presumption of Correctness does not accompany the state appellate Court's factual findings, is the Petitioner at least entitled to litigate the fairness of the evidence at a evidentiary hearing because he was previously denied a hearing by the U.S. district Court's factual decision to dismiss this matter as time-barred?
2. Did the U.S. district Court apply erroneous standard in evaluating Petitioner's claim of actual innocence to overcome the time bar under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244 (d)?
- A. Did the Petitioner establish by Convincing evidence that the factual determination by the State Court was erroneous and therefore is entitled to the actual innocence exception to the AEDPA statute of limitations?
- B. Does the two items of new evidence counts as new evidence under Schlup and serves to refute, via clear and Convincing evidence?

C. Does the Presumption of Correctness applied to state Court factfinding standard apply to issues not decided on the merits by the state Court has an application to a gateway innocence assertion?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

State v. Ridley, 421 P.3d 774, 2018 Kan. App. Unpub. LEXIS 511, 2018 WL 3320909 (Kan. Ct. App., July 6, 2018) (Unpublished opinion)

Ridley v. Kansas, 2021 U.S. Dist. LEXIS 201887, 2021 WL 4892919 (D. Kan., October 20, 2021)

Ridley v. Kansas, 2021 U.S. App. LEXIS 40117, 2021 WL 8314624 (10th Cir., December 13, 2021)

Ridley v. State, 497 P.3d 1169, 2021 Kan. App. Unpub. LEXIS 630, 2021 WL 5027471 (Kan. Ct. App., October 29, 2021) (Unpublished opinion), rev. denied July 1, 2022

Ridley v. Williams, 2023 U.S. Dist. LEXIS 20701, 2023 WL 1795542 (D. Kan., February 7, 2023)

Ridley v. Williams, 2023 U.S. App. LEXIS 23076, 2023 WL 5622928 (10th Cir., August 31, 2023)

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 2023 U.S. App. LEXIS 23076, 2023 WL 5622928; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 31, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 26, 2023, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- (1). Fifth Amendment
 - (2). Fourteenth Amendment
 - (3). Due Process Clause
 - (4). K.S.A. § 60-1501
 - (5). Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)
 - (6). 28 U.S.C. § 2254 Provides in Pertinent Part: "(b) An application for a writ of habeas Corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the States, or that there is either an absence of available State corrective Process or the existence of circumstance rendering such Process ineffective to protect the rights of the prisoner.
- "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas Corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing of the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written

Opinion, or other reliable and adequate written indicia, shall be presumed to be correct, by its terms, § 2254 (d) bars relitigation of a claim "adjudicated on the merits" in state court unless, among other exceptions, the earlier state-court "decision" was contrary to "clearly established Federal law, as determined by" the Supreme Court of the United States, § 2254 (d)(1); or the earlier state-court "decision" was based on "an unreasonable determination" of "the facts in light of the evidence presented in" the State Court Proceeding, § 2254 (d)(2).

"(c) A state prisoner seeking habeas relief based on alleged erroneous factual determinations must overcome by clear and convincing evidence the presumption of correctness afforded state court factual findings."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

In August 2016, in the District Court of Sedgwick County, Kansas Petitioner-Appellant pled guilty to and was convicted of one Count each of attempted aggravated indecent solicitation of a child, aggravated battery, and lewd and lascivious behavior, State v. Ridley, 421 P.3d 774, 2018 Kan. App. Unpub. LEXIS 511, 2018 WL 330909, at *1 (Kan. Ct. App. July 6, 2018)

(Unpublished opinion). In October 2016, the district court sentenced him to #24 months Probation with an underlying Controlling Prison Sentence of #34 months with **LIFETIME** Postrelease Supervision. Id. In September 2017, the district court found that Petitioner had violated the conditions of his Probation, so it revoked his Probation and order him to serve his underlying Prison Sentence. Id.

Specifically, the district court found that Petitioner had violated the conditions of his Probation by committing a new offense of domestic battery, by residing with his children in violation of a court order and by failing to attend sex offender treatment. On his direct appeal, the Kansas Court of Appeals (KCOA) affirmed the revocation and dismissed for lack of jurisdiction the portion of the appeal that challenged his original sentence, imposed in 2016. A copy of the Kansas Court of Appeals' opinion is attached to this Petition as Appendix C. No petition for review by the Kansas Supreme Court was sought.

In September 2017 Petitioner-Appellant filed in the District Court of Sedgwick County, Kansas, a ("motion requesting new revocation hearing due to ineffective assistance of counsel") and ("motion asserting counsel was ineffective and request for appointment of counsel.") The district court denied Petitioner's motions raising the claims in two separate minute orders on October 10, 2017. In February 2020 Petitioner-Appellant filed in the District Court of Sedgwick County, Kansas a ("Supplemental ex parte motion for reconsideration of new revocation hearing and reappointment of counsel.") The district court denied Petitioner's motion raising the claims in a minute order on March 4, 2020. Mr. Ridley (Tycoon) then attempted to appeal the order of the district court in March 2020. In March 2020 the Appellate Courts of Kansas's Clerk sent a letter to Petitioner stating: ("We could not filed Ridley's motion for appeal.")

In April 2020, Petitioner filed in the District Court of Butler County, Kansas a motion for state habeas corpus relief under K.S.A. § 60-1501. In state habeas corpus proceedings. The district court dismissed all of Petitioner's claims on June 15, 2020 except one, holding that K.S.A. § 60-1501 was not the proper procedural vehicle for such claims. Ridley v. State, 497 P.3d 1169, 2021 Kan. App. Unpub. LEXIS 630, 2021 WL 5027471, at *1 (Kan. Ct. App., October 29, 2021)

(Unpublished opinion), rev. denied July 1, 2022. The district court resolved the sole remaining claim that Petitioner's parole was wrongly revoked in 2019 and the Kansas Prisoner Review Board wrongly refused to reinstate his parole in 2020 - by granting the Respondent's motion for summary dismissal, holding that the petition was untimely and, alternatively, the arguments lack merit. Id. Petitioner appealed but the (KCOA) affirmed the district court and the Kansas Supreme Court (KSC) denied Petitioner's petition for review.

B. Proceedings in the Federal Courts

On December 14, 2022, Petitioner filed a Petition for a writ of habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Kansas. On December 16, 2022, the district court filed a notice and order to show cause. In the district court Mr. Ridley (Tycoon) "overcome by clear and convincing evidence the presumption of correctness afforded state court factual findings" pursuant to 28 U.S.C. § 2254(e)(1). A copy of the court's notice and order to show cause entered is attached to this Petition as Appendix D. On February 7, 2023, the district court filed a memorandum and order dismissing the Petition as time-barred and denied to issue a certificate of appealability. A copy of the district court's opinion is attached to this Petition as Appendix E.

The Tenth Circuit filed its opinion on August 31, 2023 (Appendix A). A majority of the Panel denied Mr. Ridley's (Tycoon) Certificate of Appealability and dismiss the matter holding that Mr. Ridley's (Tycoon) discovery that the state trial court may have been wrong about its lack of jurisdiction to consider certain post-revocation motions is not the type of "new reliable evidence" that the Tenth Circuit described in Fontenot, that was not presented at Mr. Ridley's (Tycoon) Probation revocation hearing. Because Petitioner-Appellant did not establish the actual innocence exception applied, he has failed to show reasonable jurists could debate the district court's procedural ruling dismissing his habeas Petition as time-barred. A Petition for rehearing and suggestion for rehearing en banc was filed on September 11, 2023. On September 26, 2023, the Court denied the Petition for rehearing and all three judges rejected the suggestion for en banc review (Appendix B).

REASONS FOR GRANTING THE PETITION

In order to avoid Procedural default, Petitioner-Appellant Anthony Earl Ridley (Tycoon) must prove that "it is more likely than not that no reasonable juror would have convicted him," in light of all the evidence," including newly discovered evidence. Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (quotations omitted). Without actual innocence, Ridley's (Tycoon) claims can be heard only if he demonstrates cause and prejudice to excuse his procedural default and equitable tolling to excuse his time bar under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d).

A. The Structure of Habeas Corpus

Contemporary habeas corpus doctrine strikes a delicate balance between justice and finality. See House v. Bell, 547 U.S. 518, 536, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006). Habeas Corpus is the tool by which federal courts can correct unjust incarcerations. A combination of statutory law under the Antiterrorism and Effective Death Penalty Act and judge-made law, federal habeas corpus serves as the path for prisoners to challenge both state and federal convictions. But the law makes this pathway narrow. For instance, the Court will not consider a petitioner's claims for relief that were not adequately presented to state courts. See id.; see also Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.") This narrowing function is "based on the comity and respect that must be accorded to state-court judgments." House, 547 U.S. at 536.

"Therefore, when a state court has made a factual determination bearing on the resolution of a Schlup [actual innocence] issue, the petitioner bears the burden of rebutting this presumption by clear and convincing evidence." Fontenot v. Crow, 4 F.4th 982, 2021 U.S. App. LEXIS 20642, 2021 WL 2933220, at *38 (10th Cir., July 13, 2021). (Citing 28 U.S.C. § 2254(e)(1)). Yet recognizing the justice concerns that also underlie habeas corpus, the Court has concluded the door to habeas relief is not always closed because a petitioner procedurally defaulted his claims. Rather, this Court has allowed courts to consider such claims when it is necessary to avoid a miscarriage of justice. See Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ("[T]he

fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.") Courts apply this miscarriage-of-justice exception when a petitioner can demonstrate that he is actually innocent of the crime of conviction. In these cases, the petitioner's claim of actual innocence does not serve as the basis for granting habeas relief. Instead, the claim of actual innocence is joined with a procedurally defaulted claim to serve as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 315 (internal quotation marks omitted). This exception "is intended for those rare situations where the State has convicted the wrong person of the crime or where it is evident that the law has made a mistake." Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000) (internal quotation marks omitted; alterations incorporated).

B. Standard of Review

The Court's review of habeas petitions is "governed by AEDPA" standards to the extent that the claims were adjudicated on the merits by [a]... State Court. Douglas v. Workman, 560 F.3d 1156, 1170 (10th Cir. 2009). Under AEDPA, the Court may grant a habeas petition that a state court rejected on the merits only if the state court's adjudication of the petitioner's claims resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But "[t]he § 2254(d) standard does not apply to issues not decided on the merits by the state court." Bland v. Simons, 459 F.3d 999, 1010 (10th Cir. 2006). However, an actual innocence gateway claim is a mixed question of law and fact. See Fontenot v. Crow, 4 F.4th 782, 2021 U.S. App. LEXIS 20642, 2021 WL 2933220, at *38 (10th Cir. July 13, 2021). Even in this context, the Court presume the state court's finding of facts to be correct. Id. (Citing 28 U.S.C. § 2254(e)(1)).

"When the Court is not bound by AEDPA deference, the Court review de novo the existence of an actual innocence gateway claim. The subsidiary question of whether an actual innocence gateway claim is a mixed question of law and fact which the Court of Appeals review de novo." Fontenot, 2021 U.S. App.

LEXIS 20642, 2021 WL 2933220, at *38 (Citations omitted). Even when reviewing a habeas claim de novo rather than under § 2254(d), state-court factfinding still receives the benefit of doubt under § 2254(e)(1): that is, "[a]ny state-court finding of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by 'clear and convincing evidence.'" Hooks v. Workman, 689 F.3d 1148, 1164 (10th Cir. 2012) (quoting 28 U.S.C. § 2254(e)(1)).

Thus the presumption of correctness applied to state court factfinding under § 2254(e)(1) does still apply. Therefore, "when a state court has made a factual determination bearing on the resolution of a Schlup issue, the Petitioner bears the burden of rebutting this Presumption by 'clear and convincing evidence.'" Cf. Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995) (state court factfinding entitled to presumption of correctness in fundamental miscarriage of justice inquiry). The Schlup standard does not demand conclusive proof of exoneration; rather, it involves a probabilistic determination that, in light of all the evidence—"old and new; admissible and inadmissible," Case v. Hatch, 731 F.3d at 1036—"more likely than not any reasonable juror would have reasonable doubt," House, 547 U.S. at 538. Mr. Ridley (Tycoon) presented two categories of new evidence which were ("newly presented") and ("newly discovered") in support of his actual innocence gateway assertion, both of which the district court did not credit. See Ridley v. Williams, 2023 U.S. Dist. LEXIS 20701, 2023 WL 1795542 (D. Kan. February 7, 2023). The Court thus should hold that any reliable evidence not presented to the factfinder at Mr. Ridley's (Tycoon) 2017 Probation Revocation hearing can be factored into the district court's assessment of his actual innocence gateway claim.

Judicial Discretion Review and Schlup

Should I be wrong about the application of Schlup to the facts of this case were it before this Court on review on a writ of certiorari, I maintain that 28 U.S.C. § 2254(e)(1) should be applied in habeas corpus proceedings so as to overturn convictions only in the case where clear and convincing evidence demonstrates that reversal is required to prevent manifest injustice. To so

limit Fontenot in habeas proceedings is in keeping with the scope the remedy historically has been given. See Stone v. Powell, 428 U.S. 475, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); Oaks, Legal History in the High Court - Habeas Corpus, 64 Mich. L. Rev. 451 (1966). Although the scope of habeas relief has been expanded, it has remained a remedy for exceptional cases: "It is of historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." Fay v. Noia, 372 U.S. 391, 423, 83 S. Ct. 822, 840, 9 L. Ed. 2d 837 (1963).

To apply Schlup in habeas proceedings to instances of manifest injustice requires recognition that "impermissible suggestiveness" for purposes of judicial discretion review of state-court factual findings tests on an interpretation of due process, assured by the Fifth and Fourteenth Amendments, that may not somewhat far reaching than are the supervisory powers of federal courts over federal law enforcement officials. That is, the likelihood of "new reliable evidence that was not presented at trial" should be sufficiently clear and convincing in habeas proceedings to require a setting aside of the conviction(s) to prevent manifest injustice. This position involves recognition that a vigorous application of Schlup in the review on a writ of certiorari setting rest, in part, on the Court's **SUPERVISORY POWERS** rather than exclusively on the command of the Due Process Clause of the Fifth Amendment. See Supreme Court Rule 10(a).

C. Actual Innocence

This Court has "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice." Schlup, 513 U.S. at 321. It has been applied to overcome various procedural defaults, including those stemming from successive petitions, "abusive" petitions, failure to develop facts in state court, and failure to observe state procedural rules. Mc Quiggin v. Perkins, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). Also, in Mc Quiggin v. Perkins, the Court recognized it as an available equitable exception to AEDPA's time bar for first petitions, holding that actual innocence "serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or, as in this case, expiration of the statute of limitations." Id. at 386. Accordingly, a credible showing of actual innocence will allow Mr. Ridley (Tycoon) to overcome both his state court procedural default and his failure to abide by the federal statute of limitations in order to have his ineffective assistance of counsel claim heard on the merits.

"[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt." House, 547 U.S. at 537-38 (quoting Schlup, 513 U.S. at 327).

It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. Schlup, 513 U.S. at 329.

Removing the double negative, a petitioner's burden at the gateway stage is to demonstrate "that more likely than not any reasonable juror would have reasonable doubt." House, 547 U.S. at 538. As this formulation makes clear, "actual innocence" is something of a misnomer, because "the Schlup standard does not require absolute certainty about the petitioner's guilt or innocence" - that is, a petitioner need not make a case of conclusive exoneration. Id. at 538, 553; see also Schlup, 513 U.S. at 327. ("[T]he showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard.")

D. Applying the Correct Finding of Fact & Conclusions of Law

- (1). State v. Gonzales, 290 Kan. 747 [2010]: "legal conclusions and fact finding upon which discretionary decision based reviewable for abuse of discretion; district court necessarily abuses its discretion if ruling based on an 'erroneous view of the law or on a clearly erroneous assessment of the evidence.'" (Quoting: Cooter v. Hartmarx, 496 U.S. 384 [1990]).

- (12). Pullman - Standard, Div. of Pullman v. Swint, 456 U.S. 273 [1982]: "... if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. [a] "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceeding to permit the trial court to make the missing findings." [b] "[Factfinding] is the basic responsibility of district courts, rather than appellate courts; and... the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." DeMarco v. United States, 415 U.S. 449, 450, n. [1974].
- (13). Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 [1986]: LEXIS HN9 - Appeals, Standards of Review: "If a court of appeals believes that a district court's factual findings are unassailable but that the proper rule of law is misapplied to those findings, it can reverse the district court's judgment. But it should not simply make factual findings on its own."
- (14). Darr v. Burford, 339 U.S. 200 [1950]: LEXIS HN8 - Preclusion of Judgments, Res Judicata: Res judicata does not apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after the Supreme Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner.
- (15). State v. Powell, 308 Kan. 895 [2018]: "If the court based its ruling on information it was not entitled to consider as a matter of law, it abused its discretion by basing its ruling on an error of law. See Kuhn v. Sandoz Pharmaceuticals Corp., 270 Kan. 443, 456, 14 P.3d 1170 [2000] (noting questions of law presented when appellate court seeks to review the factors and considerations forming a discretionary decision; and stating "[a] district court by definition abuses its discretion when it makes an error of law"). Again, the issue is simply whether it was an abuse of discretion for the sentencing court to consider "all the information presented today" as the district court explained. "We identify no error."
- (16). Fox v. Vice, 563 U.S. 826 [2011]: "A trial court has wide discretion when, but only when, it calls the game by the right rules."

- 17). League of United Latin Am. Citizens, Council No. 4434 v. Clements, 986 F.2d 728 [1993]: "Even under the clearly erroneous standard set forth in Fed. R. Civ. P. 52(a), a district court's factual findings may be set aside if they rest on an erroneous view of the law. When a finding of fact is based on a misapprehension of governing legal standards, it loses the insulation of the clearly erroneous rule."
- 18). United States v. Price, 925 F.2d 1268 [1991]: "An appellate court reviews a district court's factual findings regarding consent under a clearly erroneous standard. However, when findings are premised on an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue."
- 19). United States v. Forness, 125 F.2d 928 [1942]: "We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are "clearly erroneous." Chief Justice Hughes once remarked, "An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country; and I care little who lays down the general principles.'" That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples [Doubts or Carefulness], which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards. It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

A Judge has Absolutely NO "Discretion" [Freedom to Choose] to Deny the Relief and the Remedy that the Facts and the Evidence Demand relief, when applied to the Law. Due Process further Protects [and Guarantees] not only THE RIGHT TO OBTAIN A FAVORABLE DECISION [so long as the Facts and Evidence in the Case Demand that the Court Must Act to Apply those Facts and Evidence to the Law which Requires the Favorable Result] but also the Right "to obtain a decision at all... ON [ALL OF] THE MERITS OF THE CASE," 469 U.S. at 395 n. 6. (See: Ross v. Vaughn, 2001 U.S. Dist. LEXIS 10175 [2001]).

fiat justitia a fortiori = Let Justice be Done from the Highest Reason!

boni iudicis est ampliare remedia lex = It is the duty of a good judge to Amplify the Remedies of the Law.

iudicis est iudicare secundum allegata et probata = It is the duty of the judge to decide in conformity with the Pleadings and the Proofs.

The Schlup Court did not precisely define what it meant by "new reliable evidence that was not presented at trial." 513 U.S. at 324. As a result, "[t]here is a circuit split about 'new' evidence required under Schlup."

Certiorari should be granted so that this Court can resolve the conflicts among the Circuits regarding 'new' evidence required under Schlup.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anthony Earl Ridley Tyson

Date: December 19, 2023