No. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

JACOB RAMIE PRATT — PETITIONER
(Your Name)

vs.

TIMOTHY FILSON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

JACOB R. PRATT #83077
(Your Name)

Penitentiary of New Mexico, P.O. box 1059
(Address)

Santa Fe, New Mexico, 87502-1059
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Where, under state law, Claims of ineffective assistance of trial Counsel have to be raised in an initial-review collateral Proceeding, would a Claim defaulted due to a time Bar prevent a federal habeas Court from hearing a substantial Claim of ineffective assistance if, in the initial-review collateral proceeding there was no Counsel?

2. Should a Petitioner have a right, under the sixth ammendment to the Constitution, to Counsel in an initial-review Collateral proceeding, befor a federal habeas Court, where, such a proceeding would Provide the first opportunity to raise an ineffective assistance of trial Counsel Claim, or a claim of actual innocence (under state law)?

3. In a Case where a petitioner is raising an actual innocence Claim to have a defalted or time barred claim heard on it's Merrit, and the claim stems from a constitutionally infirm guilty plea, is SCHLUP V. DELO, 115 S Ct 851 (1995) the correct gateway to a pro-cedurally barred claim, with it's requierment for "Newly discovered" evidence, and it's laungauge specifically Concerning cases that have been befor a Jury?

4. Can a petitioner bring a claim of actual innocence based, not on new evidence, but rather on a lack of evidence proving guilt? Specifically when appealing from a constitutionally infirm guilty plea?

5. Should the Appeals Court have remanded this Case to the District Court for an Evidentiary hearing where, there is a slim record, petitioner asked for such a hearing, no previous Evidentiary hearing has ever been held, and petitioner has raised issues over facts not on the record?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] 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:

1) Timothy Filson

2) Nevada Attorney General

TABLE OF AUTHORITIES CITED

OTHER

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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

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

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was August 4th, 2017.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25th, 2017, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______ (date) on ______ (date) in Application No. __A______.

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

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

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ______ (date) on ______ (date) in Application No. __A______.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) The Sixth Ammendment to the U.S. Constitution

2) The fourteenth Ammendment to the U.S. Constitution

STATEMENT OF THE CASE

I was accused of Robbery, attempted Murder, and first-degree Kidnapping, all arising from a May 17, 2005 incident in Washoe County, Nevada. I was 19 years old at the time. Five Months later, I entered a guilty plea to all of the charges, and was sentenced to two concecutive Life sentences in November of 2005.

I am guilty of participation in the robbery, but I deny I am guilty of attempted Murder or first-degree Kidnapping. In my federal petition for Habeas Corpus relief, I state that my guilty plea was invalid and that my trial Counsel was Constitutionally ineffective. I acknowledge that this petition was filed after the Presumtive one-year statute of Limitations had passed, but I Maintain my actual innocence, which should excuse the proceedural time bar.

A. <u>The Facts of the offense</u>

This is a Conviction resulting from a plea. So the Lower Courts' understanding of the Case is based on My Pro Se pleading, and the state Court record provided by the state in support of their Motion to dismiss. Few facts are on record, those that are tend to be contradictory. No evidentiary hearing has ever been held. The facts are as follows:

1) I participated in the robbery of a Cab driven by a Miss. Klein

2) She was robbed of Approximatelly 100 dollars, at Knife point, at the intersection of 4th and Cemetery rd.

3) After this robbery, Miss Klein was held in the back of her cab for for about one hour to facilitate moving her from the scene of the crime to down town Reno, NV.

4) After arriving down town, I got out of the cab with Miss Klein and walked her at Knife point to the river walk parallel to the river. I told her to climb down a tree that had grown up from the river bottom adjacent to the river walk. The record states both that she grabbed a branch, which broke, and fell about ten feet into the muddy river bank and that I pushed her into the tree, which then broke, and she fell into the muddy river bank. The record is not clear on this point.

5) Miss Klein was uninjured by this fall.

6) I walked away from the river walk.

7) This took place in the middle of down town Reno, Nevada.

8) The Presentece Report states that I argued against harming Miss Klein. (See pg 4-6 of the P.S.R., Appendix E)

B CASE HISTORY

I filed a timely direct appeal of my state Court Conviction, through Counsel. It contended that the record did not support the Conviction for attempted Murder. It argued that I had neither the specific intent to commit murder, nor had I committed any act which "tends to Kill", both elements required of attempted Murder under Nevada law.

The state filed a short Answering Brief noting I could not raise an actual Inocence Claim in a direct appeal and that I had no cause to Complain as I had pled guilty. The Nevada Supreme court found I pled guilty and thus "Waived all errors". (See Appendix D.)

About seven years later, I filed a pro se petition for Post Conviction relief, supported by a supplement, in the State trial Court. I claimed that my attorney had been ineffective for advising me to accept a plea, and that I only did so because of misrepresentations that I would be convicted after trial and receive an even longer sentence and that I would only actually serve 10 years under the plea deal (Tho that was never possible) I was also never advised that I wasn't actually guilty under the Statutes. I also claimed my appellate attorney was ineffective for failing to raise the effectiveness of my plea attorney on direct appeal. I further raised a free-standing claim of actual innocence with regards to both the attempted murder and first-degree Kidnapping Convictions. I acknowledged my petition was filed after the one-year time limit of Nevada Revised Statute 34.726 had run. I noted my previous lack of legal knowledge, that I had been placed in the ~~~~ "Hole" in Nevada's Maximum security prison in Ely, Nevada, with no Counsel following my direct appeal and with very little access to a law library. Primarily, however, I argued that Nevada law allowed me to be excused from procedural bars based on a showing of actual innocence, which I maintained with respect to my attempted murder and first-degree Kidnapping charges. Citing Mitchell V. State, 122 Nev 1269, 149 P.3d 33, 36 (Nev 2006) I contemporaneously filed a "Motion for the Appointment of Counsel" and a "Request for Evidentiary Hearing". I noted amongst other things, my "Severely limited ability to investigate, take depositions, expand the record or other wise litigate this action." On August 22, 2014, only eight days after the petition was filed, and with out directing a response or holding a hearing, the state district Court dismissed my petition. The Court never addressed the innocence issue. I timely appealed. In an order of affirmance dated February 4, 2015, The Court of Appeals concluded I did not show good cause or actual innocence. (Appendix E) The Nevada Supreme Court denied a petition for review.

C. The Federal Petition

On May 18, 2015, less than a month later my state proceedings concluded, I mailed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 to the district Court of Nevada. The federal petition raised four claims similar to those raised in the state petition. At the outset I acknowledged the untimely nature of the petition but stated I could demonstrate actual innocence under the standard set forth in Bousley V. United States, 523 U.S. 614 (1998). The Court entered an order noting the concession of untimely filing and my claim of actual innocence. The Court concluded it could not evaluate the claim with the documents it had in its' possession. The Court accordingly directed the Attorney General to answer or respond to the petition.

I filed a Motion for the appointment of Counsel. I noted my inability to conduct research and investigate from Ely State Prison, and contended that a lawyer could "get the cases' record, in its entirety - including the discovery - from the state Court with which to properly argue this Writ." I also argued a lawyer could investigate crucial facts involved with the petition for Writ of Habeas.

The State filed a response to this noting I had no "right" to an attorney. The State filed a Motion to dismiss raising a number of procedural objections, and also disputing the merits of my grounds for relief. The State filed portions of the state record. I filed my opposition to the Motion to dismiss, I noted I needed to have the Discovery from my case which I'd never had, and wanted to get photos of the tree and river walk in question on the record. In short I needed to expand the record beyond the States' version of events.

The District Court entered a final order finding My petition untimely, and I could not demonstrate my actual innocence of either Attempted Murder or first-degree Kidnapping under Schlup V. Delo. The Court recognized that a reasonable jurist Might find the courts' Conclusion debatable and issued a Certificate of appealability. The Court denied My Motion for appointment of Counsel. There was no hearing, no expansion of the record.

Contemporary to these proceeding, I had been trying to get the Original Discovery in my Case, ever since I stated the State petition, with little success. Finally on February 11, 2016 a Nevada Court compelled my former attorney to turn over my Discovery. Unfortunantly too late to get on the record in my federal petition. This discovery contained Miss Klein's original statements to the police and Mirror My version of events.

On appeal, the Ninth Circuit appointed Counsel to represent Me after I had already filed My "Informal Brief". Too little too late tho' as the case had to proceed on the thin record. I filed my P.S.R. to show what the Discovery I'd gotten Contained in part as the P.S.R. was loosly based on Discovery Material. The Ninth Circuit took the P.S.R. as my evidence of innocence, Which it was not. My attorney asked to have the case returned to the lower Court, with now appointed Counsel, so he Could expand the record. The Court Said I didn't have "newly Discovered" evidence of innocence as to the first-degree Kidnapping and that the P.S.R. Synopsis was just another version of events not proof of innocence. It dismissed my Appeal, and Denied a petition for rehearing (Appendix A and C). This Petition follows.

REASONS FOR GRANTING THE PETITION

1. The issue as to question one was touched on by this Court in Martinez V. RYAN, 132 S.Ct. 1309 (2012) and so the argument should be well understood. The Merits of my Constitutional Claims have not been reviewed because of a time bar. I didn't file my claim because I did not understand the rules till it was too late to file. This would never have been an issue if I had an attorney for my claims of ineffective counsel at the plea stage, and actual innocence. Nevada did not allow either claim to be raised with Constitutionally promised Counsel on Direct appeal. In Ryan this court acknowleged that an initial review collateral proceeding (IRCP), if undertaken without Counsel may not be sufficient to ensure proper consideration is given to a substantial Claim. The state of Nevada does not appoint Counsel on IRCP and this means I've never had a review of my ineffective Counsel claim. Why did I not file on time? I had no attorney. The cause for the delay, and the default in RYAN, stem from the same problem. The equitable ruling in RYAN should cover all IRCP claims of I.A. regardless of the rule the Pro Se litigant failed to follow, because the cause is the same regardless. I was 3 weeks late preparing my initial Writ. I was advised not to file as I was now time barred. I had to wait till the decision in McQuiggin V. Perkins, 133 S.Ct 1924 (2013) to file an actual-innocence claim. I never just gave up my claims. It took me some time to get the legal knowledge and education to get this far. Yet I still haven't had proper consideration of my substantial Claims. Obviously there is a difference between default and time bar, but the cause

is just the same for those filing Pro Se. (For Nevada's line of reasoning on direct appeals see Bryant v. State 721 P. 2d 364 (1986))

2. This Court has come up against the question of whether there is a right to Counsel for I.R.C.P., but it has so far avoided the question for the preceved burden it would place on the states' appeal mechanism. I would argue, however, that by making clear the right to Counsel on review for all Substantive issues - regardless the form of proceeding - the courts will take more care to do things right the first time around and stop relying on defaults and time bars to "uphold" cases. More importantly, it would assure the timely and procedurally correct filing of Claims that would be filed regardless. This would allow for the real substantive issues to be ruled on instead of all these ancillary procedural issues, and those are what have created a log jam in the system. Besides it is the states' procedural rules that stripped us of Counsel for IRCP, not some change to our Constitution. I believe its time for this Court to say yes or no

3. There seems to be a great deal of Confusion in the 9th Circuit over what Schlup v. Delo means and where it ought to apply. Schlup was applied to my case at every turn. It never should have been. It is clear that Schlup applies to cases that have been befor a Jury and already decided on the evidence. It is totally incongruent to a case like mine, a case with no jury decision and no evidence presented. It was obvious that this point - a key point - was missed by the court of appeals.

in its decision (Appendix A) when it argued over "new evidence" or "Newly Discovered Evidence." This is a totally irrelivant question, and shows the courts confusion. In a guilty plea no evidence has been presented to a Jury. Schlup assumes a Jury has ruled on the evidence and found one guilty. In Bousley v. United States, 523 U.S. 614 (1998) this Court layed out a different standard for actual-innocence in the plea context: not "new" evidence but "all availible" evidence. Schlup assumes that you have been found guilty in an error free trial and so what evidence do you have to sway a jury of innocence? How is this similar to this case? an erronious guilty plea. It's not even determined that there is evidence of guilt to begin with. This ties it in with the next question. Because in the guilty plea context an argument that there is not enough evidence to convict on is an actual-innocence claim, not just a "legal argument." I don't need to show new evidence where there isn't evidence of guilt to start with. In my case the appeals Court didn't rule on the question of whether the facts prove a first-degree kidnapping or if the second prong of the Attempted Murder Statute - an act that tends to be fatal - was satisfied because I didn't have "new" evidence only argued that I was innocent based on existing evidence. That arguement was good under Bousley, (but not Schlup?) and that is the crux of the argument. This court in Schlup was unwilling to second guess a Jury's decision and so requiered evidence "excluded from the trial or then unavailible." In a guilty plea case, all the evidence is new evidence, as there was no trial. More over in Schlup having been found guilty by a Jury there was a strong presumption of guilt, in this case I claimed I was innocent even as I entered a guilty plea. I claim my guilty plea was made unknowingly. How is the presumption of guilt on par with a jurys' finding? These questions need to be Answered.

4. The Way Schlup v. Delo and Bousley v. United States read it seems clear that an argument of insufficient evidence is an actual-innocence claim and yet the 9th Circuit seems to feel it is just a "legal argument" (Appendix A). In this Case two of my Charges - one I'm serving two life sentences on - are not supported by the evidence. For the Attempted Murder Nevada law requiers two Elements 1: Actual intent to Kill 2: an act which tends to Kill but did not: KEYS V. NEVADA, 766 P.2d 270 (1988). The first element will be discussed below, but as to the second Element, an act which tends to Kill, the record Contains evidence of no such act. if miss Klein was pushed and fell between 8-10 feet into mud on the rivers edge, and she suffered no injuries ... how is this an act that tends to Kill? (However the record suggests Miss Klein was not pushed but fell when a branch broke) (Appendix F) The Court never considered whether the record supported the "act which tends to Kill" element because I didn't produce "new" evidence, Just a legal argument. The same is true of the first-degree Kidnapping. The facts support a second-degree charge, but not first degree. However since I rely on insufficiency of existing evidence and not some new evidence the 9th Circuit Considered this not an actual-innocence claim but a legal Argument.

Both Bousley and schlup allow for legal insufficiency arguments under actual-innocence claims but the 9th Circuit seems just as confused over this issue as it is over actual-innocence in the context of a guilty plea. This Court should clarify this issue for the lower Courts.

5. This Case should have been remanded for an Evidentiary hearing. This is my first and only Habeas petition on a case with out even the benifit of a preliminary hearing. The Habeas Corpus is suppost to be a fact intensive process. As there was no trial in this Case the record is particularly thin. More over the facts I needed to support my Claim are in the Discovery and that was never on the record. I did not ever have access to my own discovery till after the district Court made its determination. In fact I added the P.S.R. (Appendix E) to the informal Brief befor the Appeals Court, not as new evidence - or even as evidence at all - but to show that the discovery - which the P.S.R. was in part based on - supplied a nerrative that was different from the states and actually the same as mine. It also shows Miss Klein changed her story from the night of the robbery. This would have been used to impeach her later statements. Most importantly the discovery materials cast doubt - serious doubt - on any specific intent to kill, and show Miss Klein had fallen, not from a push, but an accident. The discovery is also devoid of evidence for a first-degree Kidnapping - as is the record. I needed counsel in the district Court to enlarge the record.

However the district court didnot appoint counsel. The 9th Circuit did, but it was too late at that point to do any good. Counsel saught a remand solely to expand the record. The 9th Circuit declined to do so. This case could not be propedy presented with out expanding the record. The Courts have relied on the State Attorney Generals' statement of "fact" and State Court record - esentially just the charging information - to determin this case. The record is too thin for that. There seems to be some confusion among the Circuits over when a remand to expand the record is necessary. Even tho' the 9th Circuit has cases like Jones V. Wood, 114 F.3d 1002 (9th cir 1997) it applies them sporadically. - If the habeas corpus is a fact intensive review, and there are few facts on the existing record, how can the District court even make a well reasoned decision? Especially where the facts that support the claim are outside of the record? I was pro se and in the High Risk Potential program at a Maximum security Nevada prison. I had no way, on my own, to get the discovery material on the record. There aren't even pictures of the location of the crime, yet the court just accepts the states discription of Miss Klein being "thrown of a bridge", but there wasn't even a bridge! The court could not make a just determination of this case with out an expanded record. With out facts on the record. In a case like this, with little to no record stemming from a guilty plea, it should have been remanded to expand the record with then appointed counsel. Other wise what was the point of counsel?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jacob R. Pratt

Date: November 6th, 2017