

No. 17--

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY LESTER JACKSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, pro se

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QUESTIONS PRESENTED

I. Does the court of appeal decision to deny a COA, impose an improper standard that contravenes, Buck v. Davis and Slack v. McDaniel, where a threshold inquiry into petitioners claims reveal that the underlying issues are debatable?

PARTIES TO THE PROCEEDINGS

Petitioner, Jerry Lester Jackson, was the Petitioner, Pro se in the United States district court for the Eastern district of Texas, Sherman Division civil No. 4:15-cv-161 and petitioner in the appeal court for the fifth circuit in 15-41037.

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OPINION BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner a Certificate of Appealability is hereto attached at Appendix A.

The Order of the Fifth Circuit Court of Appeals denying Petitioner's Reconsideration is also attached at Appendix A.

STATEMENT OF JURISDICTION

Petitioner timely filed a COA to appeal the District Court's decision on _____.

The Fifth Circuit ordered its denial of COA on August 2, 2017. A timely Petition for Reconsideration was filed on _____ and Rehearing En banc on October 19, 2017. The instant Petition is timely pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Under the Due Process clause of the Fifth Amendment, every person is guaranteed a right to a fair trial. See *In re Murchinson*, 396 U.S. 133 (1955).

The Due Process clause of the Fifth Amendment also requires the government to prove beyond a reasonable doubt every element of the crime with which the defendant was charged. See *In re Winship*, 397 U.S. 398 (1970).

The Fifth Amendment requires the accused to be tried only for the offense charged in the indictment. See *Stirone v. United States*, 361 U.S. 212 (1970).

Under the Sixth Amendment, a person is required to a fair and

impartial trial, *Skilling v. United States*, 561 U.S. 358 (2010).

Under the Sixth Amendment, the accused is entitled to effective assistance of counsel at all stages of a criminal proceeding. See *Strickland v. Washington*, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

On August 13, 2009, a Federal Grand Jury in the Eastern District of Texas returned a one-count indictment against Petitioner ("Jackson"), Benito Figueroa, and Edison Frank Curtis charging them with conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 846. The indictment alleged that the conspiracy took place "from sometime in or about February, 2008, and continuously thereafter up to and including August 13, 2009." The indictment also alleged that Jackson, Figueroa, and Curtis "did knowingly and intentionally combine, conspire, and agree with each other, and with other persons known and unknown to the United States Grand Jury...."

Jackson exercised his constitutional right, pleaded not guilty, and put

the government to its burden. His trial began on September 23, 2010, and after presenting testimony from 11 different witnesses (six of whom were Jackson's alleged co-conspirators) the government rested its case. Jackson timely moved for, and the district court denied, a judgment of acquittal. On September 27, 2010, the jury found Jackson guilty as alleged in the indictment and held him responsible for distributing 5 kilograms or more of cocaine.

Proceeding Pro se, Jackson raised the following issues in his petition for COA before the Fifth Circuit court of appeals:

- (1)The district court erred in dismissing his claims on procedural grounds despite his actual innocence
- (2)The indictment was defective
- (3)Ineffective assistance of counsel
- (4)The district court failed to address his claims on Due process grounds.
- (5)Cumulative errors violated hi constitutional rights.

After brief in Support of COA, a single Judge (Catharina Haynes) and a three panel of the fifth circuit denied COA, August 2, 2017, for Rehearing En banc still pending. the instant petition is timely. See Rule 13.1, Supreme Court Rules.

Summary Of The Arguments

I. Petitioner submits that a threshold inquiry into his claims clearly reveals that reasonable jurist would find debatable whether he stated a valid claim of the denial of a constitutional right, and that reasonable

jurist would find it debatable whether the court was correct in its procedural ruling and thus a COA should have issued his claims reviewed as to call for an exercise of this court's supervisory power.

ARGUMENT

I. DOES THE COURT OF APPEAL'S DECISION TO DENY PETITIONER A CERTIFICATE OF APPEALABILITY TO PURSUE HIS CLAIMS ON APPEAL IMPOSE AN IMPROPER STANDARD THAT CONTRAVENES SLACK V. MCDANIEL, WHERE A THRESHOLD INQUIRY INTO HIS CLAIMS REVEALS THE DEBATABILITY OF THE ISSUES?

In order to obtain a Certificate of Appealability ("COA"), the applicant must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" is a demonstration "that reasonable jurists could disagree with the district court's resolution of the applicant's constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cokerell*, 537 U.S. 322, 327 (2003). When the district court denies relief based on procedural grounds, a COA should issue when the movant shows that jurists of reason would find debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When "reviewing a request for a COA, the Court is only required to conduct a threshold inquiry into the merits of the claims the petitioner raises in his petition." *Reed v. Stephens*, 739 F.3d 753, 764 (5th Cir. 2014) (citing *Miller-El v. Cokerell*, 537 U.S. 322 at 336).

The threshold inquiry is not a full consideration of the factual or legal bases adduced in support of the claims, "but rather an overview of the claims in the habeas petition and a

general assessment of their merits. See *Buck v. Davis*, _____ S.Ct., _____, 1976, Ed.2d 1, 2017.

In general assessing the claims for relief in a application, the question is the debatability of the underlying claim not the resolution of the debate. *Id.*

At issue here is whether the court in reviewing Petitioner's request for COA did so under a limited threshold inquiry and general assessment of the merits of his case as interpreted by the Supreme Court. *Buck v. Davis*, 137 S.Ct. 759; *Slack v. McDaniel* 529 U.S. 473 (2000).

A. THE FIFTH CIRCUIT'S ASSESSMENT OF PETITIONER'S PROCEDURAL ARGUMENTS WAS CRITICALLY FLAWED BASED ON A LIMITED THRESHOLD INQUIRY ANALYSIS.

Under the miscarriage of justice exception, actual innocence, if proved, serves as a gateway which a § 2255 petitioner may pass when a claim is otherwise procedurally barred. *McQuiggin v. Perkins*, 135 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013).

A miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. See *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

In order to establish a fundamental miscarriage of justice based on an actual innocence, a petitioner must support allegations of constitutional error with new reliable evidence not presented at trial and that establishes that "it is more likely than not that no reasonable juror would have convicted him in light of new evidence. See *Schlup v. Delo*, 513 U.S. 298, 322, 324 (1995).

An actual innocence claim may overcome a procedural bar for either failing to raise an issue on direct review or allow re-litigation of a claim that was raised and rejected on direct review. See *Withrow v. Williams*, 507 U.S. 680, 720-21 (1993).

1. THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND SIXTH AMENDMENT BY ADMITTING INTO EVIDENCE TESTIMONY REGARDING THE GUILTY PLEAS AND CONVICTIONS OF CO-CONSPIRATORS WHICH WAS EXTREMELY PREJUDICIAL.

The Fifth Amendment guarantees criminal defendants the right to a fair trial and the denial of a fair trial violates due process. In *Re Murchinson*, 349 U.S. 133, 136 (1955) (a fair trial in a fair tribunal is a basic requirement of due process, fairness requires an absence of prejudice). The Sixth Amendment guarantees criminal defendants the right to a fair trial by an impartial jury and failure to do so violates due process. See *Skilling v. United States*, 561 U.S. 358, 377 (2010).

- a. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED.

In this case the admission into evidence of testimony regarding the guilty pleas and convictions of co-conspirators who had participated and pled guilty to the very conspiracy in which Petitioner stood trial and which implicated him, was extremely prejudicial as to constitute a violation of Petitioner's due process rights to a fair trial under the Fifth and Sixth Amendments. Trial Tr. 274-489. See *In Re Murchinson* at 136 (a fair trial in a fair tribune is a basic requirement of due process and that fairness requires an absence of prejudice in the trial). *United States v. Harrell*, 436 F.2d 606, 614 (5th Cir. 1970) (finding that the defendant's right to a fair trial was engendered by proof of a co-conspirator's guilty plea); *United States v. Fleetwood*, 528 kF.2d 528 (5th Cir. 1976) (finding that statements

elicited from witnesses who had pled guilty to the same charge prejudiced defendant's trial rights); *Bisaccia v. Atty. Gen. of N.J.*, 623 F.2d 307, 311 (3rd. Cir. 1980) (citing justice Pushman's dissent of New Jersey Supreme Court (reasoning that it is patently unfair to subject a defendant to criminal sanctions merely because his alleged co-conspirators elected not to stand trial)).

Furthermore, testimony as to the guilty pleas and convictions of the witnesses, although relevant, should not have been allowed into the trial because its relevance was far outweighed by its potential prejudicial impact upon the jurors' deliberations by allowing them to unfairly and prejudicially infer that if the witnesses had pled guilty to the conspiracy, then there must have been a conspiracy and that Petitioner must also be guilty. See *Grunewald v. United States*, 353 U.S. 391, 420 (1957) (when the probative value of the evidence is outweighed by the prejudice to the accused, the use of such evidence violates due process); *Krulewitch v. United States*, 336 U.S. 440, 454 (1940) (a conspiracy by definition contemplates two or more culpable parties, courts must be especially vigilant to ensure that defendants are not convicted on the theory that guilty birds of a feather flocked together); *Fleetwood Supra* at 533 (while information as to the guilty pleas might be logically relevant in fairness to the accused it should have been excluded); *United States v. Toner*, 173 F.2d, 140, 142 (1949) (cited by *Fleetwood* at FN 10 (from a common sense point of view a guilty plea of an alleged co-conspirator is highly relevant upon the question of the guilt of another alleged conspirator...but this is one of those

cases where it should be excluded)). Although the trial court in this case gave a curative instruction. Such instruction was inadequate to cure the prejudice caused by the co-conspirators' testimony due to the presence of aggravated circumstances. See United States v. Baete, 414 F.2d 782, 783-84 (5th Cir. 1969) (recognizing that there may be an aggravated circumstance, in which the strongest corrective instruction would be insufficient, such as when the co-defendants implicates others).

b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER SATISFIED THE MISCARRIAGE OF JUSTICE EXCEPTION REGARDING HIS FAIR TRIAL CLAIM.

Petitioner contends that although he may have raised this issue on direct review, failure to review this procedurally barred claim would result in a fundamental miscarriage of justice based on his actual innocence. Particularly so where the improper admission of prejudicial testimony regarding the guilty pleas and convictions of others caused him to be convicted of a crime in which he was innocent. See Murray Supra at 496 (a miscarriage of justice occurs when a constitutional violation probably resulted in the conviction of one who is actually innocent). In support of his claim that a constitutional error caused him to be convicted of a crime in which he is innocent, Petitioner offers new facts, such as evidence of the trial court's improper admission of prejudicial testimony regarding the guilty pleas and convictions of co-conspirators which caused the jury to improperly consider evidence of the guilty pleas and convictions of others as proof of an agreement between two or more persons and as proof of the

participation of others during its deliberations, caused a violation of Petitioner's right to a fair trial. See *Smith v. Phillips*, 455 U.S. 209, 220 (1982) (due process requires a trial judge ever watchful to prevent prejudicial occurrences and to determine when they happen); *United States v. Corona*, 551 F.2d 1386, 1391 U.S. (5th Cir. 1977) (emphasizing the trial court's obligation in the interest of fairness and justice to act "sua sponte" to avert such prejudice). As such, this argument places this procedurally barred claim within the purview of the new evidence requirement under *Schlup v. Delo*, 523 at 324 (new evidence in the context of *Schlup* does not mean "newly discovered", it just means evidence that was not presented at trial).

As adduced from the record of trial, there was an utter absence of other evidence presented at trial in which the jury could have considered in finding all the elements necessary to convict Petitioner of the conspiracy charge, therefore had the erroneous testimony been excluded, Petitioner would have been acquitted as a finding of all the elements would not have been possible. Consequently, the guilty pleas and convictions of others was the sole and strongest evidence in which the jury had to rely upon in finding Petitioner guilty during its deliberations, no reasonable juror would have diminished the value of such testimony and found Petitioner guilty beyond a reasonable doubt. *Id.* at 327.

2. USE OF THE GUILTY PLEAS AND CONVICTIONS TO PROVE INCRIMINATING FACTS VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO

CONFRONTATION.

Under the Sixth Amendment, the accused has the right to confront his accusers. See Kirby v. United States, 174 U.S. 47, 58 (1899).

- a. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S CONSTITUTIONAL SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED.

In this case, Petition contends that his Sixth Amendment right to confrontation was violated when the government, during direct examination, elicited testimony regarding the guilty pleas and convictions of alleged co-conspirators as evidence of Petitioner's guilty with regards to their plea hearings proceedings in which neither Petitioner nor his counsel were privileged to attend. See Trial Tr. at 274-489. See Kirby at 58 (observing that it is an element principle that no man shall be affected by another's acts or admissions to which he is a stranger).

- b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER HAS SATISFIED THE MISCARRIAGE OF JUSTICE EXCEPTION REGARDING HIS CONFRONTATION CLAIM.

In this case, failure to review Petitioner's procedurally barred confrontation claim would result in a fundamental miscarriage of justice whereas the violation of his constitutional rights in regards to the use of the guilty pleas and convictions of others caused him to be convicted of a crime of which he was actually innocent. See Murray Supra at 496.

In regards to the new evidence requirement as contemplated in Schlup v. Delo, Petitioner offers new facts, such as evidence that

the trial judge improperly allowed the guilty pleas and convictions of others to be used to prove facts incriminating to him and which allowed the jury to consider evidence of the guilt and convictions of others as proof of his his own guilt during its deliberations. Therefore, this procedurally barred claim falls within the purview of Schlup's requirement that Petitioner support his constitutional claim with new evidence that was not presented at trial. Id. at 324.

Furthermore, as revealed by the trial record, no other evidence was presented at trial in which it could be said that the jury considered in finding all the elements necessary to convict beyond a reasonable doubt. Consequently, the jury relied on evidence of the guilty pleas and convictions of others in its decision to find Petitioner guilty such evidence was the sole and strongest evidence in which the jury had before it during its deliberations that even remotely suggest the existence of an agreement between two or more persons or circumstantial evidence of the participation of others. Therefore, had the guilty please and convictions of other persons not been allowed into the trial, Petitioner would have been acquitted as a finding of all the elements would not have been possible and thus no reasonable jurist would have found him guilty beyond a reasonable doubt. Schlup at 324. The admission of co-conspirators' testimony regarding their guilty pleas and convictions was error of constitutional magnitude.

3. PROOF OF AN OFFENSE NOT CONTAINED IN THE INDICTMENT VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO BE TRIED ONLY FOR THE

OFFENSE CHARGED IN THE INDICTMENT.

Under the Fifth Amendment Grand Jury Clause, the accused has a constitutional right to be tried for only those offenses charged in the indictment in which he was charged. See *Stirone v. United States*, 361 U.S. 212, 217-18 (1960).

- a. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO BE TRIED FOR ONLY THE OFFENSE CHARGED IN THE INDICTMENT WAS VIOLATED.

Here Petitioner contends that he was denied his Fifth Amendment right to be tried only for the offense charged in the indictment in which he was charged (4:09-CR-136), when the government, during trial presented evidence of the offenses charged in two separated conspiracy indictments; namely the events that led to the offense charged in Count 1 of the Alvarez indictment (6:08-CR-011) regarding the February 1, 2008 events. See Gov. Exhibits 13 and 13a and the events which led to the offense charged in Count 1 of the Johnson indictment (4:08-CR-118), with regards to the May 27, 2008 events. See Gov. Exhibit 14 and 14a. Significantly, in regards to the offense charged in Count 1 of the instant indictment (4:09-CR-136), there was no proof presented that even remotely suggest the existence of the offense charged.

- b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER SATISFIED THE MISCARRIAGE OF JUSTICE EXCEPTION REGARDING HIS GRAND JURY CLAUSE CLAIM.

Failure to review this procedurally barred claim would result in a fundamental miscarriage of justice in that a violation of

Petitioner's right to be tried for only the offense alleged in the indictment clearly caused Petitioner to be convicted of a crime in which he was actually innocent. Particularly so in that proof of the offense charged in two separate indictments was also used during Petitioner's trial to serve as proof of the offense charged in the indictment in which he was on trial for.

As it relates to the new evidence standard put forth in *Schlup v. Delo*, Petitioner offers new facts, such as evidence that the trial judge improperly allowed evidence of other offenses not alleged in Petitioner's indictment to be used at trial as proof of the charged offense which in turn caused him to be tried and convicted of offenses not alleged in the indictment at issue, which places this procedurally barred claim within the realm of *Schlup*'s new evidence requirement that was not presented at trial. *Id.* 322, 324. In addition, there was no other evidence presented in the trial record from which the jury could have considered in finding all the elements necessary to convict. "But for" the trial judge's failure to exclude evidence of the other offenses Petitioner would have been acquitted. Moreover, proof of other offenses was the only and most influential factor in the jury's deliberations as proof of an agreement between two or more persons without it no reasonable jurist would have found Petitioner guilty beyond a reasonable doubt. See *Schlup* at 324.

4. LACK OF SUFFICIENT EVIDENCE PRESENTED AT TRIAL VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS.

Under the Fifth Amendment Due Process clause, the government

is required to prove beyond a reasonable doubt every element of the crime with which the defendant was charged. See *In re Winship*, 397 U.S. 358, 364 (1970).

a. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED.

In this case the trial court violated Petitioner's due process right by not holding the government to its burden of proving each and every element beyond a reasonable doubt. More specifically, there was an utter absence of proof presented at trial that showed that two or more persons had reached an agreement to commit the offense charged in Count 1 of the indictment in which Petitioner was charged (4:09-CR-136), nor was there any evidence presented that showed Petitioner's knowledge of or participation in such conspiracy.

The indictment in this case charged Jackson, Figueroa and Curtis along with others known and unknown in a single count with conspiracy to possess cocaine with the intent to distribute it (4:09-CR-136). However, the evidence presented at trial failed to provide proof of a planned or actual drug transaction from proof beyond a reasonable doubt of an agreement between two or more persons to commit the unlawful act of possession of cocaine with the intent to distribute it could be shown with regards to the specific Count (Count 1) charged in the underlying indictment.

As adduced from the record of trial, the only evidence in which the jury and the trial court had to consider as proof of an agreement came from the testimony of co-conspirators with regards to their guilty pleas and convictions, whereas each in response to

government questioning of them in regards to their guilt implicated Petitioner by alleging to have had prior drug dealings with him. Neither, however, testified to any specific agreements, meeting or activities concerning the specific count charged in the underlying indictment. Proof of past drug dealings cannot be used as proof of an agreement between two or more persons to possess cocaine with intent to distribute for the instant case. See *United States v. Fernandez*, 797 F.2d 943, 947-49 (11th Cir. 1986).

Except for what might be inferred from the evidence of the transactions presented at trial which formed the basis of two separate conspiracy indictments, one being the Alvarez indictment (6:08-CR-011) regarding the February 1, 2008 events (Gov. Exhibit 13 and 13a), and the other being the Johnson indictment (4:08-CR-118), regarding the May 27, 2008 events. There is literally no evidence in the record showing a plan or scheme to possess cocaine with intent to distribute it, much less evidence showing proof beyond a reasonable doubt an agreement between two or more persons agreed to commit the unlawful act charged in the indictment at issue. Even in considering the erroneous testimony it should be noted that such testimony merely referred to the purported past dealings between the witnesses and Petitioner which had absolutely nothing to do with the case at hand. Significantly, what the evidence at trial did prove was that two or more persons had agreed to commit each of the offenses charged in the two separate conspiracy indictments mentioned above but failed dramatically to establish that two or more persons reached an agreement or came to a mutual understanding to commit the offense alleged in Count 1 of

the indictment at issue. Particularly so in that showing proof that two or more persons had agreed to commit the conspiracies charged in the two separate indictments cannot serve as proof to show that two or more persons had agreed to commit the offense charged in the instant indictment. See *United States v. Olivares*, 786 F.2d 659, 664 (5th Cir. 1986) (for each conspiracy conviction the government seeks it must prove a separate agreement).

- b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER SATISFIED THE MISCARRIAGE OF JUSTICE EXCEPTION REGARDING HIS LACK OF SUFFICIENT EVIDENCE CLAIM.

Failure to review this procedurally barred claim would result in a fundamental miscarriage of justice because the Court's failure to hold the government to its burden of proof of proving each and every element beyond a reasonable doubt caused Petitioner to be convicted of a crime in which he was actually innocent where there was an utter absence of proof that two or more persons had reached an agreement to commit the offense charged in Count 1 of the indictment at issue.

As for the new evidence requirement as contemplated in *Schlup* Petitioner offers new facts, such as evidence that the trial judge improperly found that the government had proved each and every element beyond a reasonable doubt based on the sole testimony of government witnesses who merely testified that they had past dealings with Petitioner (Trial Tr. at 274-489).

Furthermore, evidence regarding the witnesses alleged past dealings was the sole and strongest evidence in which the trier of facts had to consider during its deliberations or the trial judge

in denying Petitioner's motion for acquittal as there was an utter absence of proof either circumstantial or direct demonstrating the existence of an agreement between two or more persons as it relates to the offense charged in Court 1 of the instant indictment. "But for" the trial judge's improperly ruling allowing evidence of past events to serve as sufficient proof to show a conspiracy for the instant case Petitioner would have been acquitted and thus no reasonable juror would have voted to find him guilty beyond a reasonable doubt as a finding of all the necessary elements would not have been possible (Id. at 324).

5. PROSECUTOR'S MISCONDUCT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL.

Under the Fifth Amendment, the accused has the right to a fair trial.

Prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. Dechristoforo*, 416 U.S. 637, 643 (1974) (recognizing that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process).

The government representative may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935).

a. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE

PROSECUTOR'S MISCONDUCT.

The prosecutors in this case struck a foul blow which compromised Petitioner's fair trial rights when it elicited highly prejudicial testimony through the repetitive and cumulative questioning of his witnesses as to the determination of their guilt and convictions. Trial Tr. 274-489), then recalling the prejudicial testimony during closing arguments. See Trial Tr. at 606-615-625-635. See Fleetwood Supra at 535 (the repeated, methodical and unnecessary questioning of witnesses as to the determination of their guilt overreached proper bounds and elicited improper testimony from the witnesses); Miranda Supra at 593-94 (it is impermissible for a prosecutor to suggest to a jury that the conviction of a testifying co-conspirator is evidence that a defendant on trial is guilty). It is well settled that the guilty pleas and convictions are not admissible to demonstrate the guilt of the defendant yet to be convicted. See United States v. King, 505 F.2d 602, 608 (5th Cir. 1974).

Furthermore, Petitioner was denied his rights to due process of law and a fair and impartial trial when the prosecutor elicited prejudicial testimony from its witnesses while emphasizing and repeatedly questioning them as to the bolstering aspect of their plea agreements with regards to the conditions placed upon them to give truthful testimony and thus urging the jury to base its decision on the illegitimate bases of what happened in criminal prosecutions against others.

- b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER SATISFIED THE MISCARRIAGE OF JUSTICE EXCEPTION IN REGARDS TO HIS

PROSECUTOR MISCONDUCT CLAIM.

Here, failure to review Petitioner's procedurally barred prosecutor's misconduct claim would result in a miscarriage of justice whereas the violation of Petitioner's constitutional right to a fair trial regarding the prosecutors misconduct caused him to be convicted of a crime in which he was actually innocent. Murray Supra at 496.

As to new evidence requirement, Petitioner points to new facts, such as evidence that the government improperly elicited highly prejudicial testimony regarding the guilty pleas and convictions of co-conspirators as evidence of his guilt and which places this procedurally barred claim within the purview of Schlup's newly presented evidence requirement. Id. at 324.

As to new evidence requirement, Petitioner points to new facts, such as evidence that the government improperly elicited highly prejudicial testimony regarding the guilty pleas and convictions of co-conspirators as evidence of his guilt and which places this procedurally barred claim within the purview of Schlup's newly presented evidence requirement. Id. at 324.

Additional, the record is void of other evidence that was presented at trial in which the jury could have considered in finding all the elements necessary to convict. Therefore, evidence considered as a result of the government's improper elicitation of prejudicial testimony was the sole and strongest evidence before the jury during its deliberations from which it could have gotten a guilty verdict. "But for" the government's error Petitioner would have been acquitted as a finding of all the

necessary elements would not have been possible and thus no reasonable jurist would have found him guilty beyond a reasonable doubt. Id. 327.

6. THE DEFECTIVENESS OF THE INDICTMENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENT.

The Fifth Amendment provides that no person shall be held to answer to a capital or infamous crime unless on a presentment of an indictment of a Grand Jury... nor be deprived of life, liberty without due process.

The Sixth Amendment provides that in al criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation.

a. REASONABLE JURISTS COULD DEBATE WHETHER THE DEFECTIVENESS OF THE INDICTMENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Although the indictment at issue set out the essential elements of the conspiracy charge, the indictment was drafted in vague terms and failed to contain even the minimum factual allegations required to fulfill the purpose intended under the Sixth Amendment. See Hamling v. United States, 418 U.S. 87, 117-18 (1974). Furthermore, the vagueness of the indictment along with the lack of specificity as to the nature of the charge allowed the government to roam at will to the prejudice of Petitioner. See indictment (4:09-CR-136); Russell v. United States, 369 U.S. 749, 668 (1962).

b. REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER'S DEFECTIVE

INDICTMENT CLAIM SATISFIED THE MISCARRIAGE OF JUSTICE
EXCEPTION.

Failure to review Petitioner's defective indictment claim would result in a miscarriage of justice as the defectiveness of the indictment caused Petitioner to be convicted of a crime in which he was actually innocent.

The new evidence of which Petitioner relies upon in support of this procedurally barred claim consists of new facts such as evidence that the government interposed alternate conspiracy theories at trial to conform with the evolution of the evidence at trial. See Schlup at 322, 324.

Furthermore, given the fact that there was a lack of other evidence proving the existence of the charged conspiracy the shifting of theories provided the sole and strongest evidence for the jury to consider in finding all the elements needed to convict. "But for" the defective indictment allowing the government to shift its theory a finding of all the elements would not have been possible and thus Petitioner would have been acquitted as no reasonable juror would have found him guilty beyond a reasonable doubt. Id. at 327.

B. TRIAL COUNSEL'S ERRORS AT TRIAL VIOLATED PETITIONER'S SIXTH
AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

As an initial matter, Petitioner points out that the ineffective assistance of cone claims were not dismissed on procedural grounds and therefore, the only question is whether reasonable jurist could debate whether his constitutional rights to effective assistance of counsel was compromised.

Under the Sixth Amendment, the accused is entitled to

accused is entitled to effective assistance of counsel at all stages of a criminal proceeding. See *Strickland v. Washington*, 466f U.S. 668 (1984). To satisfy *Strickland* based on ineffective assistance, a defendant must make two showings: (1) Counsel rendered deficient performance; and (2) his counsel's action resulted in prejudice.

1. REASONABLE JURISTS COULD DEBATE WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL TESTIMONY AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

AT trial, the prosecution elicited testimony regarding the guilty pleas and convictions of co-conspirators who had participated and pled guilty to the very conspiracy in which Petitioner stood trial. Trial Tr. 274-489. Additionally, during their admission of guilt, each of the witnesses implicated Petitioner. *Id.*

Therefore as a result of trial counsel's failure to object to the introduction of such highly prejudicial testimony as erroneously allowed based on its relevance being far outweighed by its potential prejudicial impact upon the jurors' deliberations, Petitioner was denied constitution.

2. REASONABLE JURISTS COULD DEBATE WHETHER COUNSEL'S FAILURE TO OBJECT TO A VIOLATION OF THE GRAND JURY CLAUSE VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT.

Under the Fifth Amendment Grand Jury Clause, a defendant is guaranteed the right to be tried for only those offenses presented in an indictment by a Grand Jury. See *Stirone v. United States*, 361 U.S. 212, 217-18 (1960).

During trial, the Prosecution offered proof that showed an

agreement between two or more persons to commit the offenses charged in two separate conspiracy indictments, one being the Alvarez indictment (6:08-CR-011) regarding the February 1, 2008 events. See Gov. Exhibits 13-13a. The other being the Johnson indictment (4:08-CR-118) regarding the May 27, 2008 events. See Gov. Exhibits 14-14a, neither of which however, were described in the indictment at issue (4:08-CR-136), thereby causing the trial evidence to amend the indictment by broadening the possible basis of the charges alleged in the indictment in which Petitioner was charged (see Stirone at 217-18).

A competent counsel would have objected to evidence of other offenses not alleged in the indictment being used at trial against his client. Furthermore, there was no strategic justification for counsel's failure to raise this meritorious constitutional argument to establish his client's innocence. But for counsel's unprofessional errors, Petitioner would have been acquitted, particularly so in that the Court's admission of this evidence might have been the basis upon which the jury convicted his client.

3. REASONABLE JURISTS COULD DEBATE WHETHER TRIAL COUNSEL'S FAILURE TO REQUEST AND ACQUITTAL BASED ON THE LACK OF SUFFICIENT EVIDENCE OF AN AGREEMENT VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT.

Trial counsel's failure to request a judgment of acquittal based on a lack of sufficient evidence regarding the proof of an agreement between two or more persons to commit the offense

charged in Count 1 of the indictment in which Petitioner was charged was deficient as it was clear from the evidence adduced at the trial that there was a total lack of proof demonstrating an agreement as proof of the offense alleged in Count 1 of the underlying indictment. Accordingly, rather than offer proof of an agreement for the offense in the instant indictment, proof of the February 1, 2008 and May 27, 2008 drug transactions which was presented at trial that was merely proof of the conspiracies charged in two separate conspiracy indictments (6:08-CR-011 and 4:08-CR-118) which were unrelated to the indictment at issue. A competent counsel would have requested an acquittal for his clients based on the lack of proof of an agreement between two or more persons as proof demonstrating that the charged conspiracy never existed or was formed in the first place. But for counsel's unprofessional error of failing to request an acquittal based on the lack of evidence of an agreement Petitioner would have been acquitted as there was no other proof of an agreement upon which the trier of fact could have found guilt.

4. REASONABLE JURISTS COULD DEBATE WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORS' MISCONDUCT VIOLATED PETITIONER'S SIXTH AMENDMENT.

The prosecutors in this case struck a foul blow which compromised Petitioner's fair trial rights by eliciting highly prejudicial testimony through the repetitive and cumulative questioning of co-conspirators with regard to their guilty pleas and convictions (Trial Tr. 274-489), and again by recalling this prejudicial testimony during closing arguments (Trial Tr. at 606-

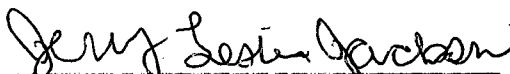
615, 625-635). See Fleetwood Supra at 535 (the repeated, methodical and unnecessary questioning of witnesses as to the determination of their guilt overreached proper bounds and elicited improper testimony from the witnesses). Furthermore, Petitioner's right to due process of law and a fair and impartial trial was violated when the prosecutors bolstered the credibility of the witnesses by eliciting prejudicial testimony from them when emphasizing and repeatedly questioning them as to the bolstering aspect of their plea agreements with regard to the conditions placed upon them to give truthful testimony. Trial Tr. 274-489.

Trial counsel's failure to object to the prosecutors' use of highly prejudicial testimony regarding the guilty plea and convictions of others during trial and then recalling the prejudicial testimony during closing argument was deficient and thus any competent counsel would have objected to the prosecutors' errors on the basis of the denial of a fair trial given the prejudicial nature of such testimony. But for counsel's error of failing to object, Petitioner would have been acquitted, given that the testimony was the sole and strongest evidence in which the jury had before it in determining Petitioner's guilt.

CONCLUSION

For the reasons stated above, this court should grant the petition to provide clear and indisputable guidance for the lower courts on important matters that affect all criminal defendants in the Federal system. Alternatively, Grant, Vacate, and Remand to the Fifth Circuit Court of Appeals.

Respectfully Submitted,

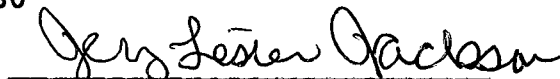


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PROOF OF SERVICE

I, Jerry Lester Jackson, do hereby declare that on this 18th day of January, 2018, as required by Supreme Court Rule 29, have served a true copy of the enclosed Petition for Writ of Certiorari on each party to the above styled proceeding or that party's counsel by depositing same in the United States mail with postage prepaid and affixed there on to:

The Solicitor General of the United States of America,
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530



Jerry Lester Jackson
Petitioner, Pro Se