

No. 17-9504

IN THE
Supreme Court of the United States

LANCEY D. RAY,

Petitioner,

V.

TRACY MCCOLLUM, WARDEN¹

Respondent.

PETITION FOR REHEARING

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

LANCEY D. RAY
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Pro se Litigant

¹ Jimmy Martin is warden of the North Fork Correctional Center in Sayre, Oklahoma where the petitioner is confined.

Comes now, Lancey Darnell Ray, *Pro se* litigant bringing his petition to rehear case no. 17-9504 and hereby invokes *Haines v. Kerner*,² where the Court stated:

Pro se litigants pleadings are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. (Emphasis added)

Ray presents a valid claim on which he could prevail. It involves the state court's violation of due process. The issue surrounding the particular claim discussed herein has been decided in a contradictory manner by the circuit courts. The issue where a petitioner's claim of actual innocence supported by evidence the jury did not have before it-which pursuant to *House*-requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. Ray therefore asks this court to afford him the same opportunity the individual circuit courts afforded to *Teleguz*³, *Coleman*⁴, *Kuenzel*⁵, and more recently *Ceras*⁶ and *Cain*⁷. The

² 404 US 519, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)

³ *Teleguz v. Pearson*, 689 F. 3d 322 (4th Cir. 2012) where the court vacated in part and remanded to the district court to address whether petitioner should be granted an evidentiary hearing on *Schlup* claim.

⁴ *Coleman v. Hardy*, 628 F. 3d 314 (7th Cir. 2010) the court remanded to the district court for evidentiary hearing regarding a *Schlup* claim.

⁵ *Kuenzel v. Allen*, 488 F. 3d 1341 (11th Cir. 2007) where the court vacated and remanded to the district court for further proceedings pertaining to evidentiary determinations on his actual innocence claim and procedural bar.

common premise among those cases-like *Ray*-is petitioners asserted claims of actual innocence. The commonality among the particular circuit courts was that they all respected the Supreme Court's holding in *House* where the Court held:

"Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If new evidence so requires, this may include consideration of 'the credibility of the witnesses presented at trial' (noting that '[i]n such a case, the habeas court may have to make some credibility assessments')"

Id at 539, 126 S. Ct. 2064.

That is, those five cases were all remanded back to the federal district courts for evidentiary determinations pursuant to *House*. The Tenth Circuit Court however fails to recognize *House* and *Schlup* claims as do the other circuit courts; neither does the Tenth Circuit Court seem to comprehend a *Schlup* claim, at least not to the extent and depth the Supreme Court explained it in *House*. Case and point: In *U.S. v. Gieswein* the Tenth Circuit Court explained "Mr. Gieswein has not argued that he is actually innocent of the offenses of conviction. And his challenge to the legal sufficiency of the trial evidence does not inherently translate to an affirmative claim of actual innocence", Fed. Appx. 994, 947, (10th Cir. 2012). Whereas the Supreme Court in *House* clearly

⁶ *Ceras v. Frauenheim*, 732 Fed. Appx. 508 (9th Cir. 2018) the court remanded the case to the district court to consider petitioner's ineffective assistance of counsel claim on the merits and to determine whether petitioner's procedurally-barred claims could be revived, **once it had the benefit of the full record**-regarding petitioner's *Schlup* claim.

⁷ *Cain v. Oregon*, 546 Fed. Appx. 641 (9th Cir. 2013) the court vacated and remanded to the district court because it "failed to make the '**probabilistic determination about what reasonable, properly instructed jurors would do**' " as required by the Supreme Court. *House*, 547 U.S. at 538, 126 S. Ct. 2064 (quoting *Schlup*, 513 U.S. at 329, 115 S. Ct. 851)

explained, “the petitioner had stated a *Schlup* gateway claim because **the central forensic proof** connecting him to the crime **had been called into question**” Id at 554, 126 S. Ct. 2064. Similarly *Ray* has consistently called into question the forensic proof i.e. the forensic pathologist’s opinion testimony.

Ray’s continued incarceration is unconstitutional because the contrary evidence-the jury did not have before it-proves the forensic pathologist’s opinion is fundamentally unreliable, in violation of due process. On Ray’s application for post-conviction relief to the state courts and requests for evidentiary hearings, he presented evidence of material facts-calling into question the reliability of the forensic pathologist’s opinion-the jury did not have before it. In response the state attorney in the same sentence lied and argued “there are no genuine issues of material facts raised in the petitioner’s pleadings [sic] and this matter involves questions of law and does not require an evidentiary hearing” Response pp. 1-2. Consequently the state district court and state criminal appeals court declined to order an evidentiary hearing regarding the evidence the jury did not have before it. *Ray v. State*, PC-2014-1053 (March 18, 2015). The state criminal appeals court’s decision was based on an unreasonable determination of the facts, as would warrant federal habeas relief, given the contrary evidence-the jury did not have before it-that plainly established the unreliability of the forensic pathologist’s opinion who testified at Ray’s trial. Further in response to Ray’s petition for

federal *habeas* relief the state asserted “No evidentiary hearing is required and any request should be denied [*sic*] as the OCCA adjudicated petitioner’s claims on the merits” (Doc. 22 p. 2). Consequently the federal district court—despite petitioner’s motion for evidentiary hearing in support of his habeas petition, calling into question the reliability of the forensic pathologist’s opinion—declined to order an evidentiary hearing regarding the evidence the jury did not have before it.

On appeal the Tenth Circuit concluded Ray’s “claims are also facially invalid or undeveloped” Order p. 18 *i.e.* Appendix A of original petition to this court. Cf. *Han Tak Lee v. Glunt*,⁸ decided in 2012, the Third Circuit Court citing *Lave v. Dretke*, 416 F. 3d 372, 380 (5th Cir. 2005) stated “A district court abuses its discretion when discovery is essential for the habeas petitioner to develop fully his underlying claim”. Moreover, before Ray’s claim of actual innocence can be adjudicated on the merits, his case must be remanded to the federal district court to assess how reasonable jurors would react to the overall, newly supplemented record and to assess “the credibility of the witnesses [forensic pathologist’s opinion] presented at trial”—pursuant to *House* at 539, 126 S. Ct. 2064. Furthermore *House* confirmed that the application of the *Schlup* standard on the entire record is one as to which the district court neither finds facts nor exercises discretion; *de novo* review is therefore appropriate. De novo consideration is the proper standard for a

⁸ 667 F. 3d 397 (3rd Cir. 2012)

Schlup claim. In *Stewart v. Cate*,⁹ decided in 2014, the court explained *Schlup* claims are more amenable to *de novo* review than *Jackson* claims: “*Jackson* entails assessment of the trier of fact’s actual findings usually after the presentation of live testimony, and thus treads more heavily on the fact finder’s traditional prerogatives [Similar to the 10th Circuit’s assessment of Ray’s claim of “legally insufficient”, but the court stated “Ray does not develop the stand alone sufficiency claim”]. By contrast, the *Schlup* standard ‘focused the inquiry on the likely behavior of the trier of fact; before the trier of fact has had any opportunity to consider evidence contained in the supplemented record’.”

Ray has presented credible post-conviction evidence that demonstrates this case to be sort of an extraordinary one that, under *Schlup*, requires reading the merits of his otherwise barred federal habeas claims. Evidently counsel’s decision not to use the evidence calling into question the reliability of the forensic pathologist’s opinion was not “conscious and informed” or that “it was so ill chosen that it permeated the entire trial with obvious unfairness”. See *Ceras v. Frauenheim*, 732 Fed. Appx. 508, 9th Cir. (April 24 2018) where the circuit court remanded the case to the district court to consider petitioner’s ineffective assistance of counsel claim on the merits and to determine whether petitioner’s procedurally-barred claims could be revived, once it had the benefit of the full record.

⁹ 757 F. 3d 929 (9th Cir. 2014)

CONCLUSION

For the reasons stated above, this petition for rehearing should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. D. Ray", with a long horizontal flourish extending to the right.

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October 17, 2018

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