No. 25-6811

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

GIFFORD JOHNSON — PETITIONER
(Your Name)

vs.

Eric Guerrero — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT OF APPEALS
FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gifford Johnson # 01736258
(Your Name)

MEMORIAL UNIT-59-DARRINGTON
(Address)

ROSHARON, TEXAS 77583
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

1. WHETHER THE FIFTH CIRCUIT COURT OF APPEAL'S APPLICATION OF SCHULP'S CLAIM WAS UNREASONABLE WHEN THE NEWLY PRESENTED EVIDENCE WAS NOT HEARD AT TRIAL AND WOULD QUALIFY AS NEWLY DISCOVERED EVIDENCE IN THE 3 RD,7 TH and 9 TH CIRCUIT COURT OF APPEALS ?

2. WHETHER WHERE TRIAL COUNSEL HAS A CONSTITUTIONAL DUTY TO INVESTIGATE WHETHER DEFENDANT INFORMS OF EXCULPATORY PHYSICAL DISABILITY OR NOT AND SUCH INJURY COULD PROVE INJURY, WAS IT INEFFECTIVE ASSISTANCE OF COUNSEL IN LIGHT OF THE SIXTH AMENDMENT'S IMPOSED DUTY FOR COUNSEL TO INVESTIGATE IRRESPECTIVE OF DEFENDANT'S ACTIONS ?

3. WHETHER IN THE CONTEXT UNDER SCHULP WHERE TRIAL COUNSEL IS INEFFECTIVE FOR FAILING TO DISCOVER EXCULPATORY EVIDENCE THAT WAS READILY AVAILABLE OF THE PETITIONER'S ACTUAL INNOCENCE THE EVIDENCEONCE OBTAINED,DOES IT CONSTITUTE NEWLY DISCOVERED EVIDENCE ?

## 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. GIFFORD JOHNSON (PETITIONER)
2. GREG RUSSEL (TRIAL COUNSEL)
3. CALVIN PARKS (APPELLATE COUNSEL)
4. THE HONORABLE MALLIA (TRIAL JUDGE)
5. ERIC GUERRERO (RESPONDENT/TDCJ-DIRECTOR)
6. CARA HANNA (ATTORNEY GENERAL REPRESENTATIVE)
7. BILL REED (ATTORNEY FOR STATE)
8. JEFFERY V. BROWN (JUDGE OF FEDERAL DIST. COURT-SOUTHERN DIST)
9. JUSTICES GRAVES, SMITH, & ENGLEHARDT (FIFTH CIRCUIT)

## RELATED CASES

a) JOHNSON V. STATE, No. 01-11-00820-CR
b) JOHNSON V. STATE, No. PD-1435-13 (2014 WL 171934)
c) EX PARTE JOHNSON, No. WR-88735-01 (2018 WL 434430)
d) JOHNSON V. STATE, No. PD-1063-18
e) JOHNSON V. GUERRERO, No. 2025 U.S. App. LEXIS 13259

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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

[X] reported at U.S.COURT OF APPEALS; U.S APP.LEXIS 13259; 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 May 30 2025.

[ ] 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: May 30 2025, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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

Certiorary should be GRANTED becausethe 5 th Court of Appeals application of the Schulp's standard for Actual Innocence was unreasonable and differred greatly from her Sister Courts in the 3 Rd,7 TH and 9 Th Circuit Courts of Appeals. Petitioner met the Schulp's standard by providing reliable eye-witness evidence in the form of an affidavit from the only eye-witness,who verified that petitioner's trial counsel never spoke with him before trial. See Exhibit C

The evidence was "material",relevant and exculpatory in that it offered detailed description of "height", "Weight",and "clothings" of the person he saw at the scene of the crime,which differed from the proffered of the State in everyway,and which was not presented at trial and the jury never had an opportunity to hear or weight.

Petitioner met standard also in that he presented newly discovered ,uncontested and reliable [scientific] evidence in the form of medical records and photos of a physical disability,that described and showed the extensive physical injury and damage to petitioner's right arm,that was material because it would have been very exculpatoryin that it would have proven that petitioner was incapable of having committed the offen because he could not have exerted the requisite duration of sustained force as testified to by the State's expert witness,namely,the Medical Examiner,evidence which the jury never heard. See Exhibits A,B,C,D,E,F,G,I, J.

There were several police statements and available to petitioner's trial counsel that directly

contradicted the State's hearsay witnesses which were never used at trial. Furthermore,the State's case against Petitioner was particularly weak.

Certiorary should be granted also,because several jurors were allowed onto the jury,unchallenged for cause or struck,even though admitting that they : that upon the States proffered theory of flight they would find guilt alone; amitted to fact of "knowing" the State's testifying witnesses police officers: having family members and friends murdered less than a year pf petitioner's trial,in breach of the 5 th,6 th and 14 th Amendments to the USS Constitution.

## STATEMENT OF THE CASE

On the Saturday preceeding "Mardi Gras",2010, Teri (decedent)picked up petitioner at his home,in LaMarque,and drove them to Galveston to Teri's sister Shannon's home for a pre-party,before driving to the Galveston strand to enjoy the Mardi Gras.

Shannon's boyfriend,Kevin Maxiey ,drove Shannon,Trace Weatherspoon,Teri and the petitioner to the strand around 9:00 p.m. Everyone else followed in their own cars. Teri and Shannon's friends.

The group walked around drinking a catching beads. Petitioner and Teri had a discussion where Teri expressed her displeasure if petitioner looked at anyone else's breast but her own at the Mardi Gras. Petitioner smoked cigarettes,which Teri could not stand,so therefore,petitioner would have to walk off from the group whenever he wanted to smoke.

Everyone had a good time and there were no arguments. Petitioner,Teri and Shannon's group left the strand around midnight,and drove straight to Shannon's home,about fifteen (15) minutes away. Petitioner and Teri got into her car and left Galveston.

Teri was a "swinger" who stayed in touch with several men at one time. She informed petitioner that she did not want him to stay the night,and droppped him off at his home. The next day,Teri's oldest duaghter discovered her body in the mud room between the home and garage. She called the police,who in turn called Shannon.

Shannon called all the people who went to Mardi Gras the previous night,(except petitioner). Shannon told the police that petitioner had killed her sister. The police told Shannon that her sister had been strangled to death.

The result was that the whole group stood around for hours at the crime scene,in discussion of Teri being choked. The police,believing they knew who had committed the crime,did not do any meaningfull investigation. The victim and her car was found in a locked garage and the only thing that was fingerprinted was part of the inside of the car.

Meanwhile, petitioner,on Sunday morning left for Mardi Gras in Louisiana,because he did not have to work on Monday. Later that afternoon, while driving towards the French Quaters,family members called petitioner,to inform him that Teri was dead and he was being accused of her murder. In grief,petitioner,angry and confused,sought out alcohol and marijuana to numb the pain and escape his new reality.

Rodney Stoll was driving down the road and saw alot of people outside of Teri's home,he called his mother,who made some phone calls to neighbors,who said "the boyfriend had killed the woman". This was in hours of the police arriving. Mr.Stoll drove back to the crime scene and was told by the police to go to the police station and

report it.

Two days later,when Petitioner was in his right mind again,he called his sister,Meshia Jhonson, who told him what she had heard. Petitioner asked her to send him $ 100.oo dollars,with the promise he would pay her back when he picked up his paycheck.

After receiving the money,Petitioner headed back to Houston,where he met up with John Jones,

Jones let the Petitioner stay at his apartment until he could pick up his paycheck. Petitioner went to pick up his check,but was told he had to return the Co2 moniter before receiving his check. Petitioner left to go and retrieve the monitor and was arrested in the parkinglot of Jones' apartment. The police told petitioner to get out of the car,when he did,some officers yelled,"get on the ground" and others yelled "hands up"and "don't move",confusing petitioner. All had guns pointed at petitioner. Petitioner informed them that he was not moving. Then the U.S. Marshall Baker walked up to petitioner and attempted to kick him in the groin. Petitioner moved out out of the way,and fearing for his safety,ran away. Petitioner could have gotten away,however,he humbly surrendered to other officers when Baker was not present, those officers protected him from Baker until he could be safely transported to Galveston County jail.

The police photographed the inside of Teri's car,which looked like it had been ranshacked.There was a cup in the cupholder that still had condensation on it at 12:00 o'clock in the.....

after noon, yet the police choose not to test it for DNA. There were two purses,yet the police choose not to look into them to see if anything was missing.

Petitioner's DNA was found on the steering Wheel however, Teri's sister testified that Petitioner oftened drove the car. On the gearshift of the car belonging to Teri,was DNA found and it was determined that DNA (other than petitioner's) belonging to an unknown,third party. On the trunk of the car,fingerprints were found,but the police chose not to test for DNA or submit for fingerprints analysis.

Teri's car had been in a wreck in her front yard that night,that broke off the parts of the lower, front fender and cracked the radiator. When the police officer picked them up,the broken pieces, he did so wearing no gloves. The officer's DNA was found along with the same "unknown"DNA profile that was determined not to be petitioner's. See Exhibit J

1) The medical examiner testified that the victim was strangled "Manually" by a "Right-handed" person,because the person left fingernail marks,the medical examiner testified that "the person had to be strong significally,because the suspect 'fractured the hyoid-bone in the neck' and cause 'deep muscle bruising". In determining,basically,it "took a sustained force of three (3) to four (4) minutes to cause that kind of damage and death--i.e,,a physical feat petitioner was incapable of due to the physical injury of his arm. See Exhibit D.

2) The state's case-in-cheif was built around and based heavily on their theory of "flight" and

the state was able to place several jurors on the unchallenged as to their admitted formed opinion that flight equaled guilt,who stated that flight "alone" was,for them,enough for guilt,lightening the States burden of proof standard,allowing petitioner to be convicted of only a theory of flight.

On Aug 12,2011,petitioner was sentenced to life. The 1st Dist. Court of Appeals for Tx. Affirmed petitioner's conviction JOHNSON V STATE No.01-11-00820-CR,2013 WL 4680360 (Tex.App-Houston [1st-Dist.] Aug,29,2013. The Texas Court of Criminal Appeals,struck petitioner's Petition for Discretionary Review,JOHNSON V STATE; No. PD-1435-13,2014 WL 171934 (Tex.Crim.App.Jan.15,2014). Petitioner later filed a State application for Writ of Habeas Corpus,in which he sought leave to file an Out-of-Time PDR,Ex PARTE JOHNSON,NO.WR-8873 5-01,2018 WL 4344430 (Tex.Crim.App.Sept.12,2018). The C.C.A. Granted petitioner's permission to file an Out-of-Time PDR, EX-PARTE JOHNSON V STATE No.PD -1063-18 (Tex.Crim.App. Nov. 7,2018)

Petitioner challenge his conviction through two State Habeas Application,the first of which was DENIED by the T.C. C.A.,without Written Order on the Finding of trial court,and Second of which was DISMISSED as subsequent by the T.C.C.A. ;SHRC-02 at "Action taken"sheet (Denied Apr.17,2018);SHRC-03 at 17 ( avering truth of the facts asserted on Jan.2,2018, "Action Taken"sheet (Dismissing June 2022(citing:Tex.Code Crim.Proc.,art 11.07 § 4 (a)-(c).)

## REASONS FOR GRANTING THE PETITION

A. GROUND FOR RELIEF:

PETITIONER'S NEWLY DISCOVERED EVIDENCE OF ACTUAL INNOCENCE WHICH WAS " WRONGFULLY EXCLUDED",NOT PRESENTED AT TRIAL SHOULD QUALIFY AS NEW EVIDENCE UNDER THE SCHULP'S STANDARD.

The U.S. Court of Appeals for the 5th circuit's denial of Petitioner's Federal Habeas Corpus §2254, 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,§ 2254(d).

The respondent argued that Petitioner should not be granted an evidentiary hearing,nor relief because the AEDPA'S estoppels. The respondent erroneously concluded that petitioner's Federal Writ of Habeas focused on his court appointed trial attorney not being forthcoming with the truth.

The Sixth Amendment to the U.S. Constitution guarantees the right to effective counsel. Petitioner argues that he is entitled to a review of the merits of his ineffective assistance of counsel ,because he is actually innocent of the charged offense he was convicted of. A Federal questions of first impression has been put before the Court that Petitioner avers should be qualified,namely,Whether in the context of ineffective of trial counsel's constitutional mandated duty to investigate and discover exculpatory evidence,a trial counsel's failure to imvestigate where scientific evidence existed that said petitioner has a "physical condition" that proved

he could not had committed the offense in accordance with State's key expert witness's testimony 'is it a denial of Due Process and a constructive,if not literrally,denial of effective assistance of counsel;and does failure of counsel to perform his constitutional duty to investigate "comport" to petitioner simply because he claims petitioner did not tell him of condition"?

The trial counsel submitted an Affidavit,Exh A responding to petitioner's claims of ineffetive assistance of counsel surrounding this issue,the court found the counsel's affidavit "credible" wherein he claimed that petitioner never told him of a physical injury,and expressed his personal opinion that he did not believe petitioner had an injury that prevented him from committing the offense. See Exh. A However,trial counsel's failure to investigate is not contigent upon petitioner informing or not informing counsel of a duty he has a constitutional duty to perform irrespective of any action on petitioner's part. To wholely place blame on petitioner for counsel's failure to investigate and discover evidence that is exculpatory or mitigating,is a gross miscarriage of justice and in direct conflict with the constitutional intent,which is the unreasonable determination thaty the lower court decided in ruling trial counsel was not ineffective becasue his affidavit was credible,when petitioner presentedincontested "newly Discovered" evidence,that not presented at trial. See Exh. B :The University of Texas Medical Orthopedics Report/Operative Report.

Clearly proof that the exculpatory evidence existed,was material,and by counsel's own admission that "he did not know such information existed" proves that he failed to investigate,which any investigation would have turned up the injury.

While Actual Innocent cannot be a "stand alone " constitutional claim,it may provide the"gateway" which otherwise barred claims,if established, may be considered on the merits to avoid a "MISCARRIAGE OF JUSTICE", * SCHULP V DELO,513 U.S 298,115 S.CT 851. The"fundamental miscarriage of justice" principle operates to permit review of the merits of procedurally defaulted claims,COLEMAN V THOMPSON, 501 U.S. at 750.

The Supreme Court made it clear that a plea of Actual Innocence can overcome the statue of limitations imposed on Habeas petitioners through the AEDPA. The court stated: "We hold that actual innocence,if proven,serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar,as in was in Schulp and House "and in the instant case at bar.

In order to invoke the exception to AEDPA'S time limitations,"a petitioner must show that it is more likely than not that no reasonable juror would have convicted [him] in light of the new evidence,Schulp,513 U.S. at 327. A sufficient showing requires the petitioner to produce "new reliable evidence"-whether it be exculpatory scientific evidence,trustworthy eyewitness accounts,or critical physical evidence that was not presented at trial,Schulp,513 U.SA. at 324.

In petitioner's case,pursuant to the requirements of SCHULP,he has met all three,when only one is required. He met his burden by producing an uncontested scientific material record that shows he had a physical condition "prior" to the offense that is clear evidence that he could not have committed the offense as testified to by the state's expert witness (see Exh. B (2) Petitioner presented reliable,trustworthy eyewitness account in the form of an affidavit from the State's only eyewitness,that contradicts State's case and provides detailed description of suspect he saw that difers greatly from petitioner's physical description and proves that counsel was ineffective never investigated him. See Exhi C :Affidavit of Mr. Stoll, and (3) petitioner presented evidence of critical physical evidence that shows the physical injury that clearly demonstrates petitioner's physical description could not have committed the offense in the manner testified to by the states witness See Exhi D :Photo of Right Arm Injury of Petitioner.

The State's expert,Harminder Narula,a forensic pathologist and Medical examiner testified that the decedant was "strangle",by a "righted-handed" person,with "significant strenght." The reason he said the person had to have significant strenght was due to the extent of the injury and deep muscle injury,namely,crushing of the "Hyoid" force would have had to be applied for a sustained "3 to-4 minutes" See Vol-5.

Petitioner is left-handed,(b) has a physical injury to his right arm,with significant tissue

damage that effects his right hand strenght,(c) petitioner was incapable of (1) applying the requisite pressure and (2) incapable of sustaining that pressure over a duration of 3 to 4 minutes as testified to in order to commit the offense.

Therefore,petitioner's new evidence,none of which was presented at trial mets the burden of establishing that "it is more likely than not that no reasonable juror would have convicted him "in light of this new evidence,See Schulp 513 U.S. at 327. Petitioner avers that in light of this fact, a record that was before the lower courts,renders their determinations and rulings unreasonable and contrary to Supreme Court proceeding and federal case law. Resulting in a miscarriage of justice, prejudicing petitioner in deying his Schulp's claim.

The U.S. Supreme Court has applied the miscarriage of justice exception to overcome various procedural defaults. This rule or fundamental miscarriage of justice exception,is grounded in the " equitable" discretion of the Habeas Court to see that Federal Constitutional errors do not result in the incarceration of innocence persons.

A credible showing of Actual Innocence may allow a prisoner to pursue his constitutional claims on the merits not withstanding the existence of a procedural bar to relief. MCQUIGGING V PERKINS,569 U.S. 383 (2013), "The "cause and prejudice" standard is not a perfect safeguard against the fundamental miscarriage of justice",MURRAY V CARRIER,477 U.S. 478,thus,recognizing a narror exception to the cause requirement where a Constitutional violation has probably resulted in the ....

conviction of one who is "actually innocent" of the subtantive offense. Id. at 478; according SCHULP.513 U.S. 298,see also WILLIAMS V TAYLOR,120 S.CT 1495 (2000).

ii.) SCHULP'S STANDARD OF "NEWLY PRESENTED"EVIDENCE"

The Schulp Court stated, " that a Federal Habas Court after being presented with new,reliable exculpatory evidence,must then weight 'all the evidence,including,evidence tenably claimed to have been wrongly excluded or to have become available only after trial'to determine whether no reasonable juror would have found the petitioner guilty"id 513 U.S. 327,28.

The reference to "wrongfully excluded" evidence suggests that the assessment of actual innocence claim is not intended to be strickly limited to newly discovered evidence at least not in the context of reaching an ineffective assistance of counsel claim based on counsel's failure to investigate or present at rial exculpatory evidence, as was the case in SCHULP,Moreover,the Court used the phrase "new Presented Evidence" in the context of discussing witness credibility assessment that may occur as part of the actual innocent gateway analysis.

When considered in context with the Court's other statements about weighing all the evidence including not only evidence unavailable at the trial but also,evidence excluded at trial--these references to evidence not presented at trial further suggest that new evidence,soley where counsel was ineffective for failing to discover or use such evidence,requires only that the new evidence not be presented to the factfinder at trial.

Indeed,amoung the new evidence presented by the

Petitioner in Schulp,was an affidavit containing witness statements that were available at trial,see ID.at 310,n,21.

The Supreme Court did not discuss the significance of the evidence's availability nor reject the evidence outright,which presumbly,it would have done if the actual innocence gateway was "strickly" limited to newly discovered evidence. Schulp, therefore,strongly suggest that new evidence in the actual innocence context refers to newly presented exculpatory evidence. Indeed,in a subseque ent decision,the Supreme Court cited Schulp for this very proposition,stating that"[t]o be credible,a claim of actual innocence,must be based on reliable evidence not presented at trial", CALDERON V THOMPSON 523 U.S.538,559; 118 S.CT. 1498 (quoting Schulp 513 U.S. at 324).

In a case where the underlying constitutional violation claim is ineffective assistance of cousel premised on a " failure to present [such] evidence,a requirement that the new evidence be known to the defense at the time of trial would operate as a road-block to the actual innocence gateway. As a case of first impression,in this case petitioner's trial counsel failed to investigated and in his affidavit response to petitioner's Habeas claim ineffective assistance of counsel,he asserted that he did "not know" of petitioner's medical /physical injury,See Exhi A ,affdavit of Mr. Russell . Thus,even under the cause and prejudice standard,trial counsel was the "cause" of the evidence not being known due to his ineffectiveness and failure to investigate and discover the exculpatory evidence,likewise,he

failed to investigate and interview state's witness "STOLL" see(Exh. C Affidavit Mr. Stoll)both of which where "not available" to the defense due to ineffective assistance of counsel.

New,reliable evidence that "undermind[s] the [trial] evidence,pointing to the identity of the [perpetrator]and the motive of the [crime] can suffice to show actual innocence",GOLDBLUM V KLEM 510 F 3d 204,233 (3rd Cir 2007).

Petitioner's Actual Innocence claim asserts an ineffective assistance of counsel based counsel-'s failure to discover the very exculpatory evidence on which petitioner relies on to demonstrate his actual innocence. It was painfully obvious during petitioner's trial(despite his self serving claim in his affidavit),from cross-examination that trial counsel,did not talked to a single witness,in particularly,a single government witness (es) before trial,including the most crucial witness,the state's proffered "eyewitness",Mr.Stoll.

All the police reports that held exculpatory evidence that contradicted the State's motive and theory of the case were never used at trial,even though they tore at the foundation of the State's case-in-chief.

Mr.Stoll did testify ,at both trials. Mr.Stoll was shown a mug shot of petitioner,and in response wrote,"never seen this man before" See Exh. C and RR Vol. 7). Other than to say the man he saw was "dark-skinned" (Vol-7)[it must be noted, Petitioner is no ways "dark-skinned"]. Neither the State or trial counsel asked Mr.Stoll to "describe" the physical characteristics of the man he saw for the jury. In fact,petitioner's counsel

spent alot of time on cross-examination arguing with Mr.Stoll about his testimony from the first trial to the second,even though the testimony was in petitioner's favor. Mr.Stoll stated that "he gave the police information". The police chose not to put that information into Mr.Stoll's police statement. Because trial counsel "never" personally spoke with Mr.Stoll "before" trial (of either trial,first or second),he was unaware of what Mr.Stoll saw that night.

Indeed,he failed to put the State's case to a truly adversarial process,rather.deficiently choosing to rely on the state's version of events and police reports. Mr.Russell's affidavit was was to be untrustworthy when in his affidavit in response to petitioner's habeas,he asserted that he spoke to and investigated "every witness",all "relevant witnesses", the court found his affidavit to be credible.

The court found him credible without him presenting one shred of evidence but his self-serving affidavit. Petitioner's new evidence showcases his actual innocence and overcomes the "presumption of correctness" of trial counsels and renders the courts credibility ruling of his affidavit unreasobanle. Namely,State's only proffered "eyewitness"Mr.Stoll,gave a sworn affidavit asserting the contested facts that trial counsel "never" personally spoke with or investigated him,before either trial,or after the first trial as petitioner was facing trial with same facts probability.

This alone is a violation of the Sixth Amendment's right to counsel that is in fact Effective: "Attorney must engage in reasonable amount of pretrial investigations,and ,at minimum,interview

potential witnesses and make independent investigation of relevant facts and circumstances; failure to interview eyewitnesses to a crime may strongly support claims of ineffective assistance of counsel' and when alibi witnesses are involved it is unreasonable for a counsel not to try to contact witnesses and acetain whether their testtimonies would aide defense",BRYAN V SCOTT 28 F 3 d 1411 (5th Cir 1994).

" Counsel's failure to interview eyewitness to [murder] with which defendant was charged constituted ineffective assistance of counsel,not withstanding counsel's vigorous cross examination of those witnesses;because identification was crucial to State's case and a reasonable lawyer, prior to trial,would not have regarded any interview as "unneccessary"."Id.

In his sworn affidavit See Exh. C Mr.Stoll swears that petitioner's trial counsel never spoke with him before either trial and that,had trial counsel asked him,the jury would have heard testimony that the man he saw the night of the murder at the victim's house,near her car was between 5'6"-to-5'7" inches in height,(Petitioner is 5'9",thats two the three inches difference, that the jury was unaware of) Also,Mr.Stoll,in his police report stated " the man was around 180 Lbs,was of "slenderbuild",he gave detail description in his affidavit. (petitioner has never been "slender"nor "180 Lbs").

That is critical information the jury never heard,i,e---offering "descriptive" identifying traits that distinguishes petitioner from the actual perpatrator of the crime. Neither the State nor Respondents dispute the authenticy of Mr.Stoll's affidavit,instead,claim his new affidavit is

not important,despite its reliability. But identity was a mayor factor of the case,and raised valid concerns about who the real suspect was.

The respondents acknowledge that Mr.Stoll's affidavit is "valid" and contains information that was heard at trial,but attempts to downplay its importance. At trial both District Attorneys put themselves in a position of testifying in their closing arguments,in particularly that --Mr.Stoll when testifying earlier about (a white hoodie that was pulled up),really was "describing petitioner's clothing the night of the murder (a long-sleeve white thermal top with no hood),which was an improper remark,steap in prosecutorial misconduct because of its impermissible potential to mislead the jury,no objection by trial counsel or curative measure was undertaken by the court,and theres no way to judge the influence it had on the jury's verdict. see Vol-11.pg-5,pgs-85 and 87.

Petitioner's counsel never objected to this misleading and false testimony raised by the District Attorney in front of the jury.

Impermissibly innudating the jury to testimony not in the record or that was lawful for the State to testify to in closing arguments,right before deliberation. Both prosecutors left the jury with the negative impression of petitioners clothing that had "not"been put into evidence properly ,which seriously impacted the jury's verdict this alone prejudiced petitioner's trial because it deprived him of a truly impartial jury.

"The fourteenth Amendment cannot tolerate a state criminal conviction secured by the knowing use of false evidence," MOONEY V HOLOHAN,294 U.S. 103 " It is impermissible for the prosecutor to assert his or her own credibility as a basis for conviction". In the case at bar,the prosecutor(s)'s attempt to impart verity to the testimony of Mr.Stoll,by giving the jury their own personal guarantee that Mr.Stoll was "actually"saying the white hoodie was a white T-shirt and a white thermal top.See Vol-11 pgs- 54-85 and 87). See also HERRA,531 F3d 790; MILLER V PATE,386 U.S. 1, 7.

When asked if he was talking about a "white T-shirt" or "white long -Sleeve termal top with no hood"--Mr.Stoll,in his affidavit clarified exactly what he testified to and reported--,which he stated," he saw a man who wore an all white hoodie with a white hood pulled up on his head". See Exh. C Had the jury heard Mr. Stoll's testimony,as presented in his affidavit the state would not have been able to "testify" falsely and leave the jury with a negative and damaging impression of petitioner's identity. In addition,there was a police report given by "TRACEE WEATHERSPOON" Exh. E in which she provided the police with a description of exactly what petitioner "wore"the night of the murder and there was no mention of a "white hoodie.

Despite Mrs. Weatherspoon testifying at trial she was not asked what petitioner was wearing, nor was her police report/statement used to

refute or impeach the States claims,which was ineffective assistance of counsel on the part of trial counsel. Petitioner avers had Mr.Stoll or Mrs.Weatherspoon's testimonies,fleshed out fully,the jury would have heard material evidence that in itself would have created a different prespective. This directly refutes the State's claim of their "version" of what Mr.Stoll "intended"(but did not) say,about what the suspect given.

Petitioner avers,had the jury been confronted with this testimony,as contained here in the Affidavit of Mr.Stoll,this evidence presented that,"there is a reasonable probability that it would have returned with a different verdict", WIGGINS V SMITH,539 U.S. 510,536. "prejudice component satisfied where missing testimony directly contradits the prosecutor's evidence. " NEARLY V CABANA 764 F2d at 1180.

Petitioner does not rely "solely" on the Sworn ,uncontested affidavit of the State's only eyewitness to the crime,but further,in addition,supplements his Actual Innocence claim with "Medical records",and "photos" of his physical injury of his right arm (See Exh,B___,D___: Orthopedic Medical Records UTMB & Photo of physical Injury)

Petitioner's Exh D,as argued supra in extent, demonstrates that petitioner was "physically incapable" of committing the crime as testified to by State's Expert Mr. Narula.

By exercising all "reasonable due diligence", years later petitioner was able to secure New

reliable "Scientific Evidence" in the form of verifiable Medical Records fron The University of Texas Medical Branch "U.T.M.B. Hospital. Petitioner had never seen the records prior to the time he obtained them,nor could he have obtained them before he did,even exercising all reasonable Due Diligence. Petitioner could not have discovered the factual basis predicate of his claim before then. Petitioner avers that his Newly Discovered Evidence "re-set"the limitation pursuant to 2244(d)( 1)(D).

Pursuant to 28 U.S.C. § 2244 (d)(1)(D) and JOHNSON V U.S.,544 U.S. 295,125 S.CT.1571; provides that the "one-year limitation period runs from "the date on which the factual predicate of the claim or claims presented (could) have been discovered through the exercise of Due Diligence" The provision is most often invoked when habeas petitioner obtain previously undiscovered evidence. ( As in this case at bar). Petitioner's case raise a "constitutional issue(s) that is based on new "factual predicate"that triggers §2 244(d)(1)(D). §2244(D)(1)"s trigger is the "discovery claims factual predicate,not recognotion of the facts legal significance,OWENS V BOYD,235 F3d 356,359. Therefore,petitioner's entitlement to the reset is premised on his discovery of the constitutionally-based evidence as to "when'it was discovered solely,not whether it has legal merit,in petitioner's case,it does prove Actual Innocence as a second instance.

Under Applicable caselaw precedent,petitioner's proofered evidence qualify as "Newly" presented and discovered evidence,Schulp,513 US at 324:HOUSE V BELL U.S. 537," the reguirement is 'that the new evidencebe reliable and that it was not presented at trial",GOMEZ V JAIMET,350 F3d 673,79(7th Cir.2008): GRIFFIN V JOHNSON, 350 F3d 956,963(9th Cir.2003): LUCAS V JOHNSON,132 F3d 1069,1078 (5th Cir. 1998).

The Third piece of Newly presented evidence,is an affidavit from Meshia Johnson. There no physi-Evidence linking petitioner to the crime,so the State manipulated the truth in order to decieve the jury into believing in a theory of "Flight" as a sign of conciousness of guilt. The State's theory was that--petitioner committed the crime and fled the State,to Louisiana,while there,he had Meshia Johnson wire to him one-hundred dollars to aide him in further flight.
Mrs.Johnson did testify at trial as a "government' witness to sending the money in a name other than petitioner's legal name.Because petitioner's trial counsel never interviewed or spoke with Mrs. Johnson before,trial,petitioner's trial counsel was not able to cross-examine Mrs.Johnson in a manner that would allow her to give an alternate explaination for her actions,and more important, her understanding of petitioner's.

Petitioner's trial counsel relied exclusively on the State's proffered investigative reports, basing his own pretrial duty to investigate solely on his assumptions he saw in the State's

files,making no independent effort to discern the facts. This despite petitioner's explaination to him "why" the money was sent and his 'intent' for why the money was requested to be sent in another name. Which was (1) so that he had enough money to "returned" and address the allegations against him, and (2) to sheild his sister from accusations of wrong doing. Petitioner was prejudiced when the jury was left with only the State's version of events. Trial counsel advised petitioner not to testify,so Mrs. Johnson's testimony was crucial to petitioner's defense and challenging the State's theory of flight, upon which its case in chief rested. See Vol-11 pg-76 and Exh. F Mrs.Johnson Affi.

Mrs. Johnson presented an official,notarized affidavit ,(Exh. F that verifies that (1) Petitioner's counsel never interviewed or spoke with her before the trial.Id. Furthermore,(2) Mrs.Johnson declares that the money she wired to petitioner was expressedly for the purpose to facilitate his "return" to address the allegations he was being accused of,lastly,(3) The money was asked to be sent in another not because petitioner did not want her to be placed at wrong for sending the money. Id.

" An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense", DAVIS V ALABAMA,596 F2d at 1217.

" without presenting any evidence in favor of the defense,counsel left the jury free to

believe [State's] account of the incident,as the "only account", HARRIS V REED,894 F 2d 871,879. "Furthermore,this was not a case that it was "unlikely that further investigation would bear fruit",,so that counsel's investigation could be excused",MCFADDEN V CABANA,851 F 2d 784; 489 U.S. 1083. "Nor is this a case where the defendant gave counsel "reason" to believe that further investigation would be in vain." STRICKLAND V WASHINGTON,466 U.S. at 696. [H]ad the jury been confronted with these [affidavits] evidence,there is a reasonable probability that it would have returned with a different [verdict]" WIGGINS,539 U.S." At least one juror [might] have struck a different balance"Id. at 510,537.

B.GROUND FOR RELIEF :

PETITIONER ASSERTS INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON FAILURE TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE OF ACTUAL INNOCENCE,AND SUCH EVIDENCE SHOULD CONSTITUTE NEW EVIDENCE FOR PURPOSE OF SCHULP'S ACTUAL INNOCENCE "GATEWAY"

Petitioner now presents more evidence of his counsel's ineffectiveness,that denied him a fundamental Fair Trial. There were "shoe-prints" found and -photographed "next" to the decedent's body (see Exh. G :Photo shoePrint).
A detective,witness for the State,testified that "the shoe-prints found next to the body did not "MATCH" the shoes found in petitioner's trunk

when he was arrested. The State introduced photos earlier in the trial,of what petitioner was wearing the night of the crime,and the detective testimony was that "the shoes do not match the shoes print found next to the body." Petitioner-received ineffective assistance and was prejudiced when trial counsel never told the jury that those shoes shown in the trunk match the shoes in the photo of what petitioner wore the same night of the murder. EXH. H-I ,

The decendent the decedent's "keyfob" and cellphone were taken during the murder according to the State's theory. Only the cellphone was found,by Mr.Armstrong,on Monday morning. Mr.Armstrong,state's witness,testified that the cellphone was "not" there on Sunday night,and when he found the phone,the phone was "dry" and that the "Grass under it was wet" (RR-Vol-7pgs 111,112;113, 122,124,and 125).

Petitioner avers that he was greatly prejudiced when trial counsel ,due to deficient performance,failed to draw crucial contrast,and did not inform the jury and stress that the State's case-in-chief- rested on theory of "Flight" and its whole case was premised on petitioner "not" even being in the State on Sunday because he had "Fled" to Lousiana Saturday night. Therefore,Armstrong's testimony was exculpatory in that the State's theory was that the perpatotor of the murder "took" the decedent's phone, the phone could not have been abandonned in Mr.Armstrong's field Saturday night due to the

conditions (uncontested) it was found in i.e. it could not be "dry" and the grass under it "wet" if State's theory was correct,petitioner could not have both "Fled" and placed the phone in his field at the time "after" he had fled, the time-line proves petitioner never possessed the phone,thus,did not murder the decedent.

The failure to consider the merits of this claim would work a fundamental miscarriage of justice,resulting in the continued incarceration of one who is Actually Innoncent.

Petitioner has met this burden with "RELIABLE" NEW EVIDENCE in the form of (a) Affidavits,(b) exculpatory scientific medical records and (c) exculpatory photos of critical physical evidence-that proves his ACTUAL INNOCENCE.

" A credible showing of Actual Innocence may allow a prisoner to pursue his constitutional claim on the merits,not withstanding the existence of a procedural bar to relief" MCQUGGINS V PERKINS 569 U.S. at 383. Petitioner avers further ,that he has met his secondary requirement of an "extraordinary showing",his evidence does not just point to a conclusory or speculative potential of innocences,but conclusively demonstrates his Actual Innocence in that it demonstrates that he was incapable of committing the murder.

C. GROUND THREE:

PETITIONER'S TRIAL WAS NOT FUNDAMENTALLY FAIR AND IMPARTIAL WHERE SEVERAL EMPANELED JUROS EXPRESSED AND/ADMITTED TO FACTS WHICH SHOULD DISQUALIFIED THEM TO SERVE ON THE JUROR PANEL.

Empaneled jurors admitted To Working in the Court House and knowing several testifying offi-

cers and the District Attorney,without being challenged for Cause nor peremptorily Struck by the Defense counsel.

Mrs.Jackson during voir dire admitted to being familiar with the district Attorney and one of the testifying officers,plus,working in the courthouse.[Vol-4 pgs.36,38,62 and 63] Petitioner's counsel allowed her on the jury without a challenge for cause.

Mr.Guillory,also admitted to being very familiar with one of the testifying officer [Vol-4 pg 61]

Halfway through the trial Mrs.Alsup admitted to the judge that she was in fact familiar with a testifying officer and his family.There was a meeting outside the presence of the jury,where counsel asked the judge to have Mrs.Alsup excused because he felt he could not receive a fair trial. That had he known of the relationship before trial he would have challenged her for cause [see vol-72 pgs 101-105-106]. yet,in his affidavit,counsel claims not to know that Mrs. Jackson and Mr. Guillory were subject for challenge [see Exh.A]

During Voir Dire Juror Magewski admitted to having a friend murdered by a co-worker less than SIX MONTHS from the start of petitioner's trial [see vol-4-pg94[ Juror Alsup also admitted to her friends parents being murdered,less than a year from the start of the trial[see vol-4-pg 90] neither was challenged for cause,nor a peremptory strike was used. Magewski was an juror ALTERNATIVE JUROR,

but after Mrs.Alsup was excused,Mrs.Magewski became a permanate juror.

Among the most essential resposibility of defese counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense. Presence of one biased juror destroys the impartiality of the entire jury and tenders it partial."Every procedure which would offer a possible,temptation to the average man..to forget the burden of proof required to convict the defendant for which might lead him not to hold the balance nice, clear and true between the State and the accused ,denied the latter due procedd of law" TUMEY V OHIO,273 U.S. 510,532, 47 S.CT 437,444, 71 L.ED 749.

The Sixth Amendment guarantees criminal defendant's a verdict by impartial,indifferent jurors and the bias or prejudice of even a single juror would violate defendant's right to a fair trail. The presence of a baised juror cannot be harmless,the error requires a new trial without a showing of Actual prejudice because it introduces a structual defect not subject to harmless error analysis.

**GROUND FOUR FOR RELIEF:**

PETITIONER'S CONVICTION SHOULD SHOULD NOT BE VALID WHERE THE STATE WITHOLD EVIDENCE TO IMPEACH A WITNESS IN ORDER TO BOLSTER ITS ONLY POINT,TO ASSURE A CONVICTION WAS SECURED.

The State withheld exculpatory evidence in form of phone records belonging to Ora Johnson. The State produced Meshia Johnson and Petitioner's phone records. Ora Johnson testified that she called and texted petitioner. But missed or unanswered calls don't appear on phone records of the person you called. The State used Petitioner's phone records to paint the image to the jury that Ora Johnson lied on the stand about calling and texting,because she knew Petitioner was guilty of murder. Inclosing aegument the State told the jury,"wel does that mean that you shouldn't judge five days worth of Flight? Does it really mean that ? " And as much as Ora Johnson wants to get up here and paint a good picture,Oh,I ttried to call my son ! You saw the phone records. There's no phone calls from Ora Johnson to her son on Sunday,February 14th,Not a single phone call. And yes Meshia Johnson tried to call her brother,but there's no evidence--the call weren't on his phone records,They were on her phone records". [Vol-=11 RR 2 Pg 78].

The State knew this was false misleading evidence concerning Ora Johnson because the police had subpoenaed Ora Johnson and Meshia Johnson's phone records in discovery. Also,the State was in possession of Petitioner's cell phone,which was not locked and they had access to and were aware of texts and voicemails on the phone calls and texts to Petitioner. Had Ora Johnson's phone been presented at trial,they would have shown phone

calls to and from petitioner and herself,contradicting the falsehood the State knowingly made,leaving the jury with a negative impression of Petitioner;thereby,prejudicing him. Because the State withheld evidence,its case was much stronger,and the defense case weaker than the full facts would have suggested.

" The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,irrespective of the good faith or bad faith of the prosecution" BRADY V MARYLAND,373 U.S. 83 at 87 (1963).

The remarks were intended to mislead the jury and prejudice Petitioner; and further, deliberately placed. The strength of the evidence against petitioner was weak. Trial counsel was constitutionally ineffective failing to object to egregious prosecutorial misconduct.

E. GROUND FIVE

PETITIONER'S COUNSEL WAS INEFFECTIVE,WHEN IN CLOSING ARGUMENT,PROSECUTOR GAVE HIS/HER PERSONAL AND UNFAIR PREJUDICIAL OPINION (multiple times),WHERE COUNSEL FAILED TO OBJECT.

The State in closing arguments said "we have proven it to you that he strangled his girlfriend. And he ran like a coward that he is."Petitioner's counsel;" " I would object to the derogatory reference to the defendant. That's inappropiate and there's case law on that ."

The State; "it's based on his action,Judge." The Court: "objection overruled." [Vol-11 RR 2,79 6-16]. The State:" so,again as much as Ora wants to get up here and testify in front of you and save her son,that she told police she saw the car that morning,sunday morning;and she couldn't point to it in her statement" Vol-4 RR 2 -79]. The State:"So again when you look--and Gifford Sr he's not even aware of his wife or other relative trying to get a hold to his baby boy. He's not even aware of it. Because,ladies and gentlemen, they know. They clearly know. Now is it realistic for me to get up here and expect Ora Johnson, Meshia Johnson,Gifford Sr.,Linda Cole and all these relatives to come in here and sink his battleship? No, I'm not going to honestly expect that" Vol-11 RR 2 pgs-81-82.

Again,the State: "as much as his family may not want to deal with this or put their heads in the sand" vol-11-RR 2-p-83,so,as much as Ora Johnson wants to come in here and testify about things that she didn't tell the police,as Gifford Sr. wants to come in here and tell you,well,the car was there at 2:00 and the car was there at 4:00 but he's never testified about that under oath and never told anybody that ,ever,that's because they're trying to cover for their son. Now,on a certain level,is that understandable ? Of course, it is. If my daughter was accused of murder,I would lie for her,I don't think that's unreasonable Vol-11 RR 2 -p-86

"The prosecution's tactics and changellenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction,yet petitioner's counsel sat silent. At the most pivotal moments,the Court can only conclude,his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy. The failure to object to these statements prejudiced Petitioner's case. "The statements Violated the established rule that the personal opinion of [prosecutor's] has no place at trial" U.S. V BESS,593 F 2d 749,754. " A prosecutor's statement of his beliefs impinge on the jury's function of determining the guilt or inadmissible matters of fact not legally produced into evidence. By giving his opinion,a prosecutor may increase the apparent probative force of his evidence by virtue of his personal influence,his presumably superior knowledge of the facts and background of the case,and the influence of his official position. If, prosecutor states in his summation that he believes a witness has lied,his statements suggest that he has private information supporting his beliefs" U.S. V MORRIS : GRAVELY V MILLS,87 F 3d at 786: DONNELLY V DECHISTOFORO,416 U.S. 637,643, 94 S.CT. 1868 ,40 L.ED 2d 431; and BARRIENTES V JOHNSON ,221 F 3d 741.

In U.S. V GARZA,608 F 2d 659,665 (5th Cir1979) " We hold that a prosecutor's repeated vouching for the credibility of witnesses constituted reversable plain error.

U.S. V CORONA,551 F 2d 1386,1389 (5th Cir 1977) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. [Fed.R. Crim. P.52 (b). The Court can review the comments under the "plain error' standard---whether the comments "seriously affected the fairness,integrity,or public reputation of judicial proceeding(s) and resulted in a major miscarriage of justice" U.S. V GOFF,847 F 2d 149,162 (5th Cir 1988)."

"It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about just one. Consequently improper suggestions,insinuations and especially,assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none" U.S.V BERGER,295 U.S. 78,88, 55 S.CT 629, 79 L.ED 1314; also LOTT V STATE 51 Phio ST. 3d 160, 555 N.E. 2d 293,300.

In weighing each error individually,the court may over look a pattern of ineffective assistance and unreasonably applied STRICKLAND AND SCHULP. However,the cumulative effect of trial counsel's errors sufficiently undermines the confidence in the outcome of the proceeding. Rather than evaluating each error in insolation,the pattern of counsel's deficiencies must be considered in there totality. "Evaluated individually,these error may not have been prejudicial to [Petitioner] but we must asses the totality of the omitted evidence under STRICKLAND AND RATHER than the indi-

vidual error" WASHINGTON V SMITH,218 F 3d at 634-35. "Defendant was prejudiced where an exculpatory witness,if believed,would have impeached the government's key witnesses" HODGSON V WARREN,622 F 3d 591,600-01. See COUCH V BOOKER,632 F 3d at Prejudice component satisfied where missing testimony directly contradicted prosecution witness and supported defendant's theory of the case, defendant met his burden of showing prejudice" NEARLY V CABANA,746 F 2d at 1180.

All of Petitioner's counsel deficient performance must be weight with the facts that DNA evidence proves that Petitioner was not the last person with the victim. An unknown DNA profile was found in several places at the crime scene and Petitioner was excluded from being a contributor to that profile. Petitioner has presented evidence that is not disputed by Respondent or the State. Two affidavits,one exclusively eliminating Petitioner as the perpetrator by height,weight and clothing; and secondly,attacking the credibility of the State's theory of flight.

Furthermore,Petitioner's medical records and photos that demonstrates that it was impossible for Petitioner to physically have committed the crime as testified to by the medical examiner.

There was noway to know what Mr.Stoll would testify to as he was never interview by Petitioner's counsel. Thus,his affidavit constitutes New evidence that gives a different height,weight,and cloting than petitioner,that eliminates him from consideration as the murderer,and Mrs.Johnson's

affidavit which contradicts the State's theory of flight of which Petitioner was convicted.

Had reasonable jurist been presented with this new reliable evidence they could debate whether the petitioner should have been resolved in a diffent manner.

WHEREFORE,PREMISES CONSIDERED,The Petitioner requests that this Honorable Court grant him the specific relief he seeks in this appeal,and for such other and further relief to which he may be entitled.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gifford Johnson

Date: August 28th 2025