IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1413

LOWER TRIBUNAL No. 89-CF-966

DANIEL JON PETERKA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th Street Wilton Manors, Fl 33334
(850) 322-2172

Attorney for Mr Peterka

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Peterka's successive motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850 and 3.851. The circuit court denied Mr. Peterka's claims without an evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"Supp. R." – supplemental record on direct appeal to this Court;

"PC-R." – record on appeal from denial of postconviction relief;

"PC-T." – transcript of proceedings from evidentiary hearing;

"Supp. PC-R." – supplemental record on appeal from denial of postconviction relief;

"PC-R2." -- record on appeal from second (or successive) denial of postconviction relief;

REQUEST FOR ORAL ARGUMENT

Mr. Peterka has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Peterka, through counsel, accordingly urges that the Court permit oral argument.

STANDARD OF REVIEW

Mr. Peterka presented a legal claim in his successive Rule 3.851 motion. The standard of review regarding Mr. Peterka's legal claim is de novo.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT..i

REQUEST FOR ORAL ARGUMENT...................................ii

STANDARD OF REVIEW..ii

TABLE OF CONTENTS..iii

TABLE OF AUTHORITIES..iv

STATEMENT OF THE CASE..1

STATEMENT OF THE FACTS.......................................4

The Trial..4

The Postconviction Proceedings...............................7

SUMMARY OF ARGUMENT...10

ARGUMENT..11

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. PETERKA'S SUCCESSIVE RULE 3.851 MOTION BECAUSE (1) THE ACTUAL INNOCENCE EXCEPTION TO PROCEDURAL BARS ADOPTED BY THE UNITED STATES SUPREME COURT IN SCHLUP v. DELO, 513 U.S. 298 (1995), APPLIES IN RULE 3.851 PROCEEDINGS, AND (2) MR. PETERKA PROFFERED SPECIFIC FACTUAL ALLEGATIONS, WHICH ENTITLE HIM TO THE RELIEF REQUESTED....11

CONCLUSION..21

CERTIFICATE OF SERVICE......................................22

CERTIFICATION OF TYPE SIZE AND STYLE........................22

TABLE OF AUTHORITIES

Page

Beck v. Alabama,
447 U.S. 625 (1980).....................................20

Booth v. Maryland,
482 U.S. 496 (1987).....................................20

Bousley v. United States,
523 U.S. 614 (1998).................................16, 17

California v. Ramos,
463 U.S. 992 (1983).....................................20

Carriger v. Stewart, 132 F.3d 463 (9th Cir 1997)
cert. denied 523 U.S. 1133 (1998)..........................17

Clemons v. Mississippi,
494 U.S. 738 (1990).....................................20

Coleman v. Thpmson,
501 U.S. 722 (1991).....................................11

Dugger v. Adams,
489 U.S. 401 (1989).....................................11

Eddings v. Oklahoma,
455 U.S. 104 (1982).....................................20

Engle v. Issac,
456 U.S. 107 (1982).....................................11

Gardner v. Florida,
430 U.S. 349 (1977).....................................20

Gregg v. Georgia,
428 U.S. 153 (1976. 1999)...............................18

Herrera v. Collins,
506 U.S. 390 (1993)...........................12, 15, 20

Jackson v. Virginia,
443 U.S. 307 (1979).................................13, 14

Lankford v. Idaho,
500 U.S. 110 (1991).....................................20

Lockett v. Ohio,
438 U.S. 586 (1978).....................................20

McClesky v. Zant,
499 U.S. 467 (1991)......................................11

Murray v. Carrier,
477 U.S. 478 (1986)...............................11, 12, 13

Murray v. Giarratano,
492 U.S. 1 (1989)..20

Peterka v. McDonough,
2007 U.S. Dist. LEXIS 23182 (N.D. Fla. 2007)............3, 8

Peterka v. McNeil,
532 F.3d 1199 (11th Cir. 2008)............................3

Peterka v. State,
640 So. 2d 59 (Fla. 1994).................................1

Peterka v. State,
890 So. 2d 219 (Fla. 2004)..............................3, 7

Roy v. Wainwright,
151 So. 2d 825 (Fla. 1963)...............................11

Rummel v. Estelle,
445 U.S. 263 (1980)......................................20

Sawyer v. Whitley
505 U.S. 333 (1992)..................................11, 18

Schlup v. Delo, 513 U.S. 298 (1995)
513 U.S. 298 (1995)..........10, 12, 13, 14, 15, 16, 17, 21

Sistrunk v. Armenakis, 292 F.3d 669 (9th Cir 2002)
cert. denied 537 U.S. 1115 (2003).........................15

Smith v. Murray,
477 U.S. 527 (1986)......................................11

Solem v. Helm,
463 U.S. 277 (1983)......................................20

Strickland v. Washington,
466 U.S. 668 (1984)......................................20
Turner v. Murray,
476 U.S. 28 (1986).......................................20

Wainwright v. Sykes,
433 U.S. 72 (1977).......................................11

Woodson v. North Carolina,
428 U.S. 280 (1976)......................................20

Wyzykowski v. Dept. of Corr.,
226 F.3d 1213 (11th Cir. 2000).............................18

Zant v. Stephens,
462 U.S. 862 (Fla. 1983)...................................20

STATEMENT OF THE CASE

On August 10, 1989, Mr. Peterka was indicted and charged with the premeditated first-degree murder of John Russell in Okaloosa County, Florida (R. 1947-8).

Subsequently, Mr. Peterka was tried by a jury in the circuit court of the First Judicial Circuit, in and for Okaloosa County, Florida. Trial began on February 26, 1990, and on March 2, 1990, the jury found Mr. Peterka guilty of first-degree murder (R. 2042). The penalty phase was held the following day, on March 3, 1990, and on that same day the jury returned a recommendation of death (R. 2043).

On April 25, 1990, the trial judge sentenced Mr. Peterka to death (R. 2077-8). This Court affirmed Mr. Peterka's conviction and sentence. Peterka v. State, 640 So. 2d 59 (Fla. 1994).

On March 24, 1997, Mr. Peterka, who was represented by the former Office of the Capital Collateral Representative, timely filed a preliminary Rule 3.850 motion (PC-R. 1-148).

The State responded to Mr. Peterka's preliminary Rule 3.850 motion on January 21, 1998 (R. 246-64).

A few hours, before the State responded, on January 21, 1998, the circuit court entered an Order denying most of Mr. Peterka's claims (PC-R. 265-9).

In December, 1998, Robert Harper entered a Notice of Appearance on behalf of Mr. Peterka (Supp. PC-R. 46-7).

On July 6, 2000, Mr. Peterka filed an Amended Rule 3.850 motion (PC-R. 290-335). Thereafter, on February 1, 2001, Mr. Peterka filed an amended, corrected Rule 3.850 motion (R. 412-62).

On February 22, 2001, the court entered an order granting an evidentiary hearing on most of Mr. Peterka's ineffective assistance of counsel claims and denying an evidentiary hearing on other claims (PC-R. 463-6).

On June 28-29, and July 16, 2001, an evidentiary hearing was held regarding trial counsel's ineffectiveness. Following the hearing, written closing arguments were submitted (PC-R. 471-505, 506-50, 555-68).

On May 2, 2002, the circuit court denied Mr. Peterka's Rule 3.850 motion (PC-R. 569-92).

Mr. Peterka appealed the denial of his claims to this Court (PC-R. 742-44).

On September 6, 2002, Mr. Peterka, pro se, filed a motion to dismiss counsel. On September 19, 2002, postconviction counsel moved to withdraw.

On October 7, 2002, this Court granted Mr. Peterka's motion to dismiss counsel and appointed the Capital Collateral Counsel for the Northern Region to represent Mr. Peterka in his appeal.

After submitting briefs concerning Mr. Peterka's appeal from the denial of Rule 3.850 relief and a petition for writ of habeas corpus, this Court denied all relief. Peterka v. State, 890 So. 2d 219 (Fla. 2004).

In early, 2005, Mr. Peterka filed a petition for writ of habeas corpus in federal district court. After briefing, the federal district court denied the petition. Peterka v. McDonough, 2007 U.S. Dist. LEXIS 23182 (N.D. Fla. 2007).

The Eleventh Circuit Court of Appeals granted a certificate of appealabilty as to Mr. Peterka's claim that his trial counsel was ineffective at the penalty phase of his capital trial. After briefing and oral argument the Circuit Court affirmed the federal district court's denial of relief. Peterka v. McNeil, 532 F.3d 1199 (11th Cir. 2008).

In November, 2008, Mr. Peterka filed a petition for writ of certiorari with the United States Supreme Court. Mr. Peterka's petition is presently pending.

While Mr. Peterka's case was pending in the Eleventh Circuit Court of Appeals Mr. Peterka filed a pro se Motion for Postconviction Relief and Memorandum. On August 27, 2007, Mr. Peterka's court-appointed Registry counsel adopted his pro se motion and memorandum (PC-R2. 57-121).

On September 7, 2007, the State moved to strike Mr. Peterka's successive 3.851 (PC-R2. 188-202). The circuit court granted the State's motion and struck Mr. Peterka's motion without prejudice so that he could file a motion that complied with Florida Rule of Criminal Procedure 3.851 (PC-R2. 203-4).

On March 10, 2008, Mr. Peterka's Registry counsel filed a motion to adopt his pro se successive motion for relief pursuant to Fla. R. Crim. P. 3.851 (PC-R2. 205-40).

The circuit court summarily denied Mr. Peterka's motion as untimely (PC-R2. 262-3).

Mr. Peterka, through counsel, timely filed a notice of appeal (PC-R2. 270-1).

STATEMENT OF THE FACTS

THE TRIAL

On March 2, 1990, a jury impaneled in the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida, found Mr. Peterka guilty of the premeditated murder of John Russell. Following a sentencing trial the jury recommended (8 to 4) the he be sentenced to death. On April 25, 1990, the trial judge followed the jury's recommendation and imposed a death sentence.

In summary, the evidence at trial showed that Mr. Peterka fled Nebraska to avoid serving two one-year prison sentences; that he traveled to Florida, found a job and became the housemate of John Russell; that he obtained a fake driver's license with his photograph and Mr. Russell's name and personal statistics on it; that he intercepted and cashed a $300.00 money order that had been mailed to Mr. Russell; and that he shot and killed Mr. Russell shortly after they arrived home from work on July 12, 1989 and hid the body. These are the salient facts of the case and they were undisputed. What was disputed is what they and other circumstances proved beyond a reasonable doubt.

The prosecution's theory was that the killing was premeditated because Mr. Peterka shot Mr. Russell and hid the body after obtaining the fake driver's licence with his photograph and Mr. Russell's personal statistics – that is, that the shooting must have been the final step in Mr. Peterka's plan to assume Mr. Russell's identity in order to avoid identification as a fugitive and imprisonment for the Nebraska convictions.

Mr. Peterka always maintained that, while he did flee Nebraska to avoid imprisonment and intended to avoid identification by using Mr. Russell's identification, the shooting occurred unintentionally during an argument and struggle that ensued when Mr. Russell confronted Mr. Peterka about the $300.00 money order.[1] Mr. Peterka hid the body out of panic and fear.

However, at trial, Mr. Peterka's counsel abandoned Mr. Peterka's true and plausible version of how the shooting occurred and argued in closing, which was the only occasion in the entire course of the trial that trial counsel attempted to articulate a theory of defense to the jury, that the shooting was a result of a gun malfunction, i.e., that the gun had simply "fired or went off or whatever" (R. 1768). Of course, the idea of a gun malfunction had already been undermined by the uncontested expert testimony presented by the prosecution that such a malfunction was implausible (R. 1554-5).

The State also introduced hearsay testimony that Mr. Russell did not intend to confront Mr. Peterka about the money order. However, the State did not introduce any direct evidence that contradicted Mr. Peterka's claim that Mr. Russell did confront him about the money

[1]More specifically, Mr. Peterka claims that Mr. Russell confronted him about the $300.00 money order he had stolen from Mr. Russell, that the confrontation escalated into a physical struggle, that during the struggle they both grabbed for a gun that was laying on a coffee table they had fallen across but he (Peterka) got it first. As Mr. Peterka stood from the table and turned to face Mr. Russell, he shot Mr. Russell unintentionally by jerking the gun's trigger for being startled to see Mr. Russell lunging toward him with his head down (R. 2072-3, 2443-4). That is what Mr. Peterka told law enforcement, his family and friends and his trial counsel.

order and that the shooting occurred unintentionally during an argument and struggle.

Due to Mr. Peterka's trial counsel's unreasonable acts and omissions the trial court and jury did not received certain evidence and argument that not only supported Mr. Peterka's claim of how the shooting occurred, but also, and more importantly, negated every item of circumstantial evidence that was critical to the jury's verdict of guilty of first degree murder. In other words, but for the ineffective assistance of trial counsel, Mr. Peterka would and could not have been convicted of first degree murder much less sentenced to death.

The Postconviction Proceedings

In his original postconviction proceedings, Mr. Peterka raised numerous claims of his trial counsel's ineffectiveness. However, during those proceedings, Mr. Peterka's postconviction counsel actively misled, deceived and thwarted his diligent efforts to present evidence that supported his claims.

After his original Rule 3.851 motion was denied by the circuit court, Mr. Peterka appealed to this Court and argued that he had been denied due process and the right to a full and fair postconviction proceeding due to his counsel's misleading and deceptive representation that thwarted his diligent efforts to develop the factual allegations that would have substantiated his claims. However, this Court denied relief on the basis that Mr. Peterka had no right to effective assistance of postconviction counsel. Peterka v. State, 890 So. 2d 219 (Fla. 2004).

Mr. Peterka's case was not one where he was simply complained that his postconviction counsel was negligent or failed to do something he was requested to do. Mr. Peterka took an active and participatory role in his initial Rule 3.851 proceedings. Mr. Peterka drafted and specifically directed his postconviction counsel to assert and develop factual allegations that would have substantiated his claims of ineffectiveness. In fact, when his postconviction counsel failed to assert the factual allegations at issue in either his amended or his corrected amended initial Rule 3.851 motions, Mr. Peterka personally went to extraordinary lengths to make sure they were asserted in a second corrected amended version. Thereafter, Mr. Peterka allowed his postconviction counsel to remain on his case **only** because postconviction counsel assured and guaranteed Mr. Peterka that he would develop his claims during the evidentiary hearing. Despite these guarantees, postconviction counsel did not develop the factual allegations at issue – even though witnesses and evidence were readily available to do so.[2]

Consequently, Mr. Peterka filed a successive Rule 3.851 motion in the trial court claiming that certain evidence and argument that

---

[2]Notably, the State did not dispute these facts when, based on them, Mr. Peterka requested an evidentiary hearing to substantiate his otherwise undeveloped claim of ineffective assistance of trial counsel in his federal petition or writ of habeas corpus. Although he was asserting an agency relationship violation as an excuse for his failure to develop the factual allegations during the Rule 3.851 proceedings and not a claim of ineffective assistance of postconviction counsel, the district court summarily denied his request for an evidentiary hearing, without adjudicating his claim, but instead found that he had no right to effective assistance of postconviction counsel. Peterka v. McDonough, 2007 U.S. Dist. LEXIS 23182 (N.D. Fla. 2007).

was not presented at trial demonstrates both that he was denied the effective assistance of trial counsel and that he is actually innocent of first degree murder, which under the actual innocence exception to procedural bars adopted by the United States Supreme Court in Schlup v. Delo, 513 U.S. 298 (1995), creates a gateway through which Mr. Peterka should be allowed to pass to have the merits of the claim of ineffective assistance of trial counsel that his postconviction counsel failed to develop during the initial 3.851 proceeding considered.

The circuit court summarily denied Mr. Peterka's motion without adjudicating his claim, finding that the motion was untimely.

SUMMARY OF ARGUMENT

In Schlup v. Delo, 513 U.S. 298 (1995), the United States Supreme Court held that federal habeas petitioners may obtain consideration of the merits of otherwise procedurally barred or defaulted constitutional claims if they can show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. In such situations, the Court said, society's interest in finality must yield to the imperative of correcting a fundamental miscarriage of justice. Mr. Peterka has presented such a situation. However, the circuit court refused to consider or recognize that the actual innocence exception delineated in Schlup applies in Rule 3.851 proceedings.

Because Schlup must apply in Florida's capital postconviction proceedings and because it is an important "safety valve" that balances society's interest in finality with the imperative of correcting fundamentally unjust convictions, this Court should find that the actual innocence exception delineated in Schlup applies in Rule 3.851 proceedings and remand to the circuit court for further proceedings.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. PETERKA'S SUCCESSIVE RULE 3.851 MOTION BECAUSE (1) THE ACTUAL INNOCENCE EXCEPTION TO PROCEDURAL BARS ADOPTED BY THE UNITED STATES SUPREME COURT IN SCHLUP v. DELO, 513 U.S. 298 (1995), APPLIES IN RULE 3.851 PROCEEDINGS, AND (2) MR. PETERKA PROFFERED SPECIFIC FACTUAL ALLEGATIONS, WHICH ENTITLE HIM TO THE RELIEF REQUESTED.

The purpose of a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 is to correct convictions and sentences on any and all grounds which subject them to attack. Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963). Although the rule, in the interest of finality, allows summary denial of successive and abusive grounds for relief, there is an exception to that procedural rule that this Court must apply in order for the rule to be constitutional: The merits of otherwise procedurally barred or defaulted constitutional claims should be considered in a Rule 3.851 proceeding if the movant can show that the failure to do so will result in a "fundamental miscarriage of justice."[3] Mr. Peterka was deprived of that critical constitutional protection when the circuit court summarily denied his successive Rule 3.851 motion based on its view that the rule barring successive claims is absolute, without exception even to correct fundamentally unjust convictions.

---

[3]Coleman v. Thompson, 501 U.S. 722, 750 (1991), accord Sawyer v. Whitley, 505 U.S. 333, 339 (1992); Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); Smith v. Murray, 477 U.S. 527, 537-8 (1986); Murray v. Carrier, 477 U.S. 478 495-6 (1986); Engle v. Issac, 456 U.S. 107, 135 (1982); Wainwright v. Sykes, 433 U.S. 72, 91 (1977). See also McClesky v. Zant, 499 U.S. 467, 494 (1991).

Although the United States Supreme Court has refrained from providing a definitive interpretation of the term "miscarriage of justice", the Court has made clear that the miscarriage of justice exception to a procedural bar or default extends, at the very least, to cases of "actual innocence", which it has defined as situations in which "a constitutional violation has probably resulted in the conviction of one who is actually innocent [of the offense for which he has been convicted]."[4]

Accordingly, Mr. Peterka asserted in his successive Rule 3.851 motion that certain evidence and argument that was not presented at trial demonstrates both that he was denied the effective assistance of trial counsel and that he is actually innocent of first degree murder, which under the actual innocence exception to procedural bars adopted in Schlup, creates a "gateway" through which he should be allowed to pass to have the merits of the claim of ineffective assistance of trial counsel that his postconviction counsel failed to develop during the initial 3.851 proceedings considered.

In Schlup, the United States Supreme Court further developed the "probable innocence" standard first announced in Murray v. Carrier, 477 U.S. 478 (1986). In doing so, the Court made clear that the standard is less demanding than the standards that apply when a

---

[4] Murray v. Carrier, 477 U.S. at 496, accord Schlup v. Delo, 513 U.S. at 325, 327-8 (constitutional violation "'probably has caused the conviction of one innocent of the crime'"or "'has probably resulted in the conviction of one who is actually innocent'" (quoting Murray v. Carrier, at 494, 496)); Herrera v. Collins, 506 U.S. 390, 442 (1993)(Blackmun, J., dissenting)(collecting various versions of the Court's "probability of innocence" test for miscarriage of justice).

petitioner claims that there was constitutionally insufficient evidence to convict him[5], that he cannot constitutionally be executed

[5] See Schlup, 513 U.S. at 330 ("Though the Carrier standard requires a substantial showing, it is by no means equivalent to the Jackson [v. Virginia, 443 U.S. 307 (1979)] standard that governs review of claims of insufficient evidence." Id. at 323 n. 38 ("Even the high standard of proof set forth in Sawyer [v. Whitley, 505 U.S. 333 (1992), which is higher that the "probable innocence" standard of Murray v. Carrier, as adopted by the Court in Schlup] falls short of the Jackson standard governing habeas review of claims of insufficiency of the evidence."; id. at 333 (O'Connor, J., concurring)(Carrier "standard which focuses on the likely behavior of jurors, is substantively different from the rationality standard of Jackson").

Under Jackson v. Virginia, the evidence of guilt adduced at trial is constitutionally insufficient only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 324 (emphasis added). The Schlup Court carefully explained the difference between the extremely stringent "binary" standard of Jackson and the less stringent "probabilistic" standard for assessing "probable innocence," namely, whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence [of innocence]." Schlup, 513U.S. at 327-8:

> Under Jackson, the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under [the manifest miscarriage standard of] Carrier, the use of the word "would" focuses the inquiry on the likely behavior of the trier of fact.
>
> Under Jackson, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of facts has power as a matter of law or it does not. Under [the] Carrier ["actual innocence" standard], in contrast, the habeas Court must consider what reasonable triers of fact are likley to do. Under this probabilistic inquiry, it makes sense to have a probabilistic standard such as "more likely than not." Thus, though under Jackson the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under Carrier.

Id. at 330 (footnote omitted)(emphasis added). Under Jackson's binary approach, "the assessment of the credibility of witnesses is generally beyond the scope of review," id., because the reviewing court is required to assess the sufficiency of the evidence on the assumption that the jury "viewed the evidence in the light most

because he is innocent of the offense[6], or that executing him without reviewing his otherwise barred or defaulted sentencing-phase claims would amount to a manifest miscarriage of justice"[7]. "Probable

---

favorable to the prosecution" and "resolve[d all] conflicts in the testimony" in favor of the state. Jackson, 443 U.S. at 319. Under the "actual innocence" test's probabilistic approach, however, the question is not whether "there is sufficient evidence which, if credited, could support the conviction," but rather, whether there is a sufficient probability that rational jurors would have credited the state's evidence and, as a result, would have voted to convict notwithstanding the petitioner's new evidence of innocence. Schlup, 513 U.S. at 329-30. Accordingly, a petitioner has met Schlup's "actual innocence" test if he "persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id.

[6]See Schlup, 513 U.S. at 315-7 (a petitioner who "accompanies his claim of innocence with an assertion of constitutional error at trial" "need carry less of a burden" than a petitioner who alleges innocence as a basis for relief from execution but proceeds "on the assumption that the trial that resulted in his conviction had been error-free"; the former petitioner "must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a fair trial," while the latter petitioner must produce "evidence of innocence . . . strong enough to make his execution 'constitutionally intolerable' even if his conviction was the product of a fair trial." See generally Herrera v. Collins, 506 U.S. 390 (discussing innocence as a freestanding basis for habeas corpus relief from death sentence).

[7]See Schlup, 513 U.S. at 325 (when underlying constitutional claim challenges legality of conviction, "probable innocence" standard is "somewhat less exacting" than when claim challenges legality of death sentence); id. at 327 (when underlying constitutional claim challenges legality of conviction, manifest miscarriage of justice is present if "it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence"; "showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard required under Sawyer [v. Whitley, 505 U.S. at 336]" for establishing manifest miscarriage of justice when underlying claim challenges legality of death sentence); id. at 326-7 ("Carrier 'probably resulted' standard rather than the more stringent Sawyer standard must govern the miscarriage of justice inquiry when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the

innocence" is established in this context if the petitioner presents "new facts [that] raise[] sufficient doubt about [his] guilt to undermine confidence in the result of the trial . . . ".[8] "To establish

the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[9]

---

consideration of the merits of his constitutional claims.") id. at 326 n. 44 (Court "confin[es] Sawyer's more rigorous standard to claims involving eligibility for the sentence of death.").

[8]Schlup, 513 U.S. at 317. Accord id. at 316 ("Evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional errors."). See also Sistrunk v. Armenakis, 292 F.3d 669, 673 n.4 (9th Cir. 2002)(en banc), cert. denied, 537 U.S. 1115 (2003)(Magistrate judge erred in stating that "only newly-discovered evidence is properly submitted in support of a Schlup claim" of actual innocence; '"new evidence' necessary to support a claim of actual innocence under Schlup" encompasses not only "newly available" but also "newly presented" evidence: "In Schlup, the Court specifically stated that a claim of actual innocence requires the introduction of 'new reliable evidence . . . that was not presented at trial.'"). Under this approach, once a petitioner shows (1) that serious and consequential constitutional error occurred at trial and (2) that he is more probably innocent than guilty, he has adequately demonstrated that his "case is truly 'extraordinary,'" and thus deserving of habeas corpus relief notwithstanding a procedural bar or default. Schlup, 513 U.S. at 327 (quoting McClesky v. Zant, 499 U.S. at 494).

[9]Schlup, 513 U.S. at 327; id. ("To satisfy the Carrier gateway standard [of actual innocence], a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."). Accord Bousley v. United States, 523 U.S. 614, 623 (1998)(quoting Schlup).

Notwithstanding the standard's somewhat misleading name (and the courts' occasional use of an equally misleading phrase, "factual innocence," when referring to the standard, see e.g. Bousley v. United States, 523 U.S at 623-4), the "actual innocence" test actually focuses on a type of legal innocence, namely whether there is a

Mr. Peterka stated a colorable gateway claim of actual innocence under the standard set forth in Schlup. He proffered a great deal

---

sufficient probability that rational jurors presented with the new evidence would have reasonable doubt as to the petitioner's guilt. See Schlup, 513 U.S. at 327-9 ("Carrier standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt"; "whether a court is assessing eligibility for the death penalty under Sawyer, or is deciding whether a petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence," (footnote omitted)). The test accordingly does not require any particular probability – in the estimation of reasonable jurors or anyone else – that Mr. Peterka is factually innocent of the crime. In other words, if Mr. Peterka's evidence would convince all reasonable jurors that he is no more likely to have committed a first degree murder than an excusable homicide, or for that matter a manslaughter, the "probable innocence" standard would be met because all reasonable jurors would have to find a reasonable doubt as to Mr. Peterka's guilt of first degree murder. See also id. at 329 (in assessing "probable innocence," "[i]t must be presumed that a reasonable juror would consider fairly all of the trial evidence presented" and "would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt" (footnote omitted)); Carriger v. Stewart, 132 F.3d 463, 478-9 (9th Cir. 1997), cert. denied, 523 U.S. 1133 (1998)(petitioner satisfied "miscarriage of justice" exception because "i[t] is more likely than not that no reasonable juror hearing all of the now-available evidence would vote to convict Carriger beyond a reasonable doubt"; "dissent incorrectly assumes that in order to prevail on a Schlup claim, Carriger must prove that he is actually innocent.

In Schlup, the Court also indicated that the determinative question is the petitioner's legal innocence "of the crime at issue in th[e] case" and not his innocence of all crimes or of all lesser degrees of the crime charged. Schlup, 513 U.S. at 328 n. 47. See id. ("Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life."). Although the Court gives and example of a petitioner innocent of the offense at issue in the case who committed a "sordid" offense in the past, id., its analysis applies equally to someone like Mr. Peterka who concedes that he may have committed a lesser offense growing out of the same circumstances. See e.g., Bousley v. United States, 523 U.S. at 624 (rejecting the Government's argument that a showing of "actual innocence" must encompass not only the crime charged in the indictment but also a related crime that the Government could have charged).

of evidence and argument in his successive Rule 3.851 motion (PC-R2. 213-32), which was not presented at trial that is strong evidence to cause all reasonable, properly instructed jurors to harbor a reasonable doubt he is guilty of the offense of which he was convicted: first degree murder. Instead, it is more likely than not that a jury hearing all of the now-available evidence would find that he committed either an excusable homicide or a manslaughter.[10]

So the question that this Court must answer is: Does the actual innocence exception to procedural bars adopted by the United States Supreme Court in Schlup v. Delo apply in Rule 3.851 proceedings? Although there is no obvious reason in either law or logic for the Florida courts to not recognize Schlup's actual innocence exception to procedural bars in Rule 3.851 proceedings[11], the trial court denied

[10]Notably, this would also make Mr. Peterka actually innocent of his death sentence, because a conviction of first degree murder is a prerequisite for the imposition of the death penalty under Florida law. Cf. §§ 775.082, 782.03, and 782.07, Fla. Stat. (Making clear that a death sentence cannot be imposed upon someone who commits either an excusable homicide or a manslaughter), with Sawyer v. Whitley, 505 U.S. 333, 346-8 (1992)(to gain review of an otherwise procedurally barred sentencing-phase claim based on actual innocence, a petitioner must show that "but for constitutional error . . . , no reasonable juror could have found him eligible for the death penalty under [state] law. This is a related yet independent basis for this Court to grant the relief requested herein, the significance of which is underscored by the Court's obligation to ensure that capital punishment is never imposed in an arbitrary and capricious manner, Gregg v. Georgia, 428 U.S. 153, 189 (1976), and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. See the cases cited in footnotes 12 and 13, infra.

[11]Indeed, in another case the State itself argued that Schlup's actual innocence exception to procedural bars applies in Rule 3.850/3.851 proceedings. See Wyzykowski v. Dept' of Corr., 226 F.3d 1213, 1219 n.8 (11th Cir. 2000)("at oral argument before this panel,

Mr. Peterka's successive Rule 3.851 motion summarily based on its view that the rule barring successive claims like the one he asserted (or, for that matter, abusive claims) is absolute, without exception to correct a fundamentally unjust conviction. This Court should not shrug its shoulders in that way.

While finality is important, its value is premised upon the assumption that those who have been prosecuted and convicted are in fact guilty of the offense of which they were convicted. However, innocent people can, and do, get convicted of crimes they did not commit. And sometimes procedural bars or defaults prevent courts from reaching the merits of their constitutional claims in Rule 3.851 proceedings. In such situations, and to prevent a miscarriage of justice that would result from the failure to adjudicate claims that a constitutional violation has probably resulted in the conviction of one who is actually innocent, Florida courts must recognize the actual innocence exception to procedural bars adopted by the United States Supreme Court in Schlup v. Delo – it is an important "safety valve" that balances society's interest in finality with the imperative of correcting fundamentally unjust convictions.

Moreover, and to the extent not already made clear, this case, like all appeals involving the denial of a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, is a death penalty case. The entire system of capital jurisprudence rests

---

the state suggested that there may be an exception to the two-year time limit in Rule 3.850(b)in the case of [Schlup-type claims of] actual innocence[, and that] the state court rather than the federal court [sh]ould address the factual issue of actual innocence in the first instance.").

on the concept that "death is different" and must be imposed reliably, consistently and proportionately – or not at all.[12] Those goals are not served by strict, exceptionless adherence to a procedural rule that requires Florida courts to blind themselves to colorable claims that a constitutional violation has probably resulted in the conviction of one who is actually innocent. Indeed, society's interest in finality is least compelling in the context of actual innocence in a death penalty case, since the quintessential miscarriage of justice is the execution of an innocent person.[13]

---

[12] See e.g., Herrera v. Collins, 506 U.S. 390, 405 (1995)("We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed."); Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989)(plurality opinion of Rehnquist, C.J.)(collecting cases); id. at 21-22 nn. 9-10 (Stevens, J., dissenting)(collecting cases); Turner v. Murray, 476 U.S. 28, 35-6 (1986); Strickland v. Washington, 466 U.S. 668, 686-7 (1984); California v. Ramos, 463 U.S. 992, 998-9 (1983); Zant v. Stephens, 462 U.S. 862, 885 (1983); Eddings v. Oklahoma, 455 U.S. 104, 117-9 (1982)(O'Connor J., concurring); Beck v. Alabama, 447 U.S. 625, 637-8 (1980); Rummel v. Estelle, 445 U.S. 263, 271-2 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[13] See e.g., Lankford v. Idaho, 500 U.S. 110, 125 (1991); Clemons v. Mississippi, 494 U.S. 738, 750 n.4 (1990); Booth v. Maryland, 482 U.S. 496, 509 n.12 (1987); Solem v. Helm, 463 U.S. 277, 294 (1983); Gardner v. Florida, 430 U.S. 349, 357-8 (1977)(plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-4, 305 (1976)(plurality opinion of Stewart, Powell and Stevens, JJ).

CONCLUSION

Mr. Peterka's case is an extraordinary death penalty case where the gross misconduct of postconviction counsel during the initial Rule 3.851 proceedings (it is undisputed that postconviction counsel actively misled, deceived and thwarted Mr. Peterka's diligent efforts to do what was required), combined with procedural limitations, has prevented the circuit court from reaching the merits of a colorable claim that a constitutional violation has probably resulted in the conviction of one who is actually innocent. To prevent the miscarriage of justice that would result from the failure to adjudicate such claims, this Court should use this opportunity to hold that the actual innocence exception to procedural bars adopted by the United States Supreme Court in Schlup v. Delo applies in Rule 3.851 proceedings.

Wherefore, the Appellant, DANIEL JON PETERKA, requests this Court to:

1. Hold that the actual innocence exception to procedural bars adopted by the United States Supreme Court in Schlup v. Delo, 513 U.S. 298 (1995), applies in Rule 3.851 proceedings;

2. Remand the case to the circuit court with instructions to (1) conduct an evidentiary hearing to determine whether the evidence of innocence Mr. Peterka has proffered in his successive Rule 3.851 motion satisfies the standard set forth in Schlup, and, if so, (2) consider the merits of his otherwise procedurally barred constitutional claim; and

3. Grant any other relief as appears just and proper in light of the facts and circumstances of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Fl 32399-1050, on December 8, 2008.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

____

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th St.
Wilton Manors, Florida 33334
(850) 322-2171

Attorney for Appellant