No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

RICKY L. KIDD,

Petitioner,

vs.

JEFF NORMAN, Superintendent,
Southeast Missouri Correctional Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner Ricky L. Kidd petitioned for habeas relief from his Missouri conviction for murder on the grounds that his trial attorney was ineffective for failing to uncover and present evidence that he is innocent. Mr. Kidd's *Strickland* claim was defaulted when his court appointed attorney omitted it from his motion under Missouri Rule of Criminal Procedure 29.15, the first proceeding in which it could have been raised. *State v. Wheat*, 775 S.W.2d 155,157-158 (Mo. 1989) (en banc). To overcome the procedural bar, Mr. Kidd asserted his actual innocence pursuant to *Schlup v. Delo,* 513 U.S. 298 (1995), proffering substantial evidence impeaching the state's main witness, establishing an alibi, and identifying the actual perpetrators of the crime. Contrary to the Third, Sixth, Seventh, Ninth and Tenth Circuits, the Eighth Circuit Court of Appeals limits *Schlup* gateway innocence claims to evidence that "was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox,* 128 F.3d 1222, 1230 (8th Cir. 1997) (*en banc*). Because trial counsel was on notice of most of the evidence supporting Mr. Kidd's innocence, *Amrine* required the courts below to reject his *Schlup* evidence solely because his trial lawyer could have found and presented it. This scenario raises the following questions:

1. Whether a habeas petitioner's evidence of actual innocence, presented as a procedural gateway to reach a defaulted claim of ineffective assistance of counsel pursuant to *Schlup v. Delo,* 513 U.S. 298 (1995), must be ignored solely because the allegedly ineffective trial counsel could have found and presented it?

2. Whether a habeas petitioner's claim of actual innocence must be rejected if, in spite of newly presented evidence of innocence, a jury could still find him guilty?

3. Whether this matter should be remanded for reconsideration in light of *Martinez v. Ryan* because the procedural bar which necessitated Mr. Kidd's reliance on the *Schlup* actual innocence gateway was caused by the ineffectiveness of appointed, first-tier state post-conviction counsel, who abandoned without investigating multiple claims of ineffective assistance of trial counsel?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Kidd prays that a writ of certiorari will issue to review the judgment of the United States Court of Appeals for the Eighth Circuit which affirmed an order of the district court that refused to consider evidence supporting petitioner's claim of actual innocence, presented pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), as a gateway to reach a defaulted claim of ineffective assistance of counsel, solely because trial counsel could have found and presented the evidence had she acted with due diligence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published as *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011), and is published in the Appendix at A-1. The Order of the Court of Appeals denying rehearing or rehearing *en banc* is published in the Appendix at A-24. The unpublished decision of the United States District Court for the Western District of Missouri, *Kidd v. McCondichie*, No. 03-0079-CV-W-SOW (W.D.Mo. Dec. 8, 2009), denying habeas corpus relief is published in the Appendix at A-13.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was issued on August 29, 2011. A timely Petition for Rehearing or Rehearing en banc was denied on January 10. 2012, with two judges dissenting. A-24. The Honorable Samuel Alito, Circuit Justice for the Eighth Circuit, pursuant to Rule 13, granted petitioner's request to extend the time within which to file this petition until May 9, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The decision below affirmed the dismissal of Ricky L. Kidd's first Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Sec. 2254. Mr. Kidd alleged, among other things, that his trial lawyer was ineffective, and pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), he asserted his actual innocence to overcome procedural bars erected by the deficient performance of his attorney in his initial collateral review proceeding. Based on Mr. Kidd's allegation that a reasonably competent trial attorney could have found and presented evidence of his innocence, the courts below dismissed his petition because the Eighth Circuit prohibits consideration of a gateway claim of innocence unless it rests on evidence that "was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox*, 238 F.3d 1222, 1230 (8th Cir. 2001).

The Trial Evidence and Missouri Proceedings

On February 6, 1996, neighbors of George Bryant watched in broad daylight as three men fled his residence at 7009 Monroe, Kansas City, Missouri, after robbing and murdering Bryant and Oscar Bridges. George Washington and Shannon Harris heard gunshots and saw three black men wearing black skull caps and knee-length black leather coats jump into a new, white Oldsmobile Sierra and speed away. T. 535-36; 550-51.[1] From across the street, Shannon Harris saw that the men wore ski masks that covered their faces. T. 554.

When Kansas City Police Officer Gary Cooley arrived at Bryant's home around 11:50 a.m., he found find Bryant's four-year-old daughter, Kayla Bryant, standing in the garage crying, still on the phone with the 911 operator. T. 487-90, 494. George Bryant was lying in a pool of blood in the snow in his front yard, shot multiple times. T. 489. The body of Oscar Bridges was in Bryant's basement, his feet, hands and mouth bound with duct-tape. He had been shot twice in the back of his head. T. 492-93.

Although there were three perpetrators, only Ricky Kidd and Marcus Merrill were charged with the crime. Their cases were joined for trial. Kayla Bryant testified that she was

[1] References to the trial transcript in *State v. Kidd,* the transcript of the habeas corpus hearing in the district court in *Kidd v. McCondichie,* and the Appendix on Certiorari herein are abbreviated "T," "Hrg. T." and "A," respectively

eating a McDonald's happy meal and watching television when men came to her house in a white car. T. 503-04. Her father opened the garage door to let them in, and as they were standing in the kitchen she heard a shot. T. 505. She called one robber "the fat one," T. 513, and the other "the skinny one." T. 506. After her father fell to the floor, Oscar ran downstairs, and one of the men followed him and shot him. T. 511. The men searched her father's pockets, the bedrooms and the rest of the house. Her father got up and ran, and they shot him again. T. 511-12. Kayla told officers that "Daddy's brother" shot her daddy, "but it wasn't Daddy's brother." T. 528. When asked whom she meant by "Daddy's brother," Kayla shrugged her shoulders and said she didn't know. T. 1024. "The fat one" told her, "It's okay." T. 513, 1024. She said the men who shot her father had come to her house two days before the shooting. T. 521.

The prosecutor asked Kayla if she saw the man who shot her daddy in the courtroom, and she replied, "No." T. 518. When shown a photo array that included both Marcus Merrill and Ricky Kidd, she selected only No. 3, Marcus Merrill, as the "fat one." T. 519-20, 994-95.[2] When asked if she identified more than one person, Kayla replied, "I only saw him," referring to Merrill. *Id.* The prosecutor told her to look around the courtroom again, and asked, "Do you see anybody in here that might have been at your house that day?" She replied, "No." T. 521. Mr. Kidd's counsel did not cross-examine Kayla Bryant. After the child failed to recognize Mr. Kidd, a detective testified that Kayla selected Ricky Kidd from a video lineup. T. 749.[3]

Mr. Kidd became a suspect because he was one of ten men named in anonymous calls to police. T. 729, 770, 817. He was arrested on February 14, 1996, in the company of his girlfriend, Monica Gray. T. 1030. They were transported separately to police headquarters and questioned. T. 1033, 1052. In separate interrogations, Mr. Kidd and Ms. Gray told police that they were together all day on February 6, 1996, and they had gone to the sheriff's office at Lake Jacomo to

[2] Ricky Kidd is six feet tall and weighed 204 pounds. T. 781. Marcus Merrill is five feet, nine inches tall and weighed 170 pounds. T. 766.

[3] The trial court excluded from evidence a video tape of Kayla Bryant's post-lineup interview which omits any reference to her alleged identification and demonstrates that she was a typical fidgety, distracted and suggestible four-year-old being questioned by homicide detectives who admittedly had no training in the questioning of very young children. T. 784, 787-89.

apply for a gun permit. T. 1056, 1100, 1222. Kidd agreed to participate in a video-taped line-up and signed multiple consents to search his car and belongings. T. 969, 1032.

The only direct testimony linking Mr. Kidd to the crime came from Richard Harris,[4] who lived at 7000 Monroe with his mother. Harris was wanted for violating his parole on a drug trafficking conviction, T. 585, and eluded capture until March 11, 1996. T. 64-65, 585. Harris claimed that he spent the morning watching "The Young and the Restless" at Michael Holland's house. When it was half over, he went home to get something to eat. T. 561. As he walked past Bryant's house, he saw Bryant run out of his garage, with blood on his sweater, yelling "Somebody help!" Bryant was pursued by two men, one of whom carried a gold plated pistol. T. 561-64. The first suspect grabbed Bryant and put him on the ground, and the second suspect walked up to Bryant and shot him. T. 567-68. When the attackers saw him, Harris turned and fled. T. 575. Based on this brief encounter, Richard Harris became the only witness to identify Ricky Kidd at trial as the shooter. T. 580-87.

No physical evidence linked Kidd to the crime. The murder weapon was never found. A slice of bread on the kitchen floor and a piece of linoleum recovered from the crime scene bore shoe impressions that did not match the footwear of George Bryant, Oscar Bridges or Ricky Kidd. T. 865-69.

Consistent with his statement to police, Mr. Kidd testified and called witnesses to establish an alibi. In February of 1996 he lived at 701 East Armour Boulevard in Kansas City with his girlfriend, Monica Gray. T. 1089. On the evening of February 5, 1996, Mr. Kidd's sister, Nechelle "Nicky" Kidd, and her son D.J. spent the night with him because she had an argument with her roommate. T. 1130. The next morning Nicky, a customer service representative for DST Mutual Funds, awoke early and drove to work in Mr. Kidd's black 1993 Toyota Corolla, T. 1131-32, which he bought to replace his unreliable 1981 Oldsmobile Delta 88. T.1193, 1198. Mr. Kidd asked Lawson Gratts, his mother's fiancé, to help jump start the Delta 88, T. 1119, 1199, then he, Ms. Gray and D.J. drove to DST to pick up his Corolla. T. 1093, 1133, 1201. Nicky's

[4] Richard Harris is not related to Shannon Harris, who lived directly across the street from George Bryant.

co-worker, Alana Wesley, saw Mr. Kidd collect the keys from his sister around 11:00 or 11:30 a.m. T. 1169.

Mr. Kidd drove the Oldsmobile home as Ms. Gray followed in the Corolla, then they drove the Corolla to the Jackson County Sheriff's Office at Lake Jacomo, where Mr. Kidd filled out an application for a gun permit. T. 1093-95, 1201-04. Jackson County Sergeant Tim Buffalow identified a copy of the application, signed by Mr. Kidd and dated February 6, 1996. Computer files show that a criminal record check was run on Mr. Kidd at 1:37 p.m. that same day. T. 1160-62. On cross-examination by the state, Sergeant Buffalow testified that Mr. Kidd's application could have been received on February 5, 1996. T. 1164-65. The state cross-examined other alibi witnesses about the significant delay between February 6 and their first contact by defense counsel, undermining confidence in their ability to fix the events to a particular day.

Although neither Gary Goodspeed, Sr. ("Big Gary"), nor Gary Goodspeed, Jr. ("Little Gary"), were ever charged with the crime, evidence implicated both in crime. Richard Harris identified Little Gary from a video line-up as the man who tackled Bryant as he ran from his garage. T. 625. Merrill and Little Gary shared an apartment in Decatur, Georgia, and airline and hotel records established that Merrill and the Goodspeeds flew from Atlanta to Kansas City several days before the homicide, stayed at the Adam's Mark Hotel, and returned to Georgia several days later. T. 537, 834-39, 1027. At Alamo Rent-A-Car near the airport, Big Gary rented a white Oldsmobile Sierra that was believed to be the getaway-car. T. 763, 969. Big Gary's fingerprint was on a Carmex lip balm wrapper found in the rental car with a price tag from a "Good To Go" convenience store a block and a half from the crime scene. T. 977-78, 1013, 1039-40.

Merrill's counsel argued to the jury that the Goodspeeds committed the crime, and since the police developed four suspects in a crime committed by three people, the issue was whether Merrill or Kidd was the third accomplice or the odd man out. T. 1358-1370. Merrill's statement to police, admitted without objection from Mr. Kidd's counsel, described Mr. Kidd and Little Gary as "best of friends." T. 86-97. Merrill's lawyer argued, incorrectly and without correction, that Kidd's fingerprint was in Goodspeed's get-away-car. T. 1364-65. The only fingerprint

identified as Mr. Kidd's was found on the window of Kidd's own 1981 Delta 88, which was never connected to the crime. T. 692-95, 1011-12. In response to Mr. Kidd's alibi defense, the state argued, based on Sergeant Buffalow's testimony, "I'm not up here to call these people liars because I can't do that….[they] are telling you the truth but they are telling the truth about a different day." Trial Tr., 1385.

The jury found both Merrill and Mr. Kidd guilty of two counts of murder in the first degree, § 565.020.1 RSMo 2000, and two counts of armed criminal action. § 571.015. Mr. Kidd was sentenced to life imprisonment without the possibility of parole for each murder, and life imprisonment on each count of armed criminal action. His convictions were affirmed on appeal. *State v. Kidd*, 990 S.W.2d 175 (Mo. App. 1999).[5]

Mr. Kidd filed a *pro se* motion under Missouri Rule of Criminal Procedure 29.15, the initial proceeding in Missouri for raising claims of ineffective assistance of trial counsel. Mr. Kidd's allegations that trial counsel failed to investigate and present evidence of his innocence were abandoned when his public defender omitted them from Mr. Kidd's amended motion. On Mr. Kidd's allegation that he was improperly sentenced as a prior felony offender, his convictions for Armed Criminal Action were vacated, but relief was denied as to his sentences to life without the possibility of parole on the murder counts. The Missouri Court of Appeals affirmed. *Kidd v. State*, 75 S.W.3d 804 (Mo. App. 2002).

Federal Habeas Corpus Proceedings Pursuant to 28 U.S.C. § 2254

Mr. Kidd filed a *pro se* petition for writ of habeas corpus in the Western District of Missouri. Thereafter his case was accepted by the Midwest Innocence Project, which followed fruitful avenues of investigation that were obvious from the police reports. A reasonable investigation produced evidence implicating Gary Goodspeed, Sr., Gary Goodspeed, Jr., and Marcus Merrill in the homicides, impeaching Richard Harris' eyewitness identification, and further substantiating Mr. Kidd's alibi defense. Based on this evidence, Mr. Kidd's amended habeas petition alleged multiple new claims that trial counsel had been ineffective, and asserted

[5] Merrill, too, was sentenced to two terms of life without parole and two terms of life imprisonment. *State v. Merrill*, 990 S.W.2d 166 (Mo. App. 1999).

a gateway claim of actual innocence pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), to overcome the procedural defaults brought about by state post-conviction counsel's failure to investigate and present the ineffective assistance of trial counsel claims in the first instance. The evidence supporting Mr. Kidd's allegations was presented at an evidentiary hearing convened by the federal district court.

A. *Evidence implicating the Goodspeeds and Merrill*.

Although Merrill told police he visited Eugene Williams at his mother's home on the morning of the murders, neither the police nor Kidd's counsel ever interviewed Williams. Hrg. T. 178-79. At the federal hearing, Williams candidly acknowledged that he and Merrill had robbed drug houses together. Hrg. T. 171-72. He also gave an account of what he knew about the murders.

According to Williams, Merrill had appeared at his house on the morning of the murders, and the Goodspeeds arrived later. Hrg. T. 174, 180. In Williams' presence, the Goodspeeds and Merrill discussed plans to rob a drug house. Hrg. Tr. 177. Big Gary was armed with a gold-plated .45 automatic pistol, Merrill was armed with a Glock 9mm, and Williams loaned Little Gary a broken .38 caliber revolver. Merrill and the Goodspeeds chatted a while then left. Hrg. T. 175-76.[6] Williams also knew Jean Bynum, Big Gary's ex-wife, and was aware that she was having an affair with George Bryant, and that Big Gary was angry about it. Hrg. T. 178. When Williams saw the murder on the news that evening, he knew what happened. Hrg. T. 177. Importantly, Williams further made clear that Ricky Kidd had not been at Williams' house, and his name had never came up in the conversation. Hrg. T. 174, 177. Although he is named in police reports, federal habeas counsel's investigator was the first person ever to interview Williams about the crime. Hrg. T. 178-79.

Marcus Merrill also testified at the federal hearing, admitting that he and the Goodspeeds committed the murders, and that Mr. Kidd had no involvement whatsoever. Hrg. T. 10-99.[7]

[6] Williams had last used the .38 in a drug house robbery he committed with Merrill, and" the cylinder thing fell out." Hrg. T. 176. Merrill pulled out his gun, so the robbery was nevertheless successful. *Id.*

[7] Mr. Kidd disclosed all of the letters he had sent Merrill over the years begging him to come

Merrill confirmed that he and the Goodspeeds met at Eugene Williams' house, and proceeded to George Bryant's house to rob him. Merrill was armed with a 9 mm pistol, Gary Sr. had a .45, and Williams loaned Gary Jr. a broken .38 revolver. On the way to George's house, Gary Sr. stopped at a hardware store and bought a roll of duct tape. Hrg. T. 25. When they arrived, George Bryant raised the garage door for them. Hrg. T. 28. Bryant was familiar with Little Gary. Because Bryant and Little Gary physically resembled one another, Bryant's nickname for Gary Goodspeed, Jr., was "Little Brother." Hrg. Tr. 18. This explained Kayla Bryant's otherwise puzzling statement that "Daddy's brother shot daddy."

Merrill further explained that, once inside the kitchen, Big Gary pulled his gun, pointed it at Bryant and said, "Give it up." Hrg. T. 28-29. Bryant rushed the gun, it went off, and he fell to the floor. Hrg. T. 29-30. This is consistent with the medical examiner's finding that a bullet entered Bryant's chest just below the neck, tracking slightly downward and left, and exited Bryant's back. T. 948. As Big Gary escorted Oscar Bridges downstairs, he told Merrill to watch Bryant. Hrg. T. 30. Merrill was searching for money or drugs when he heard a gunshot from the basement. Hrg. T. 33. Bryant had a garage door opener in his hand, and he opened the door as he rushed past Merrill and into the garage. *Id*. As Bryant pushed him, Merrill put his gun against Bryant's shoulder and fired. Hrg. T. 34. The medical examiner found a wound marked by a muzzle abrasion on the back of Bryant's left shoulder; the bullet exited the right side of Bryant's chest. T. 945-46.

According to Merrill, Little Gary was standing guard in the garage, and he held Bryant until Big Gary came upstairs, went outside and shot him. Hrg. T. 34.[8] Merrill started toward the get-away car, but Big Gary told him the little girl had seen him, and Merrill "needed to do something about it." Just as Kayla Bryant said, Merrill went back inside and told her "it would be okay," and he "shot a bullet in the wall." *Id.* Police found a bullet hole in the wall separating

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forward and tell the truth, and Merrill's replies refusing to acknowledge guilt. In one letter, Mr. Kidd suggested that Merrill might get some relief from his life sentence by helping the prosecution bring the Goodspeeds to justice. Hrg. T. 52-58. Merrill finally agreed to do so after his appeals expired. Hrg. T. 59.

[8] Bullets fired from the same unknown .45 caliber handgun were recovered from the bodies of Bryant and Bridges. T. 859

the kitchen from the garage and two 9mm bullet fragments in the garage. T. 648-51, 862-64. Merrill went outside and told Big Gary that he had taken care of the girl. Hrg. T. 45.

Merrill and the Goodspeeds drove back to the Adam's Mark Hotel. Hrg. T. 38. En route, Little Gary complained that the .38 revolver Williams had loaned him "jammed or something." Hrg. T. 28. They agreed on an alibi: they would tell the police that they were together at the hotel and then went to Jean Bynum's house. *Id.* When questioned by police, Merrill and the Goodspeeds stuck to their story. Their accounts of February 6, 1996, made no mention whatsoever of Ricky Kidd. Hrg. T. 39, 43-48. After Merrill was charged with the crime, his lawyer gave notice that Merrill would call the Goodspeeds and Jean Bynum as alibi witnesses. Hrg. T. 49.[9]

B. *Evidence impeaching Richard Harris' purported eyewitness identification.*

Trial defense counsel's cross-examination of Richard Harris amounted to little more than a rehash of his direct testimony, accented with a handful of failed attempts at impeachment. T. 597-605. Harris described the shooter as wearing a fawn colored or rust colored coat, T. 606, contrary to every other eyewitness who said the men all wore black leather coats. T. 506-08, 536, 550. When Harris said the shooter had a light beard, T. 606, trial counsel's attempt to establish a prior inconsistent statement drew the trial court's admonition, "This doesn't impeach him." T. 607-08. On her second inept attempt to impeach Harris with a prior statement, the trial court again chastised her," "If you're going to impeach him, do it right. That's not the way to impeach somebody." T. 616. The defense cross-examination of Richard Harris concluded without the defense establishing a single prior inconsistent statement.

By contrast, federal habeas counsel's investigation produced substantial evidence impeaching Richard Harris' testimony. In fact, the Eighth Circuit found that "Kidd's habeas counsel was able to discredit much of Harris's eyewitness testimony, pointing out discrepancies in his testimony and generally impeaching Harris's credibility." A. 6. For example, Harris

[9] Merrill and his lawyer chose not to call the Goodspeeds as alibi witnesses because as the evidence developed at trial, it became clear that the Goodspeeds were involved in the crime, and for Merrill to link himself to them would actually support his guilt. T. 1251, Hrg. T. 51.

claimed that "Bryant's shooter had a red do-rag on his head with hair flowing out the back, but it was undisputed Kidd had a shaved head at the time of the murders." *Id.* In a deposition before the hearing, Harris was unable to identify Mr. Kidd's photograph, saying "I don't know that person with the bald head." *Id*., 405. Harris repeatedly insisted that the shooter "was not bald-headed." *Id*., 407-08.

Habeas counsel also established that neighbors George Washington, Maurice Givens, Shannon Harris, and Phyllis Davis witnessed the shooting from four different directions, but "never saw Harris in front of Bryant's house at the time of the shooting." A. 6. In fact, Harris's then-wife, Letha Jones, testified that Harris told her he was at his mother's house when Bryant was shot, Hrg. Tr. 137, 491, and Harris told his girlfriend, Sholanda Bailey, that he saw the shooting from his mother's driveway, Hrg. T. 514, too great a distance to distinguish individual facial characteristics. Hrg. T. 137-38, 519. At trial Harris claimed that he saw the shooting and demonstrated how the shooter held the gun, T. 570-71, but he told detectives he was only assuming that second man was the shooter because he had already turned and started running when he heard the shots. Hrg. Tr. 41-42. He admitted that "I wasn't even trying to look at them that good, all I wanted to do was get away." Hrg. Tr. 410.

The Eighth Circuit also acknowledged Harris's admission to "'editing' the information he revealed to the police because he believed himself to be a suspect in the shootings." A. 6. For example, Harris "admitted he never told the police" that he saw "both Goodspeeds and a third man enter Bryant's garage when he first walked to his neighbor's house earlier in the morning." *Id.* Further, Harris concealed that he "frequently used drugs with Bryant" and that he was high on drugs at the time of the shooting. A. 6. Michael Holland testified that at the time, Harris was a daily user of marijuana, crack cocaine and PCP. Hrg. T. 507. Harris was also involved in Bryant's drug-trafficking activities; he estimated that Bryant's assailants escaped with "probably 200 G's," ($200,000) in money and drugs. Hrg. T. 397-98. When asked when he last bought drugs from Bryant, Harris replied, "The day he died." Hrg. Tr. 475.

C. *Corroboration of Mr. Kidd's alibi.*

Finally, investigation into Mr. Kidd's application for a gun permit established that Sergeant Buffalow had nothing to do with Mr. Kidd's application; it was processed by Deputy Susan Jordan, whose badge number 937 appears on the face of Mr. Kidd's application and on the related computer background check. Deputy Jordan "confirmed Kidd's application was received the same day as the shootings, refuting the state's claim at trial that Kidd may have delivered the application the day before the shootings." A. 8. Therefore, Deputy Jordan's testimony substantiated Mr. Kidd's and Ms. Gray's testimony that they were on their way to Lake Jacomo when George Bryant and Oscar Bridges were killed.[10]

The Rulings Below

The district court was not unsympathetic to Mr. Kidd's position. During the hearing, the judge commented that "one thing that really worries me about this case is that actually he, Kidd, he really had poor representation. God almighty." Hrg. T. 2. He also observed that, "what's another tragedy is that the Goodspeeds, and particularly of the Senior, … if he's getting off free, it would be terrible." Hrg. T. 362. Despite these impressions, however, the court perceived the Eighth Circuit's standard of review as insurmountable. Even though "Marcus Merrill…impressed me as a pretty truthful witness," the court remarked, "an appellate court will look at this and say, hey, they had enough to convict him." Hrg. T. 364. The district court's order denying relief is consistent with its perception that the Eighth Circuit's standard for reviewing claims of actual innocence is impossibly high and limited in scope.

In denying Mr. Kidd's petition, the district court explained that pursuant to *Amrine v. Bowersox, supra*, "The difficulty for petitioner Kidd and his current counsel is that at this stage of the proceedings, Kidd must identify new reliable evidence *that was not available at the time of his trial* and that shows he is actually innocent of the crimes." A. 23(emphasis added). Bound by that mandate, the district court refused to weigh Deputy Jordan's testimony because "Kidd

[10] Mr. Kidd restated his alibi, and also testified that before the crime, Goodspeed had asked him to participate, but he declined, and after the crime Goodspeed admitted his guilt to Kidd. Mr. Kidd acknowledged that he did not reveal any of this information to the jury. A. 5-6.

has not identified any new evidence supporting his alibi defense that was not available at the time of his jury trial." A. 21. Since the leads for locating and interviewing Kidd's new witnesses were apparent from the police reports, the district court was compelled by *Amrine* to ignore almost all of the evidence because "the only new evidence Kidd presented was Merrill's testimony." A. 7.

The district court concluded, "The only evidence that Kidd has presented to this Court that was not available to him at the time of his trial is the testimony of Marcus Merrill, claiming that Merrill committed the murders with the Goodspeeds." A. 23. Without considering the testimony of Eugene Williams, Merrill's truthful demeanor and the physical evidence supporting Merrill's confession, the district court rejected Merrill's testimony solely because a jury, hearing that Merrill's confession was motivated by hopes of freedom, "would find Merrill to be lacking in credibility." A. 20. Conceding that "there is no doubt that Harris has given some inconsistent statements," *Id.*, and that "Kidd has raised some serious concerns about how his trial counsel handled the case," A. 11, the district court rejected Mr. Kidd's claim of actual innocence and dismissed his petition.

On appeal, Mr. Kidd challenged the Eighth Circuit's rigid "new evidence" requirement as inconsistent with the plenary review of all evidence, old and new, undertaken by this Court in *House v. Bell,* 547 U.S. 518, 538 (2006). In response, the court of appeals panel acknowledged that other circuits have declined to follow *Amrine*'s strict rule, citing *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003), *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003), and *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010), *see* A. 9, but concluded that it was powerless to overturn settled circuit precedent: "Whatever the merits of a modified approach in situations like the one faced by Kidd, our panel is not at liberty to ignore *Amrine* because we have already applied *Amrine* in situations like Kidd's." A. 11. Accordingly, the panel affirmed the denial of habeas relief, A. 12; rehearing *en banc* was denied, with Judge Bye and Judge Melloy dissenting. A. 23.

REASONS FOR GRANTING THE WRIT

Mr. Kidd's habeas petition alleged that he was convicted of murder in spite of his innocence because his trial attorney performed deficiently. However, that claim was defaulted because another Missouri public defender omitted it from Mr. Kidd's initial collateral review proceeding. Mr. Kidd therefore asserted his actual innocence as a gateway to reach the merits of his defaulted claims pursuant to *Schlup v. Delo,* 513 U.S. 298 (1995), and backed up his claim with substantial evidence that not only is he innocent, but the actual killers are still at large. The court below rejected Mr. Kidd's claim of actual innocence, disregarding most of the evidence, because of its rule that a *Schlup* innocence claim must rest on "new" evidence, and "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011), quoting *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (*en banc*). Thus, the ineffectiveness of Mr. Kidd's trial attorney blocked the *Schlup* gateway because his trial counsel, through the exercise of due diligence, could have found and presented the evidence supporting his innocence.

Schlup involved a Missouri habeas petitioner who attempted to invoke the miscarriage of justice standard of *Murray v. Carrier*, 477 U.S. 478 (1986), to obtain habeas review of procedurally barred claims "that his trial counsel was ineffective for failing to interview and to call witnesses who could establish Schlup's innocence." 513 U.S. at 306. The Eighth Circuit Court of Appeals denied Schlup's petition without a hearing because its decision in *McKoy v. Lockhart*, 969 F.2d 649 (8th Cir. 1992), required prisoners invoking the miscarriage of justice standard to prove innocence by clear and convincing evidence. "The *McCoy* Court lifted this standard from *Sawyer v. Whitley*, 505 U.S. 333 (1992), a case having to do only with the question of punishment, not that of guilt or innocence." *Schlup v. Delo*, 11 F.3d 738, 754 (8th Cir. 1993) (Richard S. Arnold, J., dissenting). A panel of the Eighth Circuit acknowledged "there is

some warrant for Schlup's argument that *Sawyer* was intended by the Supreme Court to apply only to questions of punishment, and that the *Sawyer* opinion itself preserves unchanged, for purposes of the guilt-phase, the earlier standard of *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)." *Id.,* at 754-55. Judge Arnold viewed the proper application of the miscarriage of justice standard to be "a question of great importance in habeas corpus jurisprudence, and I believe it qualifies as deserving of this Court's en banc time." *Id.,* at 755. This Court agreed, granting certiorari, reversing the decision of the Eighth Circuit, and remanding with instructions to apply *Murray v. Carrier's* "probably innocent" fundamental miscarriage of justice standard. *Schlup v. Delo,* 513 U.S. at 332. [11]

The Eighth Circuit Court of Appeals next revisited the miscarriage of justice standard in the case of Joseph Amrine, another Missouri prisoner who claimed actual innocence of the murder for which he was sentenced to death. Amrine's innocence claim rested on the recantations of all of the jailhouse informants who had linked him to the crime, plus the eyewitness testimony of a corrections officer implicating one of the informants as the perpetrator. *Amrine v. Bowersox,* 128 F.3d 1222, 1223-24 (8th Cir. 1997) (*en banc*). In remanding the case for a hearing on Amrine's innocence, the court modified *Schlup,* instructing the district court that "[t]he evidence is new only if it was not available at trial and *could not have been discovered earlier through the exercise of due diligence.*" *Amrine v. Bowersox, supra,* at 1230 (emphasis added). Just as it had done in *McKoy v. Lockhart,* the Eighth Circuit Court of Appeals borrowed the "due diligence" modification to *Murray v. Carrier's* gateway innocence standard from inapposite decisions in *Smith v. Armontrout,* 888 F.2d 530, 539-540 (8th Cir. 1989), which

[11] Applying the *Murray v. Carrier* standard, the district court found Schlup's evidence credible, granted habeas corpus review of his ineffective assistance of counsel claim, *Schlup v. Delo,* 912 F. Supp. 448 (E.D.Mo. 1995), and thereafter issued the writ of habeas corpus, from which the state did not appeal. *Schlup v. Bowersox,* No. 4:92CV443 JCH (E.D.Mo. May 2, 1996) (unpublished).

presented a free-standing claim of innocence unrelated to constitutional error at trial, and *Bannister v. Delo*, 100 F.3d 610 (8th Cir. 1996), which rejected a gateway "innocence" claim that conceded guilt of a lesser degree of homicide and merely "put[ ] a different spin on evidence that was presented to the jury." *Id.*, at 618. Therefore, "Bannister is nothing like the petitioner in *Schlup*, who had asserted his innocence from the beginning." *Id.*.

On remand, the district court was compelled to ignore Amrine's evidence that was not "new," and denied relief on all of Amrine's claims, including his claim of ineffective assistance of counsel for failing to discover and present the evidence supporting Amrine's innocence. The Eighth Circuit affirmed, insisting that because Amrine's evidence was not "new," he "cannot utilize the actual innocence gateway." *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir.), *cert. denied*, *Amrine v. Luebbers*, 534 U.S. 963 (2001).

The Eighth Circuit stands alone in restricting *Schlup* evidence in this manner. *See*, *Perkins v. McQuiggin*, 670 F.3d 665 (6th Cir. 2012); *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003)*; Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010). The Third Circuit has straddled the split, accepting *Amrine's* definition of new evidence, *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004), "with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence". *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010).[12]

[12] The Fifth Circuit has noted the split, but has declined to weigh in, *Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006), and the Eleventh Circuit seems poised to decide the issue soon. *Kuenzel v. Thomas*, No. 10-10283 (11th Cir. Submitted Feb. 13, 2012). It should also be noted that there is a split among circuits on a different issue not presented here, which is whether a petitioner asserting actual innocence to overcome his failure to file a petition within the statute of limitations under 28 U.S.C. § 2244(d)(1) must also show that he was diligent with respect to the filing of his habeas petition. *See, e.g. Doe v. Menefee*, 391 F.3d 147, 160 (2nd Cir. 2004)

Mr. Kidd presents three related issues arising from the troubling likelihood that he was convicted of murder in spite of his innocence because his trial attorney performed deficiently. Certiorari should be granted because 1) the Eighth Circuit has eviscerated *Schlup's* capacity to serve as a gateway to reach defaulted claims of ineffective assistances of trial counsel, 2) just as it did in *Schlup*, the Eighth Circuit has again imposed on the habeas petitioner a burden of proof that is the functional equivalent of *Jackson v. Virginia*, 443 U.S. 307 (1979), which this Court rejected; and 3) Mr. Kidd should get the benefit of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), because the default of his claim of ineffective assistance of trial counsel was caused by the deficient performance of counsel in Mr. Kidd's initial collateral review proceeding.

1. CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT'S "DUE DILIGENCE" GLOSS ON *SCHLUP'S* ACTUAL INNOCENCE STANDARD CONFLICTS WITH EVERY OTHER CIRCUIT TO CONSIDER THE ISSUE, AND THE POWER OF FEDERAL COURTS TO CORRECT A FUNDAMENTAL MISCARRIAGE OF JUSTICE PRESENTS AN ISSUE OF GRAVE IMPORTANCE.

In *Schlup*, this Court held that even if a prisoner's constitutional claims are procedurally barred, he may nevertheless obtain habeas corpus review if he "presents 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 error." 513 U.S. at 316. The *Schlup* standard was devised to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Id.*, at 324. This Court reasoned that because truly persuasive innocence cases are rare, "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence is … significantly less than that posed by claims relating only to sentencing." *Id.* On the other hand, "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.* Because "habeas corpus is, at its core, an equitable remedy," *Id., 319*, an extreme burden of proof "would give insufficient weight to the correspondingly greater injustice that is

(diligence required) and *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) (diligence not required).

implicated by a claim of actual innocence." *Id*., 325. Because of the "imperative of correcting a fundamentally unjust incarceration," *Id.*, at 320-21, this Court concluded that the "probably innocent" standard of *Murray v. Carrier*, 477 U.S. 478 (1986), "must govern the miscarriage of justice inquiry" when a petitioner asserts actual innocence as a gateway to reach the merits of procedurally defaulted claims. *Schlup v. Delo*, *supra*, at 326-27.

Virtually every court outside the Eighth Circuit to consider applying *Amrine* to prisoners in Mr. Kidd's circumstances has declined to do so. Most recently, a panel of the Sixth Circuit pointed out that conditioning an actual innocence claim on a showing of due diligence "effectively makes the concept of the actual innocence gateway redundant since petitioners only seek equitable tolling when they were not reasonably diligent in complying with § 2244(d)(1)(D)." *Perkins v. McQuiggin*, 670 F.3d 665, 673 (6th Cir. 2012). This echoes Justice O'Connor's observation that "for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' But we do not pretend that this will always be true." *Murray v. Carrier*, 477 U.S. at 495-96, quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982). From its very inception, the actual innocence standard has empowered habeas courts to issue the writ on behalf of a prisoner who can show that a constitutional violation has probably resulted in the conviction of one who is actually innocent, "*even in the absence of a showing of cause for the procedural default." Murray v. Carrier*, 477 U.S. at 496. Indeed, in this first habeas petition, if Mr. Kidd could demonstrate that his Missouri counsel were diligent, he would not need to demonstrate actual innocence to be entitled to habeas review of his constitutional claims. Federal habeas corpus is available to a state prisoner who "was unable to develop his claim in state court despite diligent effort." *Williams v. Taylor*, 529 U.S. 420, 437 (2000).

Other circuits reject the *Amrine* diligence gloss on the *Schlup* standard because "where the underlying constitutional violation claimed is the ineffective assistance of counsel premised

on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway." *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003). Therefore, "it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation." *Id.*, at 680. Indeed, the Third Circuit, which follows *Amrine* generally, exempts ineffective assistance of trial counsel claims from the diligence requirement, to avoid the absurd result that "the rule that *Amrine* sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for *Schlup* purposes." *Houck v. Stickman*, 625 F.3d 88, 94 (3rd Cir. 2010).

Several circuits have rejected *Amrine* simply because it is contrary to *Schlup* itself. "[N]othing in *Schlup* indicates that there is such a strict limitation on the sort of evidence that may be considered in the probability determination. All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial." *Gomez v. Jaimet*, *supra*, at 679. Likewise, the Ninth Circuit has held "that habeas petitioners may pass *Schlup's* test by offering 'newly presented' evidence of actual innocence." *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). If *Schlup* had intended *Amrine's* result, its outcome would surely have been different since Schlup asserted his innocence to reach a procedurally defaulted claim that trial counsel was ineffective for failing to present the very evidence that supported his actual innocence claim. *See*, *Schlup v. Bowersox*, No. 4:92CV443 JCH (E.D.Mo. May 2, 1996) (unpublished).

U.S. District Judge Jean Hamilton, who presided over Lloyd Schlup's innocence hearing, observed, "Although the Supreme Court could have defined 'new evidence' to include only evidence that was unavailable at the time of trial and could not have been discovered through the exercise of due diligence, it did not do so." *Reasonover v. Washington*, 60 F.Supp.2d 937, 948

(E.D.Mo. 1999). This is clear from *Schlup's* directive "to consider 'all the evidence,' which includes, but is not limited to, evidence 'available only after trial.'" *Id.* Equally instructive is this Court's analysis in *Schlup,* which considered and weighed "new statements" of witnesses such as John Green and Robert Faherty who were known to trial counsel, but were never interviewed by him. *Schlup,* 513 U.S. at 317, 331. Judge Hamilton correctly points out that this Court "characterized Faherty and Green's affidavits as 'new statements,' even though the information in those statements was available at the time of trial and could have been discovered in the exercise of due diligence." *Reasonover,* 650 F. Supp. At 948-49. She reasonably concluded that "the Supreme Court's definition of 'new evidence,' as articulated and as applied in *Schlup,* is broader than the Eighth Circuit's definition [in *Amrine*]." *Id.,* at 949.

Courts also reject *Amrine's* due diligence limitation because the actual innocence standard is sufficiently high to strike a balance between finality, comity and federalism on the one hand and the important liberty interests protected by the writ of habeas corpus. Innocence is a self-limiting principle; because "only the extraordinary case" qualifies for the innocence gateway, "the existing availability of an actual innocence exception to other procedurally defaulted claims has not resulted in abuse and delay." *Souter v. Jones, supra,* at 600. It remains true that "a credible claim of actual innocence is extremely rare." *Id.* Therefore, "given the grave constitutional concerns which are raised by the incarceration of one who is actually innocent, we decline to impose additional requirements upon a petitioner beyond those which the Supreme Court has set forth in its habeas corpus jurisprudence." *Id.,* 601. "The burden for proving actual innocence in gateway cases is sufficiently stringent and it would be inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court." *Gomez v. Jaimet, supra,* at 680.

Finally, *Amrine* is antagonistic to the *Carrier* standard's intent "to focus the inquiry on actual innocence," *Schlup,* at 327, as opposed to procedural technicalities. In describing the scope of the district court's inquiry into a colorable claim of actual innocence, this Court spoke in expansive terms:

> In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.... The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Schlup v. Delo, 513 U.S. at 327-28, quoting Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 160 (1970). Some courts have rejected *Amrine's* due diligence requirement simply because it is facially inconsistent with *Schlup's* directive to consider all the evidence. *Gomez v. Jaimet*, 350 F.3d at 680; *Souter v. Jones*, 395 F.3d at 596; *Griffin v. Johnson,* 350 F.3d at 961-62. Likewise, this Court explicitly admonished that "the Schlup inquiry, we repeat, requires a holistic judgment about 'all the evidence,' … and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. 518, 539 (2006), quoting *Schlup,* at 328. Mr. Kidd urged the courtelow to reconsider the *Amrine* restriction in light of *House's* unequivocal emphasis on the duty to consider "all the evidence, old and new, incriminating and exculpatory." *Id.,* at 538, citing *Schlup,* at 327-28. However, the court of appeals "reject[ed] Kidd's contention the Supreme Court's intervening decision in *House v. Bell* casts doubt on *Amrine's* standard." A. 12.

In conclusion, the Eighth Circuit's *Amrine* standard effectively closes *Schlup's* actual innocence gateway to all prisoners seeking to pass through it to reach the merits of a defaulted claim of ineffective assistance of trial counsel. Further, it leaves in doubt the reliability of the

determination of the crucial question of guilt or innocence. On the question that "has long been at the core of our criminal justice system," *Schlup,* at 325, "[w]e ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts." *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting). The Court should grant certiorari to resolve the split among the circuits, and to preserve the power of federal courts to correct a fundamentally unjust incarceration.

2. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE DISTINCTION BETWEEN *SCHLUP'S* "PROBABLY INNOCENT" STANDARD AND *JACKSON V. VIRGINIA'S* "SUFFICIENCY OF EVIDENCE TO CONVICT" STANDARD.

The courts below in denying Mr. Kidd's *Schlup* claim of actual innocence conflated the "probably innocent" standard of *Murray v. Carrier* with *Jackson v. Virginia's* test for sufficiency of the evidence, just as the Eighth Circuit Court of Appeals did *Schlup.* Although the Eighth Circuit in *Schlup* purported to be applying the "clear and convincing evidence" standard of *Sawyer v. Whitley* to Schlup's innocence claim, this Court observed that "the Court of Appeals seems to have misapplied *Sawyer*," 513 U.S. at 323, though it rested its decision on other grounds. That observation was prompted by the Eight Circuit's rejection of Schlup's innocence evidence because the eyewitness identification testimony of two corrections officers "stands unrefuted except to the extent that Mr. Schlup now questions its credibility." *Id.,* at 331, quoting *Schlup v. Delo,* 11 F.3d at 741. The Eighth Circuit's reasoning was an "erroneous application" of the miscarriage of justice standard, and illustrative of the difference between the innocence procedural gateway and the *Jackson v. Virginia* sufficiency of evidence standard. 513 U.S. at 331.

This Court distinguished the two standards in *Schlup.* The miscarriage of justice standard assures that the protection of the Great Writ will reach prisoners who are probably innocent. The sufficiency of evidence standard, in contrast, extends great deference to the decision of a jury

after a presumably constitutional trial by authorizing relief only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 324 (1979). This Court explained, "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 fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do." *Id.*, at 330.

The district court's analysis of Mr. Kidd's actual innocence is an even more obvious use of *Jackson v. Virginia's* sufficiency of the evidence standard to deny his *Schlup* gateway claim. Indeed, the district court said as much on the record at the hearing: "Marcus Merrill…impressed me as a pretty truthful witness, [but] … an appellate court will look at this and say, hey, *they had enough to convict him.*" Hrg. T. 364 (emphasis added). Although the district court correctly stated the standard for the innocence gateway, citing *House v. Bell*, 547 U.S. 518, 537 (2006), A. 18, its explanation for rejecting Mr. Kidd's petition reflects a mechanical application of *Jackson's* sufficiency of evidence test. For example, the district court acknowledged that the jury who heard this case "had substantial reasons to question [Richard] Harris' reliability as a witness," A. 17, but rejected the troubling new evidence casting further doubt on his reliability because Harris "would still identify Ricky Kidd as the shooter if a new trial were held." A. 16-17. Similarly, it rejected evidence supporting Mr. Kidd's alibi defense because Kidd did not "definitively establish[ ] that he applied for the gun permit on February 6," A. 22, "does not give Kidd an air tight alibi." *Id*. The district court denied relief because "Kidd has not *eliminated the possibility* [of his guilt] with any of the testimony and evidence that he has presented to this Court." A23 (emphasis added). Under this reasoning, *Schlup* itself would have a different outcome because Schlup's conviction rested on the testimony of two identification witnesses who did not recant their testimony. 513 U.S. at 331.

Even though the district court granted a certificate of appealability on the issue of "whether the district court applied an excessively high burden of proof to petitioner's claim of actual innocence," A. 26, the court of appeals ignored this issue altogether, and presumably has no qualms about the district court's analysis. A. 1-12. In spite of this Court's admonition that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial," *Schlup* at 330, the courts below gave short shrift to Mr. Kidd's innocence evidence not only because of *Amrine*, but also because of their view that "[i]t is not enough for Kidd to...question the credibility of Richard Harris or to challenge the reliability of Kayla Bryant's identification." A. 23. Such analysis contravenes this Court's statement that satisfying the actual innocence standard does not require "a case of conclusive exoneration." *House v. Bell*, 547 U.S. at 553. Rather, it was sufficient that "the central forensic proof connecting House to the crime...has been called into question, and House has put forward substantial evidence pointing to a different suspect." *Id.*, at 554. Likewise, Mr. Kidd has called into question the central proof connecting him to the crime–the problematic eyewitness identification testimony of Mr. Harris–and he has put forth substantial evidence, not limited solely to Mr. Merrill's testimony, pointing to the Goodspeeds as the actual perpetrators of this crime. In addition to refusing to consider all the evidence, the discussion of the courts below provides no elucidation whatsoever on the dispositive issue of whether "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id*.

Thus, the district court's denial of Mr. Kidd's petition is based on an overly harsh application of the actual innocence standard. As Justice O'Connor observed in *Schlup*, where the lower courts applied a *Jackson*-like standard to deny habeas relief, "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo*, 513 U.S. at 333 (O'Connor, J., concurring). This case therefore presents the important question

of whether, within the territory of the Eighth Circuit, *Schlup* remains a viable standard to achieve "the imperative of correcting a fundamentally unjust incarceration." *Carrier, supra,* at 495. This Court should grant Certiorari.

3. CERTIORARI SHOULD BE GRANTED AND THIS MATTER REMANDED FOR RECONSIDERATION IN LIGHT OF *MARTINEZ V. RYAN* BECAUSE THE PROCEDURAL BAR WHICH NECESSITATED MR. KIDD'S RELIANCE ON THE SCHLUP ACTUAL INNOCENCE GATEWAY WAS CAUSED BY THE INEFFECTIVENESS OF APPOINTED, FIRST-TIER STATE POST-CONVICTION COUNSEL, WHO ABANDONED WITHOUT INVESTIGATING MULTIPLE CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Mr. Kidd conceded in the district court that his ineffective assistance of counsel claim was abandoned by his court-appointed conviction lawyer. Noting that he "has not been well served by Missouri's court-appointed counsel system," Mr. Kidd conceded that "the law permits Missouri to white-wash the mistakes of trial counsel by providing equally inept post-conviction counsel." *Kidd v. McCondichie,* No. 03-0079-CV-W-SOW First Amended Petition for Writ of Habeas Corpus, 1, citing *Coleman v. Thompson,* 501 U.S. 722 (1991). This Court in *Coleman* held that since there is no constitutional right to counsel in a postconviction proceeding, counsel's deficient performance on appeal from the denial of such a motion cannot constitute cause to excuse a procedural default. 501 U.S. at 754-55.

Although this Court had left undecided the issue of whether the cause and prejudice test can be satisfied by counsel's deficient performance in the first forum in which a constitutional claim is cognizable, *See Coleman,* at 755, the Eighth Circuit applied *Coleman's* rationale in all such cases. "[E]ven if [a petitioner's] state post-conviction proceeding was the first time he could raise claim five, we hold that his counsel's failure to do so may not excuse the procedural default." *Noland v. Armontrout,* 973 F.2d 615, 617 (8th Cir. 1992), citing *Johnson v. Lockhart,* 944 F.2d 388 (8th Cir. 1991); *Schlup v. Armontrout,* 941 F.2d 631, 639 n.9 (8th Cir. 1991), *cert. denied,* 503 U.S. 909 (1992). Because a cause-and-prejudice argument would have been dead on

arrival in any court below, a *Schlup* claim of actual innocence was Mr. Kidd's only avenue to merits review of his defaulted constitutional claims.

After the Court below denied rehearing en banc, A. 24, this Court decided *Martinez v. Ryan,* ___ U.S. ___, 132 S. Ct. 1309 (2012), which for the first time in Mr. Kidd's proceedings opens up the issue of cause-and-prejudice created by Rule 19.15 counsel's deficient performance. This Court held that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez v. Ryan, at 132 S. Ct. at 1320. Mr. Kidd's case falls within the rule of *Martinez.* Under the law, if Mr. Kidd can demonstrate ineffective assistance of his initial collateral review counsel, he can demonstrate cause-and-prejudice and obtain review of the merits of his substantial claim of ineffective assistance of counsel regardless of whether he can prove actual innocence of the crime. *Id.,* at 1318.

The collateral review proceeding in which Mr. Kidd's counsel abandoned his claims of ineffective of trial counsel qualifies as an "initial review collateral proceeding" under *Martinez.* Ineffective assistance of counsel claims are "not cognizable on direct appeal;" Missouri Rule of Criminal Procedure 29.15 is "the exclusive procedure by which a claim of ineffective assistance of counsel can be advanced." *State v. Finster*, 985 S.W.2d 881, 890 (Mo. App. 1999), *citing State v. Wheat*, 775 S.W.2d 155, 157 (Mo. 1989) (*en banc*), *overruled in part on other grounds,* Joy v. Morrison, 254 S.W.3d 885 (Mo. 2008) (en banc), *State v. Armstrong*, 930 S.W.2d 449, 453 (Mo. App. 1996), and Missouri Rule 29.15(a). Therefore, since the court below denied rehearing in this matter, the law has changed so that the ineffectiveness of the public defender who defaulted his claims of ineffective assistance of counsel constitutes cause to excuse the

procedural bar. This petition for writ of certiorari is Mr. Kidd's best opportunity to obtain the benefit of the rule of *Martinez v. Ryan*:

> Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, [an order granting the petition, vacating the judgment below, and remanding the case (GVR)] is, we believe, potentially appropriate.

Green v. Fisher, ___ U.S. ___, 132 S. Ct. 38, 45 (2011), quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). Thus, where a relevant, favorable decision is handed down since the denial of rehearing in the court of appeals, a timely petition for writ of certiorari to this Court "would almost certainly … produce[ ] a remand in light of the intervening … decision." *Green v. Fisher, supra,* at 45. Indeed, this Court has entered GVR orders in multiple cases based on *Martinez v. Ryan. See, Smith v. Colson,* 132 S. Ct. 1790 (2012), *Cantu v. Thaler,* 132 S. Ct. 1791(2012), *Middlebrooks v. Colson,* 132 S. Ct. 1791 (2012), *Newberry v. Thaler*, 132 S. Ct. 1793 (2012), *and Woods v. Holbrook,* 132 S. Ct. 1819 (2012).

This Court should therefore grant the petition for writ of certiorari, vacate the decision below, and remand this matter for reconsideration in light of *Martinez v. Ryan.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of petitioner's "Petition for a Writ of Certiorari" on petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and one copy of petitioner's "Motion to Proceed In Forma Pauperis" in the case of Kidd v. Norman, No._____, were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this _____ day of _____, 2012, to:

Andrew Hassell
Assistant Attorney General
P O Box 899
Jefferson City, MO 65102

Ten copies of petitioner's "Petition for a Writ of Certiorari" and two copies of petitioner's "Motion to Proceed In Forma Pauperis" were forwarded to:

William K. Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

pursuant to Supreme Court Rule 39.5, this _____ day of _____, 2012.

_____
Counsel for Petitioner