

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 1

Factual innocents

1 **GROUND 1. FACTUAL (ACTUAL INNOCENCE)**

2 Petitioner is factually and actually innocent of P C. §487,
3 subd. (a) grand theft under either or both theories of by fraud
4 or embezzlement. The multiple counts of grand theft arose out
5 of Petitioner's failed business-venture he developed as program
6 he termed Rent To Own. Petitioner, a California licensed real
7 estate broker with no less than 30 years in the real estate
8 market heretofore HAD NEVER been the subject of a complaints
9 about business practices. He introduced his program at the
10 point in time (2008) when the vast majority of professionals in
11 the California residential real estate market believed the
12 market crisis was over.

13
14 Petitioner, like this vast majority was dead wrong. No one
15 in the industry had even close to an accurate notion about the
16 pervasiveness of the after effects resulting from the market
17 collapse. These after-effects included but were not limited to
18 a glut of foreclosed homes whose values continued to decline as
19 more properties were added to the fast growing list, the sheer
20 volume of homes entering default and foreclosure process
21 motivating property owners to attempt to sell their "under
22 water" properties as "short sale" (priced to sell for less than
23 what the property owner owed on the property) to avoid the
24 negative credit consequences of foreclosure. Most important,
25 the dire lack of private investment capital because the
26 prolonged market collapse steadily re-ignited investors' fears
27 about the real estate market.

28 Each of the parties alleged by the prosecution to be
(Ronald Russell, Habeas Corpus Petition, Ground One, page 15.)

1 "victims" signed a contract with Petitioner's business and PAID
2 A FEE to the Petitioner - a fee for specific services (described
3 more fully below.) There was no sunset clause or completion
4 date requirement for providing said services in the contract.
5 The contract stated the fee was refundable if the customer
6 changed their mind at any time prior to moving into a home he or
7 she would be renting from the Petitioner. All of the customers
8 demanded a refund in a short period of time creating "a run on
9 the bank." Petitioner was unable to immediately provide a
10 refunds to all the customers upon demand but had a contingency
11 plan in place: If necessary, the customer(s) would obtain their
12 refund through the Brokers' Recovery Fund. (Brief details about
13 this fund follow.) Petitioner has never denied he owed refunds
14 to the customers nor has he denied he was unable to make refunds
15 to all customers upon demand. A fact of life is businesses fail
16 and many times they fail through no fault of the business owner.
17 No entrepreneur is likely to formulate a business plan that
18 seriously contemplates the likelihood all customers will demand
19 a refund at the same time as a basic premise to the plan.
20 Petitioner certainly didn't foresee that scenario as being a
21 likelihood.

22 Petitioner contends the matter of unpaid refunds was in no
23 way a criminal matter and was exclusively a civil contract
24 matter regarding specific non-performance under a contract
25 between himself and the dissatisfied customers. Petitioner
26 acknowledges the customers were particularly vulnerable because
27 of the tentative nature of their housing situations and further
28 recognizes they were victims of the residential real estate

1 market melt down before entering into a contract with him. He
2 contends their prior mortgage / financing choices when they
3 bought homes while the real estate market was booming largely
4 contributed to their subsequent victimization when the market
5 collapsed. Petitioner was not involved in encouraging or
6 influencing those choices. Nevertheless, these parties were
7 presented to the jury as victims, not victims of a faceless
8 victimizing housing market crisis but rather victims of the
9 Petitioner who had defrauded them. The members of the jury was
10 sympathetic to their plight for which somebody had to be to
11 blamed. Yet there was no face to blame for the customers'
12 victimization except for Petitioner who was after all a real
13 estate broker who stood accused an unscrupulous real estate
14 broker at that! He victimized them so he must be guilty of
15 something.

16 If granted an evidentiary hearing, Petitioner will
17 demonstrate he entered into a contract with each alleged victim
18 and from each received consideration in advance of providing
19 specific services and expertise. Petitioner will present
20 evidence that each customer fully understood Petitioner would
21 not begin to provide his services and expertise before receiving
22 said consideration.

23 Petitioner will demonstrate as a matter of law, how he
24 utilized said consideration received in the operation of his
25 business, and how he ultimately planned to apply that
26 consideration toward any future costs customers would incur
27 renting and buying a home from Petitioner should never have been
28 at issue in the criminal proceeding, yet became the central
(Ronald Russell, Habeas Corpus Petition, Ground One, page 17.)

1 issue of the proceeding. Petitioner will present evidence
2 neither the court nor jury ever considered that he did not
3 KNOWINGLY violate any laws in the conduct of this business
4 enterprise, his conduct did not reflect any of the "badges of
5 fraud" associated with fraudulent real estate transactions, did
6 not reflect the elements of embezzlement and Petitioner's
7 business venture did not meet the accepted legal definition of a
8 "ponzi scheme."

9 Finally, Petitioner will offer argument the evidence in
10 these matters point to the inescapable conclusion there was no
11 theft, fraud or embezzlement and the central issue of refunds
12 owed could have, should have and would have been prosecuted as
13 civil matters were it not for an element of malicious
14 prosecution and an overly zealous prosecutor. Petitioner did
15 not knowingly commit any crime and is indeed actually and
16 factually innocent in this matter.

17
18 **APPLICABLE CASE LAW:**

19 Schlup v. Delo, 513 U.S. 298 (1995) Actual innocence is some-
20 times referred to as a "Gateway Claim". The U.S. Supreme
21 Court held the Petitioner's procedural default could not be
22 used to deny him the right to have his habeas claim heard on
23 the merits because the petitioner was actually innocent of
24 committing the charged crime. Denying him the right to have
25 his habeas claim heard on the merits denied him his Fifth
26 Amendment right to due process.

27 Brinko v. Rio Properties, 2013 U.S. District Court Lexis 5986

28 (The Ponzi Presumption) A Ponzi scheme is a "financial fraud
(Ronald Russell, Habeas Corpus Petition, Ground One, page 18.)

1 that induces investment by promising extremely high risk-free
2 returns usually in a short time period from an allegedly
3 legitimate business venture." (emphasis added.)

4 Donell v. Kowell, 533 F.3d. 762,767 (9th. Cir. 2008) "The fraud
5 consists of funnelling proceeds received from new investors
6 to previous investors in the guise of profits fro the alleged
7 business venture thereby cultivating an illusion that a
8 legitimate profit making business opportunity exists and
9 inducing further investment." (emphasis added.)

10 In re. Blakin, 525 F.3d. 805,809 (9th. Cir. 2008) "The mere
11 existence of a Ponzi scheme is sufficient to establish actual
12 intent.

13 In re. AFI Holding, Inc., 525 F.3d. 700,704 (9th. Cir. 2008)
14 "Courts presume actual intent in relation to a ponzi scheme
15 because the debtor knows at the time of the transfer that the
16 scheme ultimately must collapse."