No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

ROWAN BROOKS,

Petitioner,

v.

JAMES A. YATES, WARDEN,

Respondent.

_____◆_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals For The Ninth Circuit

_____◆_____

PETITION FOR WRIT OF CERTIORARI

_____◆_____

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QUESTION PRESENTED

Rowan Brooks was 65 years old on the night in 2004 when his 68-year-old wife of eighteen years passed away. Neither the police officer on the scene nor the two forensic pathologists who examined the decedent's body, who were both employees of the sheriff's department, ruled the death a homicide. The prosecution's argument that the manner of death was a homicide was largely premised on fabricated "evidence" it elicited from its out-of-town forensic expert, which if exposed would have fundamentally altered the course of the trial such that it is reasonably debatable that there is a possibility that fair minded jurists could disagree about whether at least one juror would have had a reasonable doubt that the death was a homicide.

Where the state court disposed of Brooks' constitutional claims by relying on "evidence" that indisputably did not exist and the district court affirmed on the basis of "evidence" it invented out of thin air, did the Ninth Circuit err in denying a Certificate of Appealability?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rowan Brooks respectfully petitions this Court for a writ of certiorari to review the denial of a Certificate of Appealability by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The June 22, 2018 order denying Brooks a Certificate of Appealability issued by the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at A1. There was no request for a rehearing.

The October 30, 2017 order of the United States District Court for the Eastern District of California denying Brooks' petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is unpublished and reproduced in the appendix at B1-B5.

Brooks originally filed his petition for habeas corpus on August 27, 2009 in California Superior Court, and the court issued an unpublished reasoned decision denying his petition on October 30, 2009, which is reproduced in the appendix at F1-F5. Both the California Court of Appeal and the California Supreme Court summarily denied Brooks' habeas petition on June 17, 2010 and August 11, 2010, respectively, and those unpublished decisions are reproduced in the appendix at E1 and D1.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Brooks a Certificate of Appealability was filed on June 22, 2018. Appx. A1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. *See Hohn v. United States*, 524 U.S. 236, 249-52 (1998) (holding this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel).

PROVISIONS OF LAW INVOLVED

The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 2253 of Title 28 of the U.S. Code provides that:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

The prosecution relied on fabricated evidence at Brooks' trial to establish the only issue that mattered – whether it was beyond all reasonable doubt that the 68-year-old decedent in questionable health had died as a result of a homicide. The ineffectiveness of Brooks' counsel compounded the introduction of said evidence and rendered Brooks' trial fundamentally unfair and unreliable. Where the state court denied Brooks' constitutional claims on the basis of "evidence" that indisputably did not exist and the district court affirmed on the basis of "evidence" it invented out of thin air, it is reasonably debatable that there is a possibility that fair minded jurists could disagree about whether if the jury had known that the prosecution's theory regarding the only issue that mattered was premised on fabricated "evidence" at least one juror might have had a reasonable doubt that the decedent's death was a homicide. The Ninth Circuit, therefore, clearly misapplied this Court's precedents when it denied Brooks' request for a Certificate of Appealablity seeking review of his constitutional claims on the basis of the *actual record* before the state court on

collateral review, which included two declarations (reproduced in the appendix at G1-G2 and H1-H2) that were submitted under penalty of perjury by Dr. Thomas Volk, the forensic pathologist who conducted the autopsy on the decedent, clarifying what forensic evidence did and did not exist for review in Brooks' case.

This case was about forensics. If the prosecution was unable to prove beyond a reasonable doubt that the manner of his wife's death was a homicide, Rowan Brooks could not be guilty of murder.

Where the two examining forensic pathologists, both state employees, independently concluded that the manner of death could not be ruled a homicide, the prosecution had an extremely steep uphill battle to establish that the manner of death was a homicide beyond a reasonable doubt, and at the end of the day the prosecution relied on non-existent "evidence" to secure a conviction that would have been readily exposed through the adversarial system embodied in the Sixth Amendment but for the ineffective assistance of Brooks' counsel thereby rendering his trial fundamentally unfair and the result unreliable.

Rowan Brooks and Stella Fern Fox had been married almost 18 years when Ms. Fox passed away early in the morning on August 16, 2004 in Kern County, California. CR 54-3 at 31, 68, CR 54-5 at 83.[1] Brooks was 65 years old with no criminal history, he had a master's degree in social work and was a social worker at a hospice facility focused on end of life care. CR 54-4 at 184-85, CR 54-5 at 81, 162.

[1] "CR" refers to the district court clerk's record, followed by the docket entry number and ECF page number.

At the time of her death, Ms. Fox appears to have been having problems with her health. Indeed, the parties stipulated at trial that Ms. Fox had lost consciousness in February 1994, October 1995, October 1998, October 2000 and July 2002. CR 54-7 at 48. Additionally, Brooks' former employer testified that she witnessed Ms. Fox lose consciousness and fall in December 2003, less than eight months before Ms. Fox's death. CR 54-3 at 190. Ms. Fox sustained numerous injuries as a result of blacking out and falling in December 2003, including injuries to both her forehead and cheek. CR 54-3 at 195.

In the days leading up to her death, Ms. Fox had been feeling ill. CR 54-3 at 38, 45-46, 157. Two days before her death, she had told her daughter that she was not feeling well and seemed to have no appetite, which her daughter testified was unusual. CR 54-3 at 38. Brooks testified that Ms. Fox's health had continued to decline during the 24 hours since her daughter had seen her at dinner on Saturday night and described her as unwell, lacking an appetite, and unstable on her feet. CR 54-5 at 104-05, 107-15. He testified that shortly before 3:00 a.m. on August 16, 2004, he got up to use the restroom, noticed that his wife did not look right and determined that she did not appear to be breathing. *Id*. at 118-19. He immediately called 911. *Id*.

The police officer that was assigned to the dead body call testified that there was "no obvious injuries" to the deceased, no signs of any altercation, and he did not feel it was appropriate to call in homicide detectives. CR 54-3 at 183, 186-87. He testified that he observed the marks on Ms. Fox's neck, and stated that they "did

not look like assaultive wounds." *Id*. at 158. He came to that conclusion after physically investigating the marks and confirming that they were "dry to the touch" and "not rough at all." *Id*. at 159. He testified that Brooks explained to him that Ms. Fox had fallen several times over the past few hours, and that he found Brooks credible and the evidence on the scene was consistent with Brooks' explanation, including the fact that it did not appear that Brooks had sustained any injuries. *Id*. at 166, 178, 181-83.

The two forensic pathologists employed by the Kern County Sheriff's office, Dr. Volk and Dr. Dollinger, were the only two pathologists who examined the decedent's body, and both independently concluded that Ms. Fox's death could not be ruled a homicide. Dr. Volk examined the body first and conducted the autopsy. Upon observing "blunt force injuries" on the decedent's body, Dr. Volk halted the autopsy midway through and alerted law enforcement that the death might have involved foul play. CR 54-4 at 87, CR 54-5 at 28-29, 53-55. Dr. Volk resumed the autopsy and ultimately concluded that he could not rule the death a homicide, and concluded that the blunt force injuries he observed were simply a condition present at death but not the cause of death. CR 54-8 at 106. Dr. Volk identified the cause of death as "suspected cardiac arrhythmia," due to "aspiration of vomitus." *Id*.

Dissatisfied with Dr. Volk's assessment, the next day law enforcement turned to Dr. Dollinger and asked him to examine the body and provide his opinion. Dr. Dollinger promptly did so, and likewise concluded that the manner of death could

not be ruled a homicide. CR 54-6 at 213. Dr. Dollinger passed away before Brooks' trial. *Id*. at 214.

Dissatisfied with Dr. Dollinger's confirmation of Dr. Volk's conclusion that the manner of death could not be ruled a homicide, law enforcement then went shopping for an out-of-district pathologist who would give them a different assessment. They found one in Dr. Wagner, who had recently been hired in San Diego and had been in his civilian position for just over a year. CR 54-2 at 74, CR 54-5 at 39. In his brief tenure he had already made a demonstrably serious error in a different case when he overrode the examining pathologist's assessment, changing the manner of death from undetermined to a homicide (exactly what he argued should have happened in Brooks' case). *Sommer v. United States*, Case 09-cv-2093, Dkt. Entry 157, at 6 (S.D. Cal. 2013).[2]

In Brooks' case Dr. Wagner did not examine the decedent, but instead viewed histological slides created during the autopsy. CR 54-5 at 40. As the investigating detective testified, the histological slides that he provided Dr. Wagner were taken from cuttings obtained during the autopsy, which was performed by Dr. Volk. CR 54-5 at 40. At trial, Dr. Wagner confirmed that the slides he viewed were created

[2] In *Sommer*, the decedent's wife had engaged in suspicious behavior, which, after Dr. Wagner changed the manner of death to "homicide," suddenly became "evidence" that she was guilty of murder. *Id*. at 4-7. As a result of post-conviction litigation, the State re-tested tissues from the original paraffin block of tissue and discovered that Dr. Wagner's decision to amend the death certificate from "undetermined" to "homicide" had been wrong. *Id*. at 8.

from the tissue that Dr. Volk removed during the autopsy and thus were "pretty close" or "similar to the same slides" that Dr. Volk had. CR 54-2 at 79, 150, 186.

In addition to viewing slides created from the tissue that Dr. Volk removed during the autopsy, Dr. Wagner reviewed Dr. Volk's Report of Autopsy ("ROA") and viewed some reprints of photographs from the autopsy. CR 54-2 at 78, 105, 153. In the span of a few hours, Dr. Wagner concluded that the manner of death was a homicide and issued a report of his findings to the investigating detective. CR 54-2 at 105.

Dr. Wagner was the only witness that mattered for the prosecution's case. Without Dr. Wagner there was no homicide, and thus no foundation for a murder conviction. No matter how odd or eccentric Brooks' behavior may have seemed, he could not be guilty of murder if the prosecution was unable to establish beyond a reasonable doubt that the manner of death was homicide.

At trial Dr. Wagner opined that the manner of death was a homicide caused by manual strangulation. He acknowledged that there were many reasons to be skeptical that Ms. Fox's death was caused by strangulation, chief among them was the fact that her hyoid bone was intact. CR 54-2 at 132, 140. Dr. Wagner noted that a fracture of the hyoid bone is particularly likely in cases such as this one where the deceased is older and her bones are more brittle, and thus it was "unusual" that Fox's hyoid bone was intact. *Id*. at 97, 132, 169.

Additionally, Dr. Wagner acknowledged that many of the other classic signs of asphyxiation were also absent in this case. For example, he acknowledged that in

cases of manual strangulation petechia (bleeding capillaries) in the larynx is a "common finding," yet there was none in this case. *Id*. at 173-74. He also acknowledged that in the case of strangulation we would expect to see extensive hemorrhaging in the musculature of the neck, yet the autopsy photographs did not depict extensive hemorrhaging. CR 54-2 at 161-62. He further testified that the act of strangulation is not easy, and it is only the "minority" of cases where, as was the case here, the alleged perpetrator (who was 65-years old) sustained no injury. *Id*. at 155, 185.

Finally, Dr. Wagner testified that the marks on Ms. Fox's neck were essentially a red herring because they were not in fact "part of the choking mechanism." *Id*. at 154, 159-61.

So that begs the question: if the telltale signs of strangulation were not present here, on what basis was Dr. Wagner opining, contrary to the two forensic pathologists who actually examined the decedent's body, that the manner of death was a homicide? Dr. Wagner explained that he concluded the manner of death was a homicide because there needed to be "a mechanism for the hemorrhages in the brain or in the eyes in the absence of neck compression of some sort." CR 54-2 at 169-70. The problem with that answer was there was no evidence of either hemorrhaging in the brain or the eyes. Dr. Wagner reached his ultimate conclusion on the basis of non-existent evidence.

Notably, at trial, Dr. Wagner did not identify any hemorrhaging in the brain related to asphyxiation. Similarly, in the ROA Dr. Volk did not identify

hemorrhaging in the brain related to asphyxiation. CR 64 at 62. Dr. Wagner testified that he agreed with Dr. Volk that the brain looked "relatively normal" with the exception of the area on the back of the brain where there was some hemorrhaging that was only on the surface and represented nothing more than a contusion, *i.e.*, "a bruise to the back side of the right side of the brain" that was "a common injury in falls where a person is falling backward and their head is striking a flat, firm surface" and had nothing to do with asphyxiation. *Id*. at 101, 179. Apart from the surface bruise that he attributed to a likely fall, Dr. Wagner opined that the "brain, itself, shows either no or limited evidence of trauma." *Id*. at 125-26.

Fifty-four pages into his testimony and shortly after he had opined that the brain appeared fine apart from a surface bruise that had nothing to do with asphyxiation, out of thin air the prosecutor introduced the concept of perivascular hemorrhaging. CR 54-2 at 128. Immediately following that prompt, Dr. Wagner delivered his thesis – hemorrhaging in the eye (which he mentions for the first time in response to the prosecutor's prompt) and perivascular hemorrhaging in the brain (which he also mentions for the first time in response to the prosecutor's prompt) means that the manner of death must have been a homicide. *Id*. Dr. Wagner never proceeded to reconcile his testimony that the brain was relatively normal apart from the surface injury to the back of the head with the prosecution's assertion that perivascular hemorrhaging was somehow present in this case. Dr. Wagner never pointed to any evidence that there was in fact perivascular hemorrhaging in the brain or indicated where he might have seen said perivascular hemorrhaging.

Notably, the prosecution introduced eighteen photos from the autopsy, two of which were of the brain, and yet it failed to introduce any evidence of the all-important perivascular hemorrhaging that was critical to its expert's outlier opinion that the manner of death had been a homicide. CR 71-4 at 300-01. The bottom line is the only hemorrhaging that Dr. Wagner ever demonstrated actually existed in the brain was the same hemorrhaging that Dr. Volk identified – hemorrhaging relating to a surface contusion that Dr. Wagner attributed to a fall and testified was in no way associated with asphyxiation. CR 54-2 at 101.

Aside from the non-existent hemorrhaging in the brain, the other pillar of Dr. Wagner's theory was hemorrhaging in the eyes, referred to as petechia. The purported hemorrhaging in the eyes was also non-existent, but this time instead of ignoring the problem of proof as it did with the alleged hemorrhaging in the brain, the prosecution affirmatively mislead the court and the jurors into believing that there was in fact evidence of hemorrhaging in the decedent's eyes.

On direct examination, Dr. Wagner acknowledged that there was no evidence in the photographs of petechia in the eyes, but claimed that he that he read about petechia in the decedent's eyes in Dr. Volk's autopsy report. CR 54-2 at 128-30. Yet, Dr. Volk did not describe petechia in the decedent's eyes as the State now acknowledges. CR 72 at 53 (State's Answer to Brooks' Petition for Writ of Habeas Corpus in district court).

Dr. Wagner also claimed to have seen petechia in the eyes in "his [Dr. Volk's] microscopic slides." CR 54-2 at 129-30. Dr. Wagner, however, could not possibly

have observed petechia in microscopic slides because no eye tissue was removed from the decedent from which slides could have been made. Dr. Volk's ROA clearly states that the organs removed for subsequent histological slide preparation were the heart, the lungs, the small intestine, the colon, the esophagus, the liver, the spleen, the kidney, the brain and the skin. CR 54-8 at 110. Noticeably absent from that list are the eyes. Indeed, as Dr. Volk confirmed in a declaration he authored under penalty of perjury in support of Brooks' habeas petition in state court, no eye tissue was retained for microscopic examination and thus no microscope slides of the decedent's eye tissue were created. CR 54-8 at 19 (Appx. at H1). In other words, Dr. Wagner could not have viewed the slides he claimed to have viewed that formed the basis for his conclusion that the manner of death was a homicide.

Notwithstanding that there was no evidence provided at trial to support either of the pillars of its expert's outlier opinion that the manner of death was a homicide, during the final moments of its closing argument the prosecution informed the jury that "***the most important thing in this case***" was "petechia in the eyes. . . in combination with perivascular hemorrhaging" in the brain. CR 54-7 at 162.

In support of "the most important thing in the case," the prosecution informed the jury at two separate points in its closing that Dr. Volk had described petechia in the decedent's eyes, CR 54-7 at 102, 162, which, as the State now acknowledges, was not true.

In its closing the prosecution also brazenly lied to the jury, falsely claiming that they had seen for themselves the dispositive petechia in the decedent's eyes in "the microscopics of the eyes that you viewed." CR 54-7 at 102. The prosecution did not introduce *any* slides at trial, let alone a slide of the eye. The only slide that was introduced was introduced by the defense and was a slide of the heart, which the prosecution objected to as a "biohazard" shortly before its closing argument. CR 71-4 at 303-04, CR 54-7 at 18, 102. The prosecution certainly knew it had not introduced any slides during the trial, and thus the jury could not possibly have viewed a slide depicting petechia in the decedent's eye.

Notably, based on his post-conviction declarations, Dr. Volk would have agreed with the State that petechia in the eyes was one of the most important things in this case, with the critical exception that it was the *absence of petechia* in the decedent's eyes that supported his conclusion that Ms. Fox's death could not be ruled a homicide. CR 54-8 at 19 (Appx. at H1).

When the prosecution claimed that the jury had seen a slide depicting petechia in the decedent's eyes defense counsel objected as a misstatement of the evidence. CR 54-7 at 102. The prosecution then affirmatively denied that it was misstating the evidence, and the objection was overruled. *Id*. In other words, the jury was informed by the prosecution that they had in fact seen evidence at trial of "the most important thing in this case" – petechia in the decedent's eye – when they in fact had not, and this critical misstatement was then confirmed as true by the trial court.

The damage was further compounded by defense counsel who inexplicably introduced a picture of an eye with petechia that belonged to some unknown person for the purpose of showing the jury what petechia looks like. Defense counsel then signaled to the jury that the picture depicting petechia in someone else's eye was somehow of great significance to the case by spending pages discussing it with his expert under direct examination. Even the trial court was confused, and asked whether the picture was "a demonstrative or was that from the autopsy? That wasn't clear, I don't think." CR 54-6 at 81. The court subsequently *admitted* the picture into evidence and sent it back with the jury during its deliberations as evidence in the case. CR 54-7 at 17, CR 71-4 at 303. In other words, defense counsel shockingly got admitted into evidence, the only "evidence" of arguably the most dispositive fact at trial – petechia in the eye. The problem being that it was petechia in someone else's eye, not the decedent's eye but neither the court, nor presumably the jury, understood that.

Permitting the admission of a visual depiction of petechia in the eye of a random person as if it was evidence in the case is but one example of how alarmingly inept defense counsel was at performing his one constitutional mandated role at trial: "to ensure that the adversarial testing process works to produce a just result." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Indeed, given that there could be no murder conviction if the prosecution could not establish beyond a reasonable doubt that the *manner* of death was homicide and given that the prosecution's theory of the case was premised on a

house of cards, defense counsel should have made short work of the prosecution's case. Instead, defense counsel went off on a frolic and a detour, seemingly oblivious as to what was in Dr. Volk's ROA, including the fact that Dr. Volk never described petechia in the decedent's eyes, or the reality that no eye tissue was removed during the autopsy and thus Dr. Wagner was basing his ultimate conclusion on viewing slides that he could not possibly have seen.

Instead of impeaching Dr. Wagner on the fact that he could not possibly have read about petechia in the eye in the ROA, defense counsel inexplicably bolstered Dr. Wagner's false testimony by opining that he did "believe that Dr. Volk does talk about that [petechia in the eye] in his report." CR 54-2 at 171. Assuming the existence of petechia in the eye, defense counsel then inexplicably engaged Dr. Wagner in a colloquy about other possible causes of petechia in the eye. *Id*. at 171-72. And, incredibly, when Dr. Wagner stated on cross examination that he had reached his conclusion that the manner of death was a homicide notwithstanding that the forensic markers of manual strangulation were absent because he needed a mechanism to explain the non-existent conditions of perivascular hemorrhaging in the brain and petechia in the eye, defense counsel thanked Dr. Wagner and informed him that he was "going to move on to something else." CR 54-2 at 170.

Instead of exposing the reality that the prosecution's argument that the manner of death was homicide was premised on non-existent evidence, defense counsel assumed the burden of proving a specific *cause* of death, and not just any cause of death, but a cause of death that even his own expert observed occurred in

approximately only .15% of her cases. CR 54-6 at 114, 118. In other words, defense counsel unconstitutionally assumed the burden of proving innocence, and in so doing provided the jury with a binary choice. If the jury rejected defense counsel's attempt to prove a rare cause of death, it was left with the prosecution's theory that the manner of death had been homicide, a theory that at its core rested on fabricated evidence that the defense shockingly failed to expose.

This was a case about manner of death, not cause of death. As the prosecution's own expert testified, in the case of sudden death involving the heart there may not be any findings that point to a specific cause of death. CR 54-2 at 113. It was not necessary for the jury to decide on a cause of death. The only thing that mattered was whether the prosecution could prove that the manner of death was a homicide notwithstanding the fact that the two forensic pathologists who had examined the body had concluded that the death could not be ruled a homicide. Without a homicide, there could be no conviction for murder.

As this Court has recognized, forensic experts called by the prosecution can make mistakes, can be incompetent and/or can rely on fabricated evidence which poses a very real threat to a fair criminal trial, a threat that "is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses." *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014). That did not happen here.

Hopelessly distracted by his quest to prove a rare cause of death, defense counsel failed to call the only witness at trial that mattered – Dr. Volk – the forensic

pathologist who performed the autopsy, authored the Report of Autopsy, and made the decision as to what organs to remove for the purpose of creating microscopic slides for further examination. Where Dr. Wagner reached his conclusion by finding a mechanism (strangulation) to explain conditions that did not exist (petechia in the eye and hemorrhaging in the brain), and claimed as the basis for his opinion things that he asserted Dr. Volk had written (which Dr. Volk had not written) and things that he claimed he saw in a slide of the decedent's eye (an impossibility since Dr. Volk did not remove the eye during the autopsy thereby precluding creation of any such slide), only Dr. Volk could have clarified the state of evidence, and definitively established that Dr. Wagner neither read about petechia in the eye in his autopsy report nor saw petechia in the eye in a non-existent slide.

In other words, this was not a case of one expert's opinion versus another expert's opinion; Dr. Volk was uniquely positioned to expose the house of cards upon which the prosecution's theory of the case was built. Dr. Volk would have been able to unequivocally establish that the evidence the prosecution deemed "the most important thing in the case" did not in fact exist.

Moreover, the trial court ruled that without Dr. Volk's testimony both the Report of Autopsy he authored, as well as Dr. Dollinger's conclusion that the manner of death could not be ruled a homicide, were inadmissible. CR 54-6. at 214, CR 54-5 at 93. Notably, the jury asked for a copy of the ROA during its deliberations, and was informed they could not view it as it had not been admitted. CR 71-5 at 55.

Defense counsel's failure to call Dr. Volk, therefore, meant that the jury was unable to review the Report of Autopsy as it requested and did not hear from the only two forensic pathologists who had actually examined the body, and who both independently concluded that the manner of death could not be ruled a homicide based at least in part on the fact that there was no petechia in the decedent's eye. Nor did the jury learn that Dr. Wagner's contrary conclusion was built on a house of cards in that it was premised on his claim that he had either read about petechia in the decedent's eye in the ROA (an impossibility which the State now concedes) or seen petechia in the decedent's eye in a slide that did not exist.

Notwithstanding the fact that Dr. Volk, the independent state-employed pathologist who conducted the autopsy on the decedent, submitted multiple declarations in post-conviction litigation deeply troubled by the mischaracterization of the forensic evidence that resulted in Rowan Brooks being convicted of murder, no post-conviction court has granted Brooks oral argument let alone an evidentiary hearing where, based on his post-conviction declarations, it would be expected that Dr. Volk would definitively establish that the prosecution's argument that the manner of the decedent's death was a homicide was premised on fabricated evidence, and it was the very absence of such evidence that meant neither he nor his colleague Dr. Dollinger could rule the death a homicide. Only two post-conviction courts have issued reasoned decisions, the state superior court and the federal district court, and both decisions are premised on non-existent "evidence."

The state superior court correctly understood that at the heart of Brooks' habeas petition was the argument that his counsel had been ineffective by failing to call Dr. Volk as a witness at trial, but the court failed to appreciate the significance of Dr. Volk's testimony. CR 54-8 at 5. The state court unreasonably concluded that the only difference between Dr. Wagner and Dr. Volk was one of interpretation. *Id*. The state court appeared not be troubled by the fact that Dr. Wagner's claimed that he either read about petechia in the decedent's eyes in the ROA or saw it in the microscopic slides because the court unreasonably believed that Dr. Wagner had viewed the petechia that was the basis for his conclusion that the manner of death was homicide in some photographs. *Id*.

Yet, if there is one thing everyone in this case can agree upon, it is that Dr. Wagner did not view petechia in the decedent's eyes in any photographs. Both Dr. Wagner and the prosecution acknowledged at trial that there were no photographs depicting petechia in the decedent's eye. CR 54-2 at 129-130, CR 54-7 at 162-63. Nobody (apart from the state court reviewing Brooks' habeas petition) claimed that Dr. Wagner saw photographs of petechia in the decedent's eye.

Unreasonably concluding that Dr. Wanger had seen photographs depicting petechia in the decedent's eye, and thus not understanding that the central issue at the heart of Brooks' habeas petition was that Dr. Wagner had reached a conclusion concerning the manner of death by relying on fabricated evidence that only Dr. Volk could have exposed at trial, the state court unreasonably concluded that Dr. Volk's

testimony would have been "cumulative and only lead to confusion of the jury." CR 54-8 at 5.

There is no conceivable strategic reason that defense counsel could have had that would have justified allowing Dr. Wagner's conclusion on the ultimate issue to stand when calling Dr. Volk would have exposed that the foundation of Dr. Wagner's testimony was built on a house of cards. But because the state court made an unreasonable determination of the facts in light of the actual record, it failed to appreciate that Dr. Wagner's conclusion that the manner of death was a homicide was premised on fabricated evidence that would have been readily exposed if Brooks had been afforded competent counsel who performed his role of ensuring "a reliable adversarial testing process" as guaranteed by the Sixth Amendment's right to counsel. *Strickland*, 466 U.S. at 688.

While the state court attempted to save Dr. Wagner's testimony by asserting that he must have seen the petechia in the eye in some photographs, the district court premised its denial of Brooks' habeas petition on an even more outrageous invention of facts. Indeed, the district court responded to a petition that has at its heart a well-documented allegation of fabricated evidence by inventing its own "evidence." In its Findings and Recommendations denying Brooks' habeas petition, the magistrate judge bizarrely asserted that "Dr. Dollinger had conducted a second autopsy after Dr. Volk" and "obviously, he could have been the source of these recuts." CR 77 at 14. The district court adopted the magistrate court's assertion, made without any basis in fact and contrary to the record and commonsense, that

Dr. Dollinger conducted a second autopsy after Dr. Volk and removed additional organs from the decedent from which slides could have been made. Appx. at B3.

In other words, the district court attempted to save Dr. Wagner's testimony by speculating that a second secret autopsy was performed by Dr. Dollinger at which time Dr. Dollinger secretly removed the eye tissue from the decedent and secretly created a microscopic slide from the secretly removed eye tissue and then secretly got the secret slide to Dr. Wanger for him to secretly view, and then presumably had the secret slide secretly destroyed so that it could not be introduced at trial.

Not only is there no evidence that Dr. Dollinger conducted a second autopsy, the record is most decidedly to the contrary. Dr. Volk wrote the Report of Autopsy on August 20, 2004. CR 54-8 at 106-12. Dr. Volk is listed as the only forensic pathologist conducting an autopsy. *Id*. at 106. The Kern County Coroner's Facility issued the Coroner's Report on October 27, 2004, CR 54-8 at 105, which indicates there was one autopsy performed, and it was performed on August 16, 2004, and was conducted by Dr. Thomas Volk and nobody else. *Id*. at 103. Dr. Dollinger examined the decedent on August 17, 2004, the day after Dr. Volk conducted the autopsy on the decedent and three days before the Report of Autopsy was issued in this case. CR 54-6 at 213.

Forensic pathologists cannot make recuts of something that does not exist. If the organ was not removed from the body during the autopsy, there is no tissue block created from which a recut could be made. The ROA is crystal clear as to

what organs were removed from which slides could be made. CR 54-8 at 110. There is no ambiguity – eye tissue was not removed for microscopic analysis. And if that was not clear enough, Dr. Volk's 2008 declaration reiterated that no tissue from the eye was removed during the autopsy and thus no microscopic slides of the decedent's eyes were prepared for examination. CR 54-8 at 19 (Appx. at H1).

Commonsense tells us that pathologists do not do a secret second autopsy where they remove organs from the decedent's body without carefully documenting what they are doing. Moreover, if the prosecution had actually provided Dr. Wagner with slides of the eye to review, and that was where he saw the critical petechia in the eye, it defies credibility that the prosecution would not have introduced said slide at trial.

In other words, instead of confronting the issue before it, which was that Brooks was convicted on the basis of fabricated evidence that would have been readily exposed if his defense counsel had called Dr. Volk, and in lieu of holding an evidentiary hearing, the district court disposed of Brooks' habeas petition on the basis of outlandish speculation.

Brooks requested that the Ninth Circuit issue a Certificate of Appealability with respect to whether the cumulative effect of multiple constitutional violations rendered Brooks' trial unfair or the result unreliable, and specifically whether Brooks' trial counsel failed to effectively perform his role in ensuring Brooks received a fair trial and whether Brooks received a trial that was free of prosecutorial misconduct that so infected it with unfairness that the resulting

conviction represents a denial of due process. Six months later the Ninth Circuit denied Brooks' request for a COA without any analysis and thus there is no way to know on what "facts" the Ninth Circuit relied in issuing its denial. Given the fabricated evidence that permeated not only his trial but also the denial of his habeas petition in both state and district court, the Ninth Circuit's decision to issue a denial without any analysis evinces a profound lack of understanding of the constitutional defects at the heart of this case that rendered Brooks' trial both unfair and unreliable.

REASONS FOR GRANTING THE WRIT

A. Where the Entire Evidentiary Picture Would have Been Altered If the Prosecution's Reliance on Fabricated Evidence Had Been Exposed, It Is At Least Reasonably Debatable that There Is a Reasonable Probability that At Least One Juror Would have Weighed the Evidence Differently.

Brooks had a clearly established constitutional right to the effective assistance of counsel (*Strickland v. Washington*) and to a trial that was free of prosecutorial misconduct that so infects a trial with unfairness that renders the resulting conviction a denial of due process. *Miller v. Pate*, 386 U.S. 1, 7 (1967) ("the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice"). It is difficult to see how a court reviewing the *actual record* on collateral review (something that thus far no court has done)

could have the requisite confidence that Brooks' trial was fair and produced a reliable result.

Where the prosecution elicited, and then relied on, non-existent evidence that by its own admission was "the most important" evidence in its case against Brooks, and Brooks' counsel not only failed to take the most basic steps to clarify the record by calling the forensic pathologist who conducted the autopsy and created the autopsy report and the microscopic slides on which the prosecution's expert was purportedly relying, but in fact further obfuscated the record on the only issue that mattered, and where the state court's decision denying Brooks' petition was premised on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding and the district court decision upholding the state court's decision was premised on outlandish speculation about a secret autopsy that resulted in the creation of secret slides that only the prosecution's witness saw and which were too secret to be introduced at trial, "jurists of reason could disagree with the district court's resolution of his constitutional claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This Court, therefore, should grant Brooks' request for a COA pursuant to 28 U.S.C. § 2253(c).

As this Court recently reiterated, "[a]t the COA stage*, the only question* is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327)

(emphasis added). Whether or not Brooks' appeal will ultimately succeed is not the issue. Indeed, this Court does "not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus," which means that a "COA will issue in some instances where there is no certainty of ultimate relief." *Miller-El*, 537, U.S. at 337-38.

Where "the only question" before the Ninth Circuit was whether the district court's resolution of Brooks' constitutional claims on the basis of outlandish speculation was subject to debate amongst reasoned jurists, the Ninth Circuit's caviler dismissal of Brooks' request for a COA should be deeply alarming to anyone concerned about governmental overreach and the fair administration of justice.

The dispositive issue at trial was whether the prosecution could prove the manner of death was a homicide beyond a reasonable doubt, and the prosecution dug itself deeply into a theory that was premised on non-existent evidence that should have been readily exposed. Where the telltale signs of strangulation were absent, where the investigating officer on the scene did not believe a homicide had occurred, where the only two forensic pathologists who actually examined the body were employees of the sheriff's department and both concluded the death could not be ruled a homicide, and where the prosecution's out-of-town forensic expert reached the opposite conclusion in reliance on "evidence" that did not exist, which would have been readily exposed had defense counsel called Dr. Volk at trial to establish what was in his ROA, what tissue had been removed for microscopic slides and what injuries he had caused post-mortem during the autopsy, it cannot be that

the district court's decision to dispose of Brooks' petition on the basis of "evidence" it invented is beyond debatable by jurists of reason. Indeed, exposing the prosecution's reliance on fabricated evidence that went to the heart of its case is by definition going to have a profound impact on the evidentiary picture of the case that ultimately goes to the jury, and will likely profoundly alter the inferences the jury draws from the evidence as well as the credibility assessments that it makes.

Because it is reasonably debatable that it is reasonably likely that at least one juror would have credited the testimony of the examining forensic pathologist when he testified that he did not write about petechia in the eye in the Report of Autopsy nor were any slides created of the decedent's eye at any time, and on the basis of that testimony concluded that Dr. Wagner's theory was premised on non-existent evidence thereby creating a reasonable doubt as to whether the manner of death was a homicide, this Court should grant Brooks' petition for a COA. This is particularly so where the prosecution identified petechia in the eye as the "most important" evidence in the case and Dr. Volk would have testified that one of the primary reasons that he could not rule the death a homicide was the *absence* of petechia in the decedent's eyes.

B. Where the Second Circuit Recently Granted a Habeas Petitioner Relief in a Case That Is Substantively Similar to Brooks' Case in that the Prosecution's Expert Testified to the Dispositive Fact on the Basis of Forensic Slides That Did Not Exist, the District Court's Decision to Deny Brooks' Petition Is Clearly Debatable By Jurists of Reason.

Under facts substantively similar to those presented here, the Second Circuit in *Rivas v. Fischer*, 780 F.3d 529 (2d Cir. 2015) granted relief to the petitioner, and thus it cannot be that the proper resolution of Brooks' petition is not subject to reasoned debate, which means that the Ninth Circuit erred in failing to grant Brooks' request for a COA.

In *Rivas* the defendant engaged in conduct that looked suspicious and could be argued made him appear guilty of murder. *Rivas v. Fischer*, 687 F.3d 514, 524 (2d Cir. 2012). The problem for the prosecution was that if the murder occurred when the medical examiner had originally indicated, then the defendant could not possibly have been guilty. Accordingly, although there was "troubling circumstantial evidence pointing to Rivas," *id.* at 546, "the prosecution's case rested almost entirely on the testimony of Mitchell, the medical examiner, to persuade the jury that Hill died on Friday night and not on Saturday as Mitchell had initially determined." *Rivas*, 780 F.3d at 539.

Just as in Brooks' case, the prosecution's forensic expert testified that his conclusion of the dispositive fact was premised on viewing slides of tissue from the decedent that did not exist, and in its closing the prosecution emphasized the importance of said non-existent slides. *Rivas*, 687 F.3d at 525, 525 n.19. Because Rivas could not be convicted of murder if the decedent had died on Saturday as

opposed to Friday as the medical examiner had concluded before purportedly viewing the non-existent tissue slides, the only task that mattered for the defense was to discredit the prosecution's forensic expert who relied on non-existent "evidence" to conveniently move the time of death to the timeframe during which it had been established that Rivas did not have an alibi. *Rivas,* 780 F.3d at 540 n.19, 549. Yet, just like defense counsel in Brooks, Rivas' counsel appeared oblivious to the only task that mattered.

Where, like in Brooks, Rivas' defense counsel "relied on a strategy that was completely divorced from this central issue," the Second Circuit granted Rivas relief. *Id.* at 549. The court observed that Rivas was denied the effective assistance of counsel where his counsel failed to confront the prosecution's expert on the weak foundation upon which his theory concerning the time of death rested, and, specifically, failed to impeach the prosecution's expert on the non-existent brain slides upon which his opinion rested. *Id.* at 531-33. The court emphasized that the significance of the non-existent slides could not be underestimated where, just like the prosecution did in Brooks' case, the prosecutor explicitly stated in his closing argument that its forensic expert had reviewed the (non-existent) slide and on the basis of that review formed his conclusion on the dispositive issue. *Id.* at 552.

The parallels to Rivas' and Brooks' cases are remarkable. In both cases it did not matter how much circumstantial evidence of guilt there was against their clients, if there was not in fact a homicide, their clients could not be convicted of murder. And in both cases whether or not the homicide occurred (at a particular

time or, in Brooks' case, at all) depended on forensic evidence and in both cases the prosecution put on a forensic expert who relied on forensic slides that did not exist to stake out a position that the forensic evidence otherwise did not seem to support. And in both cases, instead of exposing that the prosecution's expert's testimony on the dispositive issue in the case was built on a house of cards, defense counsel pursued nonsensical defense strategies, which in Brooks' case resulted in unconstitutionally shifting the burden of proof to the defense.

Given the striking similarities between Rivas' and Brooks' cases, and that three circuit court judges unanimously granted Rivas relief on his habeas petition, at the very least, reasonable minds could debate Brooks' underlying constitutional claims, and that is all Brooks needs to establish his entitlement to a COA. *C.f.*, Rule 22.3 (CA3 2011) (in contrast to the Ninth Circuit's two judge panel, in the Third Circuit a COA request is reviewed by three judges and will issue if any judge believes the requisite showing under 28 U.S.C. § 2253 was made).

C. Intervention by this Court is Needed to Promote Conformity With this Court's Binding Precedent and Ensure Meaningful Access to Federal Collateral Review.

Not only is the Ninth Circuit's decision to deny Brooks a COA wrong, the caviler nature in which it disposed of Brooks' request represents such an outrageous application of this Court's controlling precedent that it threatens to foreclose meaningful collateral review to law-abiding citizens unjustly convicted in proceedings that are neither fair nor reliable. Action by this Court is needed.

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). "The Constitution guarantees a fair trial through the Due Process Clauses," *Strickland*, 466 U.S. at 684-85, and the "right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). And at the end of the day, "the basic elements of a fair trial" are largely safeguarded "through the provisions of the Sixth Amendment, including the Counsel Clause" designed "to ensure that the adversarial testing process works to produce a just result." *Strickland*, 466 U.S. at 685, 687.

There is no sound trial strategy that explains the failure of defense counsel to call Dr. Volk as a witness when the only dispositive issue was whether the prosecution could prove the manner of death was a homicide beyond a reasonable doubt and Dr. Volk would have exposed the reality that the prosecution's outlier theory was built on a house of cards. And, if the prosecution had been forced to pivot midstream in response to defense counsel calling Dr. Volk to establish that Dr. Wagner could not possibly have viewed a slide of the eye or read about petechia in the eye in his ROA and that there was no perivascular hemorrhaging in the brain, there is a reasonable probability that at least one juror would have struck a different balance, which means Brooks should be entitled to relief on the *merits* of his petition. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (granting relief where an evaluation of how the totality of the evidence would have looked but for

counsel's deficient performance created a reasonable probability that the outcome would have been different); *Porter v. McCollum*, 558 U.S. 30, 41, 44 (2009) (same); *Wiggins v. Smith*, 539 U.S. 510, 514 (2003) (explaining that if the altered evidentiary landscape that would have existed but for counsel's deficient performance has a reasonable probability of altering the judgment of just one juror, a petitioner's writ for habeas corpus must be granted). Indeed, as this Court recently cautioned, "[s]ome toxins can be deadly in small doses," *Buck*, 137 S. Ct. at 777, and it is difficult to conceive of a more deadly toxin than the prosecution eliciting and relying on non-existent evidence through its own expert to establish the dispositive element in the case.

And where the only issue before the Ninth Circuit was whether jurists of reason could *reasonably debate* the district court's decision to uphold the state court's decision, which was premised on an unreasonable determination of the facts, by speculating about a secret autopsy resulting in secret slides that only the prosecution's expert saw, the Ninth Circuit's two-judge unreasoned decision denying Brooks a Certificate of Appealability where no post-conviction court has reviewed the merits of Brooks' constitutional claims on the *actual record* before the post-conviction court is shocking, and is deeply troubling to the fair administration of justice and the consistent application of 18 U.S.C. § 2253(c) across the circuits.

Where the state court failed to reach the merits of Brooks' core constitutional claims because it unreasonably concluded, contrary to the unambiguous trial testimony, that Dr. Wagner had viewed the petechia upon which his testimony was

premised in some photographs, and where the district court failed to reach the merits of Brooks' core constitutional claims when it engaged in unfounded speculation that Dr. Wagner had seen the petechia upon which his testimony was premised in secret slides that resulted from a secret second autopsy, it cannot be that reasonable jurists would consider Brooks' entitlement to relief "to be beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). Indeed, where the entire evidentiary picture would have been altered had defense counsel provided effective assistance and exposed that the prosecution had built its case on non-existent evidence, it cannot be credibly argued that it is not reasonably debatable that there is a reasonable probability that at least one juror would have concluded that the prosecution had failed to establish beyond a reasonable doubt that the manner of death was a homicide, and thus found Brooks not guilty.

To ensure meaningful access to post-conviction review which this Court has consistently safeguarded through judicious application of 18 U.S.C. § 2253(c), this Court should, therefore, grant Brooks' petition requesting a Certificate of Appealability and remand for adjudication of his constitutional claims on the merits.

CONCLUSION

As the Ninth Circuit erred in denying Brooks a Certificate of Appealability permitting him to appeal the district court's denial of his habeas petition, this Court should grant this Petition and summarily remand this matter to the Ninth Circuit with directions to grant a Certificate of Appealability.

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Respectfully submitted,

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