

No. USCA NO. 17-7816

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

RHETT BEAN — PETITIONER  
(Your Name)

vs.

WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

4<sup>th</sup> Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Rhett Bean

(Your Name)

24414 Mussellwhite Dr.

(Address)

WAVERLY Virginia 23891

(City, State, Zip Code)

I don't have one

(Phone Number)

### QUESTION(S) PRESENTED

FOR the purpose of U.S.C.A 2253(c), is it debatable that wrongly excluded evidence MAY be used to rebut the presumption of guilt for a criminal conviction under Schulp - V. Delo 513 U.S 289, 113 S.Ct 851, 324, 332 (1995) ?

IF sufficient facts ARE presented to demonstrate that a petitioner will be able to PROVE he didn't commit the crime presented at trial should a U.S.C.A 2253 (c) Certificate of appealability issue on a miscarriage of justice claim ?

When counsel does NOT ensure mandatory procedures ARE followed and allow his client to go to trial without those safe guards in place is the thresholding showing of a constitutional violation meet for U.S.C.A 2253 certificate of appealability ?

## LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

|                                                        |   |
|--------------------------------------------------------|---|
| OPINIONS BELOW .....                                   | 1 |
| JURISDICTION.....                                      |   |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... |   |
| STATEMENT OF THE CASE .....                            |   |
| REASONS FOR GRANTING THE WRIT .....                    |   |
| CONCLUSION.....                                        |   |

## INDEX TO APPENDICES

|                                                                                        |
|----------------------------------------------------------------------------------------|
| APPENDIX A: UNITED STATE FOURTH CIRCUIT: Civil Action NO. 17-7316, Exhibit A1 - A3     |
| APPENDIX B: UNITED STATE DISTRICT COURT: Civil Action NO. 3:16 cv 803, Exhibit B1 - B3 |
| APPENDIX C: HABEAS STATE TRIAL COURT: Civil Case NO. 15-2202, Exhibit C1 - C6          |
| APPENDIX D: CRIMINIAL TRIAL TRANSCRIPTS EXCERPTS: No 1877 criminal, Exhibit D1 - D7    |
| APPENDIX E: TRIAL EXHIBITS, Exhibit E1 - E3 criminal state trial 1877                  |
| APPENDIX F: NEW EVIDENCE, Exhibit F1 - F7                                              |
| APPENDIX G: RAPE KIT REPORT NEW EVIDENCE, Exhibit G1 - G13                             |

## Appendix

Reference to an appendix will be underlined. The 1<sup>st</sup> letter is the category and the number is the item under that category.

Appendix A - United States Fourth Circuit: Civil Action No. 17-7316

A1 - Per Curiam

A2 - Order denying rehearing

A3 - Judgement of Court

Appendix B - United States District Court: Civil Action No. 3:16 cv 803

B1 - Magistrate's proposed finding

B2 - Order denied certificate of appealability 2253(c)

B3 - District Judge acceptance of Magistrates recommendation as conclusion of law and fact

Appendix C - Habers State Trial Court: Civil Case No. 15-2202

C1 - Opinion that bill of particulars need not be presented by trial counsel

C2 - Opinion that bill of particulars need not be presented by sentencing counsel

C3 - Opinion that bill of particulars not being presented would be a meritless appeal

C4 - Opinion that no crime occurred prior to 11/11:30 am on 10-31-11

C5 - State Judge adoption of the respondent opinion as finding of fact and conclusion of law

C6 - Supreme Court dismissed petition under 5:9 a lack of filing proper notice in trial court

Appendix D - Criminal Trial Transcripts Excerpts - No. 1877 criminal

D1 - Prosecution close case in chief arguments and summary of evidence, Judge Ruling

D2 - Judge rationale of finding me guilty, found guilty on indictment alone

D3 - Key witness testimony that D. Woodard saw her and I together on 10-31-11

D4 - D. Woodard testimony of the time of day he saw me and my accuser together

D5 - Duration of acts alleged in the indictment

D6 - Complaining witness explanation of how she was allegedly raped with her underwear on

D7 - Leanea Childers trial testimony of arriving at the apartment 13 minutes after I called her and revealed the cheating affair

Appendix E Trial Exhibits

E1 - Indictment

E2 - Forensic report on sheets

E3 - Forensic report on underwear

## Appendix F New Evidence

### E1 - Bill of particulars

- F2 - Police Report by J. Wallace "1030" sex occurred
- F3 - Discovery Report showing I provided my phone Number
- F4 - Request and order of Leavena Childers Phone Records
- F5 - Show minor types of our fluid mixed during sex
- F6 - Order preserving physical evidence

### E1 - Diagram of explanation for testing

#### Appendix G Rape Kit Reports New Evidence

G1 - Anxiety and Depression reported from key witness

G2 - No sexual history reported in past 5 days

G3 - Did not change clothes

G4 - Narrative reported to nurse

G5, G6, G7, G8 - No injuries reported

G9 - Wood Lamp, Secretions found, ABQ card P30

G10 - Clothes description and not changed

G11 - Specimen collected for testing

G12 - Toluidine blue Dye test and abnormal findings

G13 - Consent to release, chain of custody, pictures taken during the exam.

#### Appendix H - Verbatim Case Law

H1 - Griffin - V - Johnson 350 F.3d 956, 963 (9th Cir 2003)

H2 - Livingston - V - Com 184 VA 830, 837, 36 S.E 2d 561, 565 (1946)

H3 - Miller EL - V - Cockrell 537 U.S 322, 123 S.Ct 1029 (2003)

H4 - Schulp - V - Delo 513 U.S 298, 115 S.Ct 851 (1995)

H5 - Strickland - V - Washington 466 U.S 668, 104 S.Ct 2052 (1984)

H6 - United States - V - Hess 124 U.S 483, 8 S.Ct 571 (1888)

H7 - 28 U.S.C.A 2253 (c)

## TABLE OF AUTHORITIES CITED

### CASES

### PAGE NUMBER

|                           |                                            |    |
|---------------------------|--------------------------------------------|----|
| Griffin -V- Johnson       | 350 F3d 956, 963 (9th Cir 2003)            | 6  |
| Livingston -V- Com        | 184 Va. 830, 837, 36 SE 2d 561, 565 (1946) | 9  |
| Miller EL -V- Cockrell    | 537 U.S 322, 123 S.Ct 1029 (2003)          | 10 |
| Scholz -V- Delo           | 513 U.S 298, 115 S.Ct 851 (1995)           | 6  |
| Strickland -V- Washington | 466 U.S 668, 104 S.Ct 2052 (1984)          | 9  |
| United States -V- Hess    | 124 U.S 483, 8 S.Ct 571 (1888)             | 9  |

### STATUTES AND RULES

28 U.S.C.A 2253 (c)

5+10

### OTHER

SEE APPENDIX H

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ~~C6~~ to the petition and is

☐ reported at N/A; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the ~~Supreme Court of the State of Texas~~ State trial court appears at Appendix ~~C6~~ to the petition and is

☐ reported at C1-C5; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.



## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 27 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 13 2018, and a copy of the order denying rehearing appears at Appendix A2.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including July 2 2018 (date) on Sept 27 2018 (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was dismissed. A copy of that decision appears at Appendix etc.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions involved are 5<sup>th</sup> and 14<sup>th</sup> Amendment due process of Law, Equal Protection of State + Federal Law for new evidence.

- 6<sup>th</sup> Amend case and nature
- 6<sup>th</sup> Amend right to counsel assist at trial

Statutory Provision: 2253(C) Certificate of Appealability

## STATEMENT OF THE CASE

This is a 2253 (c) case in which the 6<sup>th</sup> Amend-Violation was first presented to the state trial court in Virginia C5

CASE # 15-2202

The Supreme Court of Virginia dismissed the appeal on procedural grounds C6

CASE # 151829

The 2254 1<sup>st</sup> Federal habeas petition was denied on procedural grounds AND 2253 (c) C.O.A was denied A3 CASE # 3:16 CIR 803

Fourth Circuit of Appeal denied 2253(c) C.O.A and rehearing A2 A3

This is a habeas challenge to a state "Virginia" Rape and object sexual penetration conviction. In the Federal ARENA I raised a 2254 petition in which I alleged my trial, sentencing and appellant attorney was ineffective for not bringing to the court that the bill of particulars was omitted from trial and in Virginia it must be read with the indictment. Even though these claims was presented in state court all my claims are time barred. Actual innocence was raised and denied because the evidence was available at the time of trial, yet, not presented at trial. I demonstrated how if allowed the evidence not presented can establish the base for an actual innocence claim using a time line, forensic evidence and the testimony presented at trial. The bill of Particulars is what this case foundation is based on and if the facts allege in my petition is proven the cases will know I was never charged with the action I'm currently convicted under

~~DECLINATORY STATEMENT~~

~~this court has never authorly granted by 28 U.S.C. 2253 (b)(1)(B) (C) (D) (E) (F) (G) (H) (I) (J) (K) (L) (M) (N) (O) (P) (Q) (R) (S) (T) (U) (V) (W) (X) (Y) (Z)~~

~~this petition was filed prior to the 40 day deadline of the denial from a rehearing~~

~~1~~  
I was charged with a Rape & object sexual penetration occurring prior to 1100AM but was found guilty of sexual Assault occurring around 1220 noon in which I was factually not around for. Cellphone records and eyewitness can demonstrate I was not around if allowed to present.

## REASONS FOR GRANTING THE PETITION

### CONCISE STATEMENT ON WHY REVIEW SHOULD BE HAD

The circuits are split over what New Evidence is. This is of national importance because depending on where a petitioner is housed in the United States will determine what New Evidence is. This is a matter of federal law and not state law. So, New Evidence should be one established standard and not different standards depending on where a petitioner lives.

The constitutional violation is important beyond this case because if counsel does not ensure mandatory procedural requirements are met, he/she must and should be viewed as at minimum deficient! If not counsel will have free range to use court as a sham for a job.

### Question(s) Presented for review - New Evidence

Can evidence not presented at trial, but available at trial be used to form the basis of an actual innocence claim in Federal court?

- ① District court ruled evidence that was available for uses at trial can not be used to form the basis of an actual innocence claim (B1, B3). Court denied C.O.A B2. Fourth circuit upheld the procedural ruling of no New Evidence (A1, A2, A3). The ninth circuit took a different approach than the fourth circuit: "We framed the relevant question not as whether the New Evidence was available to the defendant during his trial, but rather as whether the New Evidence was introduced to the jury at trial." Griffin -V- Johnson 350 F.3d 936, 963 (2003).
- ② The Fourth circuit has sanctioned res judicata being applied to evidence and not just issues. (See B3, A1)
- ③ 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 Schulp -V- DeLo 513 US 298, 115 Sct at 324 (1995). This proves that as a matter of law and fact wrongly excluded evidence may form the basis for an actual innocence claim.
- ④ It has not been clearly established by the Supreme Court if only newly discovered evidence or both evidence excluded at trial and evidence unavailable at trial can be used to form an actual innocence claim. The holding in Schulp -V- DeLo 513 US 298 <sup>⑥</sup>

speaks of any evidence that's reliable that wasn't presented to the trier of fact but the concurring opinion only speaks of "New Discovered Evidence" id at 332. Since, both can be viewed as controlling law the issue of New Evidence is inherently debatable for the purpose of 2253(c). SEE Appendix DL, EE, EL.

⑤ It is unreasonable to conclude that it's not even debatable that the court ruling of wrongly excluded Evidence is wrong!

### MISCARRIAGE OF JUSTICE

6) Position of Innocence - Consensual sex at 10:30 AM on 10-31-11

7) Position of Guilt - No crime occurred prior to 11:00 AM. Crime occurred after 11/11:30 AM when Bean was seen going into the apartment - 12:20 PM is when the assault approximately occurred. Appendix DL, EL

8) Proving no crime occurred around 12:20.

Leanea Childers will establish that I was not at the apartment from 11:15 AM until police arrived around 1300 on 10-31-11. Appendix DL Leanea Childers was home 13 minutes after Bean initially called her by allowing EL phone records and EE my phone # be revealed will show the exact time she was called which will provide an approximate time of her arrival at the house. I called her at about 1050. Leanea testified I was not around when she arrived. She is an Alibi witness when time is considered.

9) This leaves only 11/11:30 AM on 10-31-11 to prove no crime occurred in. The witness testified the duration of the act lasted about 15 minutes. DS As a matter of fact and law the initial of any non consensual penetration is when the assault would have occurred. Leanea Childers called after sex. So, subtract 15 minutes from the time she was called, would give precise time of when sex occurred.

10) Appendix EL and EL control the legal fact finding scope, when the exact time police is revealed it will replace the word approximately. In other words no juror could believe the indictment occurred after the factual time police was called. Proving sex occurred at 10:30 AM as in the police report EE makes Woodward testimony of seeing me after sex DL. Appendix DL show that my accuser agree to Woodward seeing us. She was not crying although she has anxiety and depression issues EL that would have produced a visible change in demeanor if the indictment occurred prior to the police being called close to 11:00 AM. When the times are factored in, it's unlikely that the indictment even occurred. THIS CASE DESERVE ENCOURAGEMENT TO PROCEED FURTHER!

## INNOCENCE DEALING WITH SCIENCE

The acts described in the indictment E1, is that assault occurred with underwear on D6.  
The judge accepted the explanation D2.

- 1) To prove no underwear was worn the following need to be understood: I didn't remove them, the physical evidence is preserved E6, the sheet has possible vaginal stains on it E2, sex occurred on the streets G3, the clothes were not changed G3 G10, no sex reported on the sheet past 5 days G2, No stains reported on underwear E3, Vagina naturally lubricated G5, fluid mixed during sex between her and I E5.
- 2) By demonstrating the stains on the sheet are vaginal stain from the witness and the underwear are stain free, it's impossible for the underwear tube worn during sex and not have any stains on them. If the underwear was worn the vaginal fluid would have 1st drained on to the underwear and then the sheet. It's undetermining what those stains are! see diagram E1
- 3) The rape kit finding are favorable if the same nurse is allowed to explain the difference between what she called normal and abnormal findings. When a violent non date rape is alleged (G4 kicking screaming, G5-G7 no injuries) scattered uptake is usually found. Scattered uptake is tears inside the vagina due to dryness. Toluidine Blue Dye is a chemical used to detect uptake but none was found.
- 4) It should not be accepted without question whether the witness is telling the truth. This has the power to prove the state trial court factual finding is in clear error.
- 5) I need this court authority to be allowed to use science to prove my factual innocence

### Question Presented for Review - Constitutional Violation

- 6) It's counsel failure to inform the Judge in a bench trial that the indictment is limited by the factual scope found in the bill of particulars, unreasonably deficient when counsel raised an insufficient evidence motion and the fact in the bill of particulars was not presented or proven and it's a mandatory procedure that the court read the indictment and bill of particulars together? The state court factual findings are presumed correct in Federal court. The state court found the bill of particulars was not read with the indictment see Appendix C1, C2, E3 and G5 for the state court acceptance of this factual position. The legal conclusion that counsel don't have a duty to present the bill of particulars and the bill of particulars don't have to be read with the indictment. see Appendix E1 for indictment and E1 for bill of particulars. The court only used the indictment in trying the case and I was found guilty only on the indictment Appendix D2

17) Case Law was mandatory language and say it does > United States - v. Hess 124 U.S. 483, 8 S. Ct. 571 (1888); Livingston - v. Comm 184 Va. 830, 837, 36 S.E.2d 561, 565 (1946) and a law treatise 1 Archb. Crim. Pr. and Pl. 291 <sup>SEE</sup> Appendix H16. The bill of particulars and indictment must be read together.

18) Strickland - v. Washington 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed. 2d 685 (1984) use language that demonstrate counsel has a duty to ensure that I'm being tried on the issue defined in advanced. Appendix H5

The Judge didn't recognize all the elements of the charge Appendix E1 dF1, Appendix D1 demonstrate the Judge never took time into material consideration. The entire Criminal Pleading is destroyed without both instruments being read together. The pleading did not form an issue for the trier of fact to decide. Appendix H16.

IN CONCLUSION A double standard for New Evidence can't be considered a standard at all. A standard is - something established by authority, custom, or general consent as a model or example. Especially in the context of Actual Innocence! If I lived in the federal 9th CIR region these additional sanctions would not be placed on me and other petitioners who live in the 4th CIR. Where a petitioner lives in the United States should not determine if he can have access to the actual innocence exception based on if the New Evidence was available at trial or not. It should depend on if the trier of fact heard the evidence and the court knew it's materiality. Also, the constitutional violation of counsel is one that is easy to understand. Counsel failed to ensure the procedural protection request prior to trial and granted was in place during the course of trial. Lastly the court shouldn't accept this states conclusion of fact and law. I've presented a triable issue of fact on the issue of innocence which is, when did sex occur? Lower courts can't float at a clear decision of

#### CONCLUSION

this court! Miller EL-V-Crookell 537 U.S. 322, 123 S.Ct 1029 (2003) Standard has been met to issue a C.O.A. the Procedural issue & Constitutional claim are both debatable, Please Help. The petition for a writ of certiorari should be granted.

relief to Grant a C.O.A and determine what New Evidence standard for Actual Innocence in Federal Habeas.

Respectfully submitted,

Rhett Bean

Date: July 16 2018