No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH STEPHENSON ,
Petitioner.

vs.

STATE OF CONNECTICUT,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Did the district court and the court of appeals misapply this Court's holdings concerning habeas petitioners' gateway claims of actual innocence as described in *House v. Bell*, 547 U.S. 518 (2006)?

List of Parties

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

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Petitioner Joseph Stephenson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated .

Opinions Below

The decision of the court of appeals that remanded the case to the district court in order to evaluate Mr. Stephenson's claim of actual innocence is an unpublished summary affirmance and is set forth at App. 1, *infra.* The Ruling and Order of the district court following the remand is set forth at App. 2, *infra.* The decision of the court of appeals, affirming the district court's dismissal of the action is an unpublished summary affirmance and is set forth at App. 3, *infra*.

Jurisdiction

The Court of Appeals opinion in this case was filed on November 6, 2018. A timely petition for rehearing was filed on November 27, 2018. The Court of Appeals denied the

petition for rehearing on January 31, 1019. On April 19, 2019, Mr. Stephenson's application to extend time to file a petition for certiorari was granted (Application 18A1077) and Mr. Stephenson's time within which to file his petition was extended to July 1, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 28 U.S.C. § 2254 (writ of habeas corpus for state prisoner). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts).

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment XIV:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Statement of the Case

Procedural background: Joseph Stephenson was convicted in Connecticut state court of robbery in the third degree and two counts of larceny in the fifth degree. He appealed his conviction and the judgment was affirmed. *State v. Stephenson*, 131 Conn.App. 510, 27 A.3d 41 (2011), *cert. denied*, 303 Conn. 929 (2012).

Mr. Stephenson brought the habeas action that is the subject of this petition for certiorari in the federal district court for the District of Connecticut raising various claims. The district court dismissed the claims on the merits. Mr. Stephenson requested leave to amend his petition to add new claims: ineffective assistance of counsel, improper dismissal of a juror, error in sentencing, and vindictive prosecution. Mr. Stephenson also argued that he was actually innocent of the most serious crime for which he had been convicted, robbery in the third degree in violation of Connecticut General Statutes § 53a-138. The district court denied Mr. Stephenson's request for leave to amend on the ground that the new claims were procedurally barred.

Mr. Stephenson appealed to the Court of Appeals for the Second Circuit. That court remanded the case to the district court for a determination of whether the new claims, although

procedurally defaulted, should be adjudicated on the merits based on Mr. Stephenson's claim that he is actually innocent of third degree robbery. Second Circuit docket no. 14-1310. App. 1. The court of appeals ordered the district court to determine whether Mr. Stephenson could establish a credible and compelling showing of actual innocence, and, if so, whether his proposed amendments advanced any legitimate constitutional claims. App. 6-8.

The district court, after conducting an evidentiary hearing, concluded that Mr. Stephenson had not met his burden of establishing a credible, compelling claim of actual innocence, declined to allow his petition to be amended to include new claims, dismissed his petition, and denied his request for a certificate of appealability. App. 28.

Mr. Stevenson moved in the Court of Appeals for a certificate of appealability, to proceed in forma pauperis, and for continued representation under the Criminal Justice Act. The Court of Appeals denied the motion and dismissed the appeal. The Court of Appeals ruled that Mr. Stephenson had not shown that " 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling' concerning whether Appellant had made a showing of actual innocence. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *see Doe v. Menefee*, 391 F.3d 147, 160-64 (2d Cir. 2004)(discussing requirements for 'gateway' actual innocence claim)." App. 30.

The trial: The charges against Mr. Stephenson arose from alleged shoplifting incidents at two stores.[1] As is described more fully below, when Stephenson left a Macy's department store, he was followed by Donovan Sinclair, a store detective. Outside the store, Sinclair detained Stephenson, taking from him a bag which he believed contained stolen Macy's merchandise. Sinclair attempted unsuccessfully to handcuff Mr. Stephenson, until arresting officers arrived. Stephenson's encounter with Sinclair formed the basis of the robbery count.

[1]Following Mr. Stephenson's apprehension outside Macy's, officers found items from another store in the Macy's bag that had been taken from Stephenson, and the state alleged that these items were also stolen. The habeas petition at issue, however, concerns only Mr. Stephenson's conviction for robbery in the third degree, a crime which Mr. Stephenson asserts he did not commit.

The basis of the Mr. Stephenson's "gateway" actual-innocence claim is that he did not use force or the threat of force in order to prevent his retention of items taken from Macy's. Force, one of the elements of robbery in the third degree, did not exist in this case. Stephenson neither used nor threatened to use any physical force. He is, the evidence establishes, actually innocent of third-degree robbery.

Four witnesses testified about the events that occurred outside Macy's, during which force was allegedly used by Stephenson.

The state's primary witness was Donovan Sinclair, a Macy's security guard. Sinclair followed Stephenson as he left Macy's because he believed that Stephenson had stolen merchandise inside a Macy's bag he had brought with him into the store. (ECF # 78 at 86-87). [2] Once outside, Sinclair approached Stephenson and identified himself as the store detective. Stephenson, Sinclair testified, "said he didn't do anything and he began to walk across the street." *Id*. at 87. Following Stephenson, Sinclair asked him about the contents of the shopping bag. When Stephenson refused to stop and continued walking. Sinclair pinned against the fence and took the Macy's bag away from him. ECF # 100 at 9; *see* ECF # 78 at 87-88. While Stephenson was "pinned against the fence," Sinclair asked him if he possessed any weapons. Stephenson, Sinclair testified, responded that he had a pocket knife in his pocket. ECF # 78 at 90. Having retrieved the Macy's bag, Sinclair attempted to handcuff Stephenson. As will be described in greater detail below, witnesses approaching the scene as Sinclair tried to get the cuffs on Stevenson observed Stevenson attempting not to be handcuffed, waving his arms, flailing and shouting that he would sue. Sinclair indicated he kept Stephenson pinned against the fence for about five minutes. *Id*. at 92.

Sinclair also testified that while he had Stephenson pinned against the fence, there was "a little pushing and shoving because he was still trying to walk away." *Id*. at 90-91. Sinclair's

[2]The trial transcripts were filed in the district court, and references to the trial transcript are made by citation to the ECF docketing numbers for the transcripts.

testimony that there was a little pushing and shoving was the only testimony of a witness that he himself had been the subject of force. Sinclair's testimony that there was some pushing and shoving as he tried to stop Mr. Stephenson from leaving proved to be, as the district court noted, "important to the state's case." Ruling at 3, App. 11. Mr. Stephenson was charged with second degree robbery, which requires proof that the accused "display[ed] or threaten[ed] the use of . . . a deadly weapon or a dangerous instrument." Conn. Gen. Stat. § 53a-135. After the state presented its case, the trial judge granted a motion to dismiss the second degree robbery charge but permitted the state to proceed on a charge of third degree robbery, which requires use or threatened use of physical force. A motion for judgment of acquittal on the charge of third degree robbery was denied. Referring to Sinclair's testimony, the trial judge stated that there was evidence of "some pushing and shoving between [Sinclair] and the defendant after Mr. Sinclair followed the defendant outside the store." Trial Transcript, Oct. 29, 2008, at 51-58.

Sinclair also noted that not long after Steve Johnson (a fellow store employee) came outside to assist him, the police arrived. *Id.* at 92-93. Up to ten officers converged on the scene and took Stephenson into custody. *Id.* at 93-94. Sinclair testified that while his "confrontation" with Stephens on was "very heated," Stephenson did not injure him in any way. *Id.* at 23).

This was the sum of Sinclair's testimony pertaining to the use-of-force component of the robbery charge. The only mention of force was Sinclair's vague statement as to "a little pushing and shoving because he was still trying to walk away." Neither the prosecutor nor defense counsel asked Sinclair any questions about who was doing the pushing and shoving and who was being pushed and shoved.

Officer Peter McManus testified that he had been in his patrol car when he received a dispatch to respond to Macy's. Arriving on the scene, McManus saw four individuals, one of whom was "up against the fence," and that "this one male was fighting back with these three other males. *Id.* at 35. McManus observed that "[Stephenson] was struggling" and that "[h]e was moving his body around, they were attempting to handcuff him and he was attempting not to

be handcuffed." *Id.* at 36. McManus stated Stephenson, after being taken into custody, "was still verbally being abusive towards all of us, just shouting out that he was going to sue us" *Id.* at 37. While McManus testified that, upon searching Stephenson, a pocket knife was recovered from his right front pocket, *id.* at 38, there was no testimony by McManus that Stephenson used or threatened the use of any force.

Officer John O'Meara testified that when he arrived at the scene, he saw a " security guard that was known to me that had a suspect up against the fence, he was trying to handcuff the individual." *Id.* at 94. O'Meara described Stephenson as "[e]xtremely agitated, aggressive. He was yelling and the security officer was trying to handcuff him when I arrived." *Id.* at 95. O'Meara handcuffed Stephenson and put him into a police car. *Id.* at 95-96.

Sinclair's co-worker, Steven Johnson testified that he had gone outside to assist Sinclair. Johnson and seen Stephenson "[w]aving his arms, flailing, screaming just let me go. Stop, let me go." *Id.*. at 36. Johnson saw two other associates helping Sinclair restrain Stephenson. He sent them back inside the store as it was not their job. *Id.* at 36-37. The police arrived minutes later. *Id.* at 37.

None of the witnesses testified that Mr. Stephenson had touched them or attempted to use force against them.

Because the evidence did not support the assertion that Stephenson had used a weapon, the trial court granted a motion for judgment of acquittal on second-degree robbery. The court, however, permitted the State to amend the charge to third-degree robbery and denied a defense motion for a judgment of acquittal on that charge. In denying the motion, the trial court relied heavily on Sinclair's testimony that there had been "some pushing and shoving between himself and the defendant after Sinclair followed the defendant outside the store." ECF # 78-2 at 52-59. This vague assertion, of *some* pushing and shoving–without any indication that Stephenson had done the pushing or shoving–was the basis of the third-degree robbery charge submitted to the jury, although the court acknowledged: "Perhaps it isn't the strongest case in the world." *Id.* at

60.

The defense sought to re-call Donovan Sinclair as a defense witness to testify that one of the officers involved in the case had encouraged him to enhance his testimony by adding that Stephenson had been holding a knife during Sinclair's altercation with him. Sinclair had not accepted the officer's suggestion, but the defense sought to admit the testimony to demonstrate the possible taint to the prosecution's case. Questioned by the court outside of the presence of the jury, Sinclair testified that after testifying for the State, he telephoned defense counsel to inform him that one of the police officers had asked him, in advance of trial, to commit perjury. *Id*. at 79. Sinclair specified the officer had asked him to testify falsely that Stephenson had waved a knife at him during their altercation. *Id*. at 80. The court precluded the testimony, and the remainder of the defense case had nothing to do with the force component of the robbery charge.

***The Deliberations and Verdict*:** At the close of the case, the court charged the jury on the crimes of third-degree robbery and larceny. ECF # 78-6 at 17. The jury ultimately found Stephenson guilty of all three charged crimes. ECF # 78-7 at 18-19.

The New Evidence: Sinclair's Notarized Letter: On March 6, 2009–several months after the trial but before sentencing–the court received a notarized letter from Sinclair, a letter in which he stated he had seen a post-trial newspaper article about the case and realized that Stephenson had been convicted of robbery because of his testimony as to the "pushing and shoving." ECF # 1-1 at 50.

In the letter, Sinclair did what defense counsel failed to do: he clarified who pushed and shoved.

> I said that there was some pushing and shoving. I admit now that the man did not touch me in any way at all. In fact, it was I that pushed and shoved him against the fence across from the store. He only pulled his hand away so I could not handcuff him properly. He gave me the bag when I asked for it and I thought the jury would understand that there was only arguing involved and no force whatsoever. Even though we had a heated argument I remember clearly that the man did not fight with me. I feel very badly now that the man was convicted for something that he did not do and I cannot sleep properly knowing that I may have

said something that was taken in the wrong way and sent someone to jail.

Id. at 50. Sinclair's letter also informed the court, again, that the police had encouraged him to exaggerate the incident in his report, advising him to lie to the jury about being threatened with a knife, though no such thing occurred. *Id.* It was only when Stephenson argued with him and threatened to sue that Sinclair "became very angry and went along with the police." Sinclair admitted in the letter that he, "was worried about his job at the time and wanted to make sure that the man would be convicted." *Id*. at 50-51.

> I realize now that it was wrong for me to exaggerate on the incident report that the police told me to write and I could not bring myself to lie in court about the man pulling a knife on me when it didn't happen. Nowhere in my report did I mention that the man touched or fought with me in any way and I think it was wrong for the police to say that they saw the man fighting with me and two other guys. The fact of the matter is that the police came sometime after I already apprehended the man and everyone had calmed down before the police came.

Id. at 51. Sinclair's letter noted he "made a slip of the tongue when [he] said there was 'a little pushing and shoving'" *Id*. The letter advised it had been Sinclair's intention "to convey the fact that there was no fighting whatever and that it was a minor incident . . . . I did not realize that the jury would take my statement as seriously as they did." *Id.*

The Sentence: On March 10, 2009, Stephenson appeared for sentence. Defense counsel, seeking probation, noted Stephens on had been offered concurrent time on this case and another case. Both defense counsel and the State discussed Stephenson's psychiatric or emotional challenges, and the lapse in treatment that resulted when, as a result of this arrest, he left college and lost the medical insurance he was provided as a student. ECF # 78-8 at 7,11-18. Stephenson pled guilty in the other charged case but, despite the proffered consolidated plea bargain, insisted on proceeding to trial in this case. *Id.* at 12-15.

Mr. Stephenson addressed the court:

> I know I was wrong in Macy's and I accept that, Your Honor. I accept that, you know, the Court's decision but I am not a violent person, Your Honor and I am

> just saying that the fighting and all of that, I didn't do that, Your Honor. I don't know what to do. I don't know what to do.

Id. at 18.

The court commented upon the less-than-overwhelming nature of the State's evidence, noting, "It's not the most violent robbery I've ever heard of but it apparently fits the definition of robbery and they convicted him of that and I accept the jury's verdict." *Id*. at 22.

The court sentenced Stephenson as a persistent larceny offender to three years' imprisonment, with execution suspended after nine months, to be followed by three years of probation. *Id.* at 23-24. There was no mention at sentencing, and little mention on appeal, of Sinclair's notarized letter.

The habeas hearing in the district court: After the Court of Appeals for the Second Circuit had remanded Mr. Stevenson's habeas claims to the district court, instructing that court to determine whether Mr. Stephenson had made a credible and compelling claim of innocence, the district court conducted an evidentiary hearing. During the course of the hearing, Donovan Sinclair testified. He described, as he had during the course of the trial, the manner in which he had apprehended Mr. Stephenson -- but with some important clarifications. Sinclair testified that he had taken Stephenson's shopping bag without any resistance from Stephenson. ECF #100 at 10. While Simpson held him against a fence, Stephenson did not fight to keep the bag. Sinclair testified that Stephenson did not touch him, push him, shove him, or use any force whatsoever against him. *Id.* at 9-10. Sinclair clarified that part of his trial testimony in which he said that there had been "some pushing and shoving." He explained that *he* had been the one to do all the pushing and shoving, and that Stephenson had not used any force against him at all. *Id.* at 11. Sinclair stated that it had not been his intention at trial to convey the idea that Stephenson had pushed or shoved *him*. *Id*.

Sinclair testified that some months after the trial, Stephenson's lawyer had contacted him and requested a meeting. *Id.* at 11-12. During this meeting, trial counsel had asked Sinclair many questions and took extensive notes. *Id*. Approximately two weeks later, Sinclair again

met with Stephenson's counsel, who presented a letter to be sent to the trial judge, which Sinclair signed. The letter was not written by Sinclair but had been written by Stephenson's trial counsel, apparently from the notes that he had taken while talking with Sinclair two weeks before. *Id*. at 11-12.

Shown the letter, Sinclair testified that two of its assertions were incorrect: statements that seemingly exonerated Stephenson of larceny and a statement indicating no one had asked him to write or sign the letter. *Id.* at 15-16. Sinclair remained adamant, however, that the assertions in the letter stating it was Sinclair alone who did all the pushing and shoving were accurate. *Id.* at 16.

On cross-examination, Sinclair was confronted with a Macy's report that he had written within 24 hours of the incident. *Id.* at 20. Asked about the report's statement that Stephenson had threatened Sinclair with a knife, Sinclair confirmed that he had so reported, but added what had actually happened was that he asked Stephenson if he had a knife; Stephenson said yes and showed it to Sinclair. *Id.* at 21-22.

On re-direct examination, Sinclair related that in the course of Stephenson's trial– but outside the presence of the jury–he had testified that the responding police officers had tried to coerce his testimony and asked him to lie under oath. *Id*. at 23. He had also testified previously that the officers had told him what to write in his Macy's incident report. *Id*. at 23-24. Sinclair reiterated that the responding officers asked him falsely to testify that Stephenson had a knife that he tried to use against him. *Id*. at 24. Sinclair repeated that when he asked Stephenson if he had a knife on his person, Stephenson advised that he had a pocket knife, which he then removed from his pocket and gave to Sinclair. *Id*. at 25. Specifically, Sinclair directed Stephenson to take the knife from his pocket, Stephenson complied, and Sinclair took possession of the knife. *Id*. at 28. Soon after Sinclair took the pocket knife, he also recovered the Macy's shopping bag from Stephenson without any resistance. *Id*. Again, Sinclair confirmed Stephenson had not used any force against him at all. *Id*. at 29.

The court asked Sinclair about whether he had sufficient justification physically to restrain Stephenson. Sinclair explained that Stephenson kept trying to walk away and that Sinclair's primary interest was recovering the merchandise. *Id*. at 33. Sinclair also told the court this was the first time he had found it necessary to pin someone against a fence, and that it was an upsetting experience which still bothered him. *Id*. at 34. The court suggested that Sinclair's physical restraint of Stephenson was proof that Stephenson had struggled or resisted, asking, "[i]f he wasn't resisting, why would you do that?" *Id*. at 41. Sinclair replied that his belief that Stephenson had stolen merchandise, combined with the fact that Stephenson was walking away, had resulted in Sinclair "doing the pushing and shoving." *Id*. at 42. On further direct examination, Sinclair continued to maintain that it was he who had used physical force, to apprehend Stephenson, pursuant to store policy, to prevent him leaving the scene. *Id*. at 43.

The district court's decision: The district court found that Mr. Stephenson had failed to present a claim of actual innocence that was "both 'credible' and 'compelling,'" *Rivas v. Fischer*, 687 F.3d 514, 541 (2d Cir. 2012) (*quoting House v. Bell*, 547 U.S. 518, 521, 538 (2006))

The district court found that Mr. Stephenson's reliance on the Sinclair letter submitted to the state judge was misplaced. The court found that Sinclair had not acted on his own in writing to the judge and that Sinclair had not read the entire letter before he signed it. Ruling at 10, A 18. "It is one thing for a witness to come forward on his own initiative because he fears his testimony has caused a miscarriage of justice; it is another for the defendant's lawyer to contact the witness, encourage him to recant and obtain his signature on a letter," the district court wrote. Ruling at 11, A 19. The district court found that the assertions in the letter were not trustworthy because of inconsistencies between the letter, the trial testimony of Sinclair, the Macy's report prepared by Sinclair, and the trial testimony of other witnesses. *Id.* at 11-12, App. 19-20 The district court recognized that recantation by a victim presents a sympathetic scenario for a claim of actual innocence, but viewed Sinclair's clarification of who was doing the pushing and the shoving as suspect. *Id.* at 15-16, App. 23-24. Sinclair, after all, did not recant any testimony

concerning Mr. Stephenson's use of force. He had testified at trial that there had been a little pushing and shoving but he had not identified who had done the pushing and shoving. His testimony at the habeas hearing, the *he* had done the pushing and shoving, was not a recantation, but a clarification, which he would have provided at the jury trial, if he had only been asked. While the district court found no corrupt or dishonest motivation underlying Sinclair's attempts to clarify his trial testimony, the court surmised that Sinclair may have sympathized with a defendant who was likely to be deported on the basis of what Sinclair viewed as a minor incident. *Id.* at 18-19, A 27-28. (Sinclair was never asked about this during the habeas hearing.) The proffered evidence, according to the district court, was not sufficiently reliable to satisfy the requirement that it be credible, and it was not sufficiently compelling to believe that any reasonable juror would have a reasonable doubt about Mr. Stephenson's guilt. *Id.* at 20, A 28.

Reasons for Granting the Petition

This petition for a writ of certiorari should be granted because United States Court of Appeal for the Second Circuit and the United States District Court for the District of Connecticut have decided an important federal question in a way that conflicts with relevant decisions of this Court. While we recognize that a writ of certiorari is rarely granted when the asserted error consists of misapplication of a properly stated rule of law, this is a case, like *House v. Bell*, 547 U.S. at 518 (which similarly involved the misapplication by the district court of this Court's rule of law concerning actual innocence) in which the petition should be granted.

The district court viewed Sinclair's testimony with suspicion. Sinclair, however, was no cooperating witness who had struck a deal in exchange for his testimony. He was no jilted friend or lover who had reconciled with the defendant and now wanted to undo the harm to the relationship that his testimony had caused. He had no financial dealings with Mr. Stephenson; no changes in fortune had led to a change of testimony. The district court posited that Sinclair felt sorry for Mr. Stephenson because he had discovered that Mr. Stephenson, after a long and legal stay in the United States, was bound to be deported on the basis of what Mr. Sinclair felt

(as most would) was a relatively minor incident.

The inconsistencies that the district court found in Sinclair's testimony were in large part not evidence of Sinclair's lack of reliability, but failures in questioning Sinclair during the course of the trial. None of the questioning at trial focussed upon the fact that Sinclair had pushed Stephenson against a wall, had taken back the Macy's bag, and then tried to handcuff him, before other witnesses to the incident had come upon the scene. None of the questioning made clear that what later witnesses on the scene observed – Stephenson's resisting handcuffing and trying to get away – had occurred after the Macy's bag had been recovered, and was Stephenson's reaction to being handcuffed by a Macy's employee, rather than an attempt to retain items that had already been taken away from him. Most significantly, no one had asked Sinclair who it was who had done the pushing and shoving that formed the basis for the element of force, and, as Sinclair's testimony in the habeas proceeding made clear, it was he himself who had done the pushing and shoving.

Connecticut General Statutes § 53a-136 provides that "[a] person is guilty of robbery in the third degree when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . . (1)[p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after that taking." *See State v. Stephenson*, 27 A.3d at 46 n. 7. The amended information charged that "while in the course of committing a larceny, used physical force upon another person to prevent and overcome resistance to the taking of the propery and the retention thereof immediately after the taking. . . ." *Id.*, 27 A.3d at 46. There was here no claim that Mr. Stephenson had used physical force to overcome resistance to the taking of property: this was a shoplifting case. Rather, the state claimed that Mr. Stephenson had used force to overcome resistance to his retention of the allegedly stolen property. The trial attorneys, the trial court, the Connecticut Appellate Court and the federal district court overlooked the fact that whatever witnesses may have observed Stephenson do in order to resist having a store security officer handcuff him, all of this occurred

after the store security officer had taken the property away from Stephenson. Stephenson could not use force to retain what he no longer possessed.

For purposes of the actual innocence exception, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("The miscarriage of justice exception is concerned with actual as compared to legal innocence.") That standard is satisfied here: Mr. Stephenson claims actual innocence. He did not use force or the threat of force to retain goods taken from Macy's.

To use the actual innocence "gateway," a habeas petitioner must present "a claim of actual innocence [that is] both 'credible' and 'compelling.'" *House v. Bell*, 547 U.S. at 521, 538. "For the claim to be 'credible,' it must be supported by 'new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.'" *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). "For the claim to be 'compelling,' the petitioner must demonstrate that 'more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.'" *House*, 547 U.S. at 538.

The district court held Mr. Stephenson to a higher standard than is required by this Court to establish actual innocence. The requirement is not, like that governing claims to dismiss for insufficient evidence, that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307 (1979). This Court requires, rather, that "it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." *House v. Bell*. 447 U.S. at 536-37.

The district court set forth the evidence that it believed, viewed as a whole, would compel a jury to find Mr. Stephenson guilty of third-degree robbery. Ruling at 19-20, App. 27-28. The evidence, however, viewed as a whole, including Sinclair's expanded description of the events,

establishes that Mr. Stephenson left Macy's with a bag containing various items. A security guard followed him and told him to stop. Mr. Stephenson disregarded the guard's order. The guard pushed and shoved him against a fence and took away the bag containing the merchandise. When the security guard attempted to place handcuffs on Mr. Stephenson, he resisted, waving his arms and shouting that he would sue. The police arrived and took Mr. Stephenson into custody without incident.

No properly instructed juror would find that Mr. Stephenson had used force or threat of force in order to retain the items taken from Macy's. The pushing and shoving was performed by the security guard, as the guard admitted. Mr. Stephenson's protestations were the complaints about being detained and handcuffed by a security guard after the Macy's bag had been taken away from him. It is more likely than not that any reasonable juror would have a reasonable doubt that Mr. Stephenson had used force or threat of force to retain the items that he had taken from Macy's. His claim of innocence is both credible and compelling.

This is a case like *House* in which "although the District Court attentively managed complex proceedings, carefully reviewed the extensive record, and drew certain conclusions about the evidence, the court did not clearly apply *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt." *House v. Bell*, 547 U.S. at 540.

Conclusion: Because the district court and court of appeals have decided an important federal question in a way that conflicts with relevant decisions of this Court, we respectfully request that this petition be granted.

Respectfully submitted,

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