No. _____

In The
Supreme Court of the United States

Thomas Rhodes,
Petitioner,

vs.

Michelle Smith, Warden,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2244(b)(2)(B)(ii), a claim presented in a second or successive habeas corpus application must be dismissed before a hearing on the merits unless:

> the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The statute does not define "evidence as a whole," and the circuits have adopted significantly different interpretations. Does the statute require the district court to consider all evidence relevant to the applicant's guilt or innocence—even evidence that is unrelated to the constitutional violation—as the majority of circuits has held, or is the inquiry more circumscribed, as the minority position holds (including the Eighth Circuit here)?

RELATED PROCEEDINGS

Eighth Circuit

Rhodes v. Smith, No. 18-3581, judgment entered Feb. 24, 2020

In Re Rhodes, No. 16-3967, order entered July 7, 2017

District of Minnesota

Rhodes v. Smith, No. 17-4025, Report and Recommendation entered July 6, 2018, and adopted on Oct. 29, 2018

Rhodes v. Dingle, No. 08-198, 2008, Report and Recommendation entered Jan. 24, 2008, and adopted on Feb. 19, 2008

Rhodes v. Fabian, No. 04-176, Report and Recommendation entered April 22, 2005, and adopted on September 12, 2005

Supreme Court of Minnesota

Rhodes v. State, No. A13-0560, A15-0136, Order entered Feb. 17, 2016

Rhodes v. State, No. A07-148, Order entered July 19, 2007

State v. Rhodes, No. C3-98-1839, Order entered March 20, 2003

Kandiyohi County District Court, Eighth Judicial District

State v. Rhodes, 34-K6-97-001529, Conviction dated July 29, 1998

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PETITION FOR WRIT OF CERTIORARI

Petitioner Thomas Rhodes respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

JURISDICTIONAL STATEMENT

The Eighth Circuit entered judgment on February 24, 2020. The deadline to file a petition for a writ of certiorari was extended 150 days pursuant to this Court's Order dated March 19, 2020, due to the ongoing public health concerns relating to COVID-19. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW & RELATED PROCEEDINGS

The Eighth Circuit's decision (Pet. App. A-2) is published at 950 F.3d 1032. The district court decision (Pet. App. A-11) is unreported but can be found at 2018 WL 5555123. The magistrate judge's Report and Recommendation (Pet. App. A-17) is unreported but can be found at 2018 WL 5557053.

RELEVANT STATUTES

This case involves the interpretation of a section of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") that applies to a second or successive application for a writ of habeas corpus. In particular, 28 U.S.C. § 2244(b)(2), provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF CASE

On July 29, 1998, Thomas Rhodes was convicted of first- and second-degree murder in connection with the death of his wife, Jane Rhodes. (Pet. App. A-24.) Mr. Rhodes has spent twenty-two years in prison, all the while maintaining his innocence.

Mr. Rhodes' conviction divided the Minnesota Supreme Court. (Pet. App. A-6.) Two dissenting justices concluded that "newly discovered evidence, if proven to be true, and considered in the light most favorable to Rhodes, would establish by a clear-and-convincing standard that no reasonable jury would have convicted Rhodes of first-degree premeditated murder beyond a reasonable doubt had the newly discovered evidence been presented at trial." *Rhodes v. State*, 875 N.W.2d 779, 799 (Minn. 2016) (Anderson, J., dissenting).

The conviction also troubled the federal courts. Both the district court and the magistrate judge concluded that "jurists of reason" might disagree over whether Mr. Rhodes was denied a constitutional right. (Pet. App. A-15, A-62.) The Eighth Circuit branded Mr. Rhodes' conviction "troubling." (Pet. App. A-6.) Nevertheless, these courts ultimately denied habeas corpus to Mr. Rhodes relief based a narrow, circumscribed approach to evaluating newly discovered evidence Mr. Rhodes presented in post-conviction proceedings. That approach artificially limited consideration of the exculpatory evidence Mr. Rhodes presented, though the court allowed the State to present evidence that the jury never heard and

that was never cross-examined in any adverserial process.

I. The boating incident.

The State's case against Mr. Rhodes was, by every account, "wholly circumstantial." *State v. Rhodes*, 657 N.W.2d 823, 827 (Minn. 2003). On August 2, 1996, the Rhodes family was vacationing on Green Lake in Spicer, Minnesota. (Pet. App. A-20.) That evening, Thomas Rhodes told his son, Eric, to set an alarm so they could go fishing the next morning. (Dkt 17-10 at T.1314.)[1]

Mr. Rhodes and his wife, Jane, then took their new Baja Blast jet boat onto the lake, as they had the night before. (*Id.*) Witnesses testified they could hear the couple having fun. (Dkt 17-5 at T.744; Dkt 17-6 at T.822, 825, 830.)

According to Mr. Rhodes, after some time, the couple decided to move to a different part of the lake. As Mr. Rhodes accelerated to "plane out" the boat, his wife stood up to search for an earring she dropped. (Dkt 17-5 at T.698-700; Dkt 17-6 at T.872.) The couple's son, Eric, testified that his mother would often lose earrings because "[s]he would fiddle with them." (Dkt 17-10 at T.1315.) As Jane was searching

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[1] References to the appellate record are to the Docket ("Dkt") entries in the district court, which were transmitted to the Eighth Circuit. The entire trial transcript was filed with the district court in *Rhodes v. Smith*, 17-cv-04025 at Dkt No. 17. It was broken down into 12 separate volumes designated 17-1 through 17-12. For purposes of this brief, Rhodes cites to the specific volume and trial page number, with the trial page number denoted by a "T."

for the earring, Mr. Rhodes glanced back and saw that she had fallen into the water. (Dkt 17-5 at T.698-99.)

Mr. Rhodes turned the boat around and began frantically circling (in the dark) searching for his wife. Witnesses confirmed that they saw the boat repeatedly doing circles in the same general area, "almost like a figure eight." (Dkt 17-5 at T.768; Dkt 17-6 at T.802-03.) Mr. Rhodes eventually jumped into the water in a panic, finally discontinuing his search after about 20 minutes so he could hurry back to the hotel where his family was staying to get help. (Dkt 17-5 at T.700-01; Dkt 17-6 at T.922.)

Norm Westby, a clerk at the hotel, was working when, at about 1:00 a.m., Mr. Rhodes came in from the lake, soaked from "head to toe," and talking "like huge sobs were trying to get out." (Dkt 17-7 at T.1050-52, 1059-60.) Mr. Westby testified that Mr. Rhodes was "just beside himself;" his face was contorted, and he looked like he was going to vomit. (*Id.* at T.1062.) At first, Mr. Westby could not fully understand Mr. Rhodes, but he called 911 when he realized that Mr. Rhodes was saying that his wife had fallen into the lake. (*Id.* at T.1052-53.)

Randall Kveene, a detective with the Kandiyohi County Sheriff's Department, arrived ten minutes later. (Dkt 17-5 at T.690-91; Dkt 17-7 at T.1055.) Mr. Rhodes ran out to meet Deputy Kveene and implored him "to go fast to help [his] wife" because she had fallen in the lake. (Dkt 17-5 at T.691-93, 711.) Mr. Rhodes was frantic, desperate, and shaken. (Dkt 17-5 at T.711, 720; Dkt 17-6 at T.888, 901.) He had trouble explaining the exact location where Jane had fallen in. Perry Weiland, a

volunteer EMT, also assisted with the search. (Dkt 17-6 at T.896-97, 899.) Mr. Weiland recalled that Mr. Rhodes appeared confused, as if he did not really know where he was or where Jane fell in. (*Id* at T.901.) Likewise, another first responder, David Strom, wrote in his report that Mr. Rhodes "was very upset . . . and somewhat confused as to where this incident had occurred." (*Id.* at T.905-06, 912.)

Police searched the general area of the lake where Mr. Rhodes believed his wife entered the water for about 90 minutes, but had to stop because of "limited visibility." (*Id.* at 872, 889.) Strong winds also hampered search efforts. One officer who was on the scene testified: "The wind velocity made it to the point where the [search] dogs could not find the scent because of the speed of the wind." (*Id.* at T.890.)

Police resumed searching at 7:00 a.m. the next morning. (*Id.* at T.873.) Windy conditions persisted. Kermit Olson, a fisherman who was on the lake that morning, stated: "[I]t was so windy. I think we were the only ones out there." (*Id.* at T.855.) Mr. Olson testified that he and his son were initially fishing in the area where search-and-rescue efforts were underway, but they decided to move away from the Sheriff, and instead "drift all the [way] down the lake with the wind, staying with the wind." (*Id.*)

Between 1:00 p.m. and 1:30 p.m. that afternoon, Mr. Olson saw Jane's body floating in shallow water near the shore, less than a mile from where Mr. Rhodes told police his wife fell into the water. (*Id.* at T.856, 879-80.) Michael Roe, a water safety officer for the Kandiyohi County Sheriff's Department, testified that he was not surprised they

found the body in that area because of the wind. (*Id.* at T.889.)

Authorities conducted an extensive forensic examination of the Rhodes' boat, looking for any indications of an assault. The Bureau of Criminal Apprehension chemically tested the boat for blood and other fluids. (Dkt 17-7 at T.964.) All tests were negative. (*Id.*) The BCA also sprayed luminol to try to discover even the faintest blood spatters. (*Id.* at T.965.) That test, too, detected no presence of blood. (*Id.*) As the BCA technician agreed, "everything that could be done with existing technology [was] done to detect blood on this boat." (*Id.* at T.965-66) None was found. What investigators did find, however, was Jane's earring on the boat's floor. (Dkt 17-5 at T.722-23.)

Despite all of this, the State charged Mr. Rhodes with first- and second- degree murder—more than a year after Jane's death. The State alleged Mr. Rhodes choked his wife, and then threw her into Green Lake.

II. Dr. Michael McGee.

With respect to Jane's injuries, the State relied on Dr. Michael McGee, whose false or incorrect testimony has led at least two different courts in Minnesota and Wisconsin to order new trials for other wrongfully convicted persons.[2]

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[2] *See Hansen v. State*, No. 23-KX-04-1222, 2011 Minn. Dist. LEXIS 197, at *16 (Minn. Dist. Ct. July 13, 2011) (granting a new trial and reasoning: "Dr. McGee's testimony regarding the symptoms and clinical course of a child with a skull fracture . . . was false or incorrect."); *State v. Zimmerman*, 669 N.W.2d 762,

Dr. McGee testified that "Mrs. Rhodes [had] a series of soft tissue hemorrhages inside her neck region." (*Id.* at T.638.) He said that the force had to be enough to cause "breakage of the blood vessels" in three different areas and, in turn, "cause the hemorrhage to occur." (*Id.* at T.640.)

It is undisputed, however, that Jane's neck was "clear" of *external* signs of choking or other trauma. Dr. McGee testified:

> Q: Were there any marks on the outside of Mrs. Rhodes neck that would correspond to these internal injuries?
>
> A: The neck is clear.

(*Id.* at T.639.) The State's theory was therefore based on the premise that a person can violently choke or strike a person in the neck with enough compressive force "to cause breakage of the blood vessels," while leaving no external signs of trauma (such as bruising).

To support this allegation, Dr. McGee testified that the hemorrhages on the *interior* of Jane's neck were consistent with a hand used "in the V position," indicating Mr. Rhodes choked his wife. (*Id.* at T.641.) And the State contended from the outset of the case—in its opening statement—that internal neck hemorrhaging is *not* consistent with natural drowning. (*Id.* at T.578.) That theory culminated in

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772 (Wis. Ct. App. 2003) (reversing murder conviction and ordering new trial, noting that even the sitting Milwaukee Medical Examiner disagreed with Dr. McGee's medical opinion).

the State's closing argument, where the State reinforced its position that Thomas Rhodes "knock[ed] his wife out of the boat *with a blow to the neck*, causing those soft tissue injuries that Dr. McGee testified about, injuries that he testified *had to be caused* by the brief application of compressive force to the neck." (Dkt 17-11 at Ex. 11 at T.1344 (emphasis added).) As one Minnesota Supreme Court Justice observed, Dr. McGee's opinion that Jane's neck hemorrhaging was caused by external force (such as choking) "was the most critically incriminating evidence of the entire trial." *Rhodes*, 875 N.W.2d at 793 (Anderson, J., dissenting).

During a post-trial hearing in 2001, Dr. McGee stuck to his opinion regarding Jane's internal hemorrhages because, in his view, then-available medical literature established that the natural drowning process may often result in injuries to internal neck muscles, but did not establish that drowning could result in internal hemorrhages in the soft tissue. After noting that Jane's internal neck injuries were predominantly soft tissue, Dr. McGee testified:

> Q: Why is that significan[t] in ruling out overexertion and hyperextension as a cause of these injuries?
>
> A: Because, *if I understand the articles* that are put—that I have reviewed, they talk about hemorrhage being presented in the musculature that can be seen[,] and the injuries seen at the time of the autopsy were not confined to the muscle [and were] actually in wider-ranging areas of the neck area, including soft tissues adjacent to

> the muscle as well as surrounding the tips of the hyoid bone and at the back of the neck area that are not described [in the literature].

(Dkt 2-1 at Ex. 3 at T.59.)

Recent peer-reviewed medical literature, however, shows that Dr. McGee's conclusions that internal soft tissue injuries in Jane Rhodes' neck had to have been caused by compressive forces (such as choking), and could not be caused by the natural drowning process, are wrong. Studies published in 2009 (Pollanen, *et al.*)[3] and 2011 (Alexander & Jentzen)[4] refute the previously accepted science that internal neck hemorrhages—like the ones Jane Rhodes exhibited—cannot occur as a result of natural drowning.

The Pollanen study, for example, concluded that, when a body is angled downward in the water—which is common in drowned bodies—extravascular rupture and leakage from blood vessels due to gravitational pressure after death can cause "pseudo bruises" in the interior soft tissue of the neck that lead to "*misidentification of violent neck injury*." (Dkt 2-1 at Ex. 4 at 322 (emphasis added).) The

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[3] Michael S. Pollanen, S. D. Channa Perera, & David J. Clutterbuck, *Hemorrhagic Lividity of the Neck: Controlled Induction of Postmortem Hypostatic Hemorrhages*, 30AM. J. FORENSIC MED. & PATHOLOGY., 322 (2009). (Dkt 2-1 at Ex. 4.) Dr. Pollanen, who led the study, is the Chief Forensic Pathologist for Ontario, Canada.

[4] Russell T. Alexander & Jeffrey M. Jentzen, *Neck and Scleral Hemorrhage in Drowning*, 56 J. FORENSIC SCI. Vol. 522 (2011). (Dkt 2-1 at Ex. 5.)

researchers were able to reproduce (in numerous cadavers) hypostatic hemorrhages "in the soft tissues of the anterior neck and strap muscles" that "mimic soft tissue injury ('pseudo bruising') and the internal injuries related to strangulation." (*Id.*)

More than a year later, the Alexander & Jentzen study established that internal neck hemorrhaging can also occur *before* death, as a drowning person struggles to stay above water. As that study noted, for years the accepted science was interior neck hemorrhages "which are often seen in cases of strangulation do not occur in drowning and should always raise the suspicion of foul play." (Dkt 2-1 at Ex. 5 Ale at 524 (quoting Spitz, DJ, *Investigation of Bodies in Water*, SPITZ AND FISHER'S MEDICOLEGAL INVESTIGATION OF DEATH (4th ed. 2006)).) The study, however, showed internal neck hemorrhaging can in fact be caused by "elevated central venous pressure" and rupture of congested blood vessels caused by natural drowning reactions, such as coughing and abdominal contractions. (*Id.* at Ex. 5 at T.525.)

These critical studies were not available in 1998 when Mr. Rhodes was convicted based on Jane's internal neck hemorrhages and the scientific belief—as the prosecutor put it—that such hemorrhages would not be "consistent with drowning." (Dkt 17-5 at T.578.)

Since this shift in the science, numerous expert pathologists from across the country have extensively reviewed this case (without charge). They include: the Chief Medical Examiner for Miami-Dade County, Florida (Dr. Bruce Hyma); the Chief Medical Examiner for Duval County, Florida (Dr. Valerie

Rao); a Professor of Pathology at the University of Michigan and co-author of the Alexander & Jentzen study (Dr. Jeffrey Jentzen); the Chair of the Department of Forensic Sciences at George Washington University (Dr. Victor Weedn); a Harvard-educated pathologist from San Francisco, California (Dr. Judy Melinek); a forensic pathologist and former professor at the University of Miami (Dr. Ronald Wright), and a forensic pathologist from Seattle, Washington (Dr. Carl Wigren).

These experts all agree that science now definitively demonstrates that Dr. McGee's opinions about the cause of Jane's internal neck hemorrhages were wrong, as were his opinions concerning other alleged pre-mortem injuries. Their opinions include:

- "I would not consider this death a homicide." (Hyma Aff. ¶4; Dkt 2-1 at Ex. 6)
- "The hemorrhages in the neck do not appear to have been caused by external pressure. Neck hemorrhages can occur during the drowning process and floating face down can cause blood to accumulate in neck tissues." (*Id.* ¶6 (citing Pollanen and Alexander & Jentzen).)
- "Other injuries to the face and head appear to be postmortem. The injuries to the mouth appear to be typical aquatic animal activity." (*Id.* ¶5.)
- "Abrasions on Jane Rhodes's face and hands were typical of postmortem injuries commonly seen in drowning victims." (Rao Aff. ¶6; Dkt 2-1 at Ex. 7)
- "Recent scientific literature supports my conclusion that the hemorrhages in Jane Rhodes's neck could be attributable to something other than external pressure." (*Id.* ¶9 (citing Pollanen and Alexander & Jentzen).)

- "The autopsy report and photographs did not suggest signs of a struggle. It is my opinion that all of the injuries can be attributed to postmortem artifacts on a submerged body." (Jentzen Aff. ¶6; Dkt 2-1 at Ex. 8.)
- "In my opinion, the hemorrhages in Mrs. Rhodes' neck could have occurred during the drowning process or post-mortem, as opposed to pre-mortem external pressure." (*Id.* ¶10.)
- "I do not believe that there is evidence of trauma." (Weedn Ltr. at 2; Dkt 2-2 at Ex. 9.)
- "Dr. McGee misinterpreted postmortem artifacts, specifically livor mortis and postmortem trauma, as antemortem injuries." (*Id.*)
- "[T]here were no . . . injuries of the head consistent with head trauma." (*Id.* at 3.)
- "There were no markings of the external neck to correlate with such internal injury. I do not agree that the intramuscular hemorrhage is specific to trauma." (*Id.*)
- "Another explanation for the presence of neck hemorrhage at autopsy is the phenomenon of postmortem hypostatic hemorrhage described in a recent paper (Pollanen, 2009). This is a process whereby blood pools due to gravity (lividity) . . . . Hypostatic hemorrhage of the neck soft tissue including muscles may be misinterpreted as blunt force injury to the neck." (Wigren Report at 6; Dkt 2-2 at Ex. 10.)
- "The defects on Jane Rhodes face are explained by a combination of postmortem artifact ('travel abrasions'), probable animal scavenging, and draining of perimortem subgaleal hemorrhage from the top of her scalp forward into forehead and eyelids." (*Id.* at 14.)

- "These [neck] hemorrhages are not consistent with blunt force injury to the neck but rather the active process of drowning." (*Id.* at 7.)
- "The bleeding in Jane Rhodes's neck was postmortem extravasation (leakage of blood from blood vessels), which is also common in drowning victims." (Wright Aff. ¶4; Dkt 2-2 at Ex. 11.)
- "There is new scientific literature that supports my conclusion that the hemorrhages in Jane Rhodes's neck were postmortem." (*Id.* ¶7 (citing Pollanen and Alexander & Jentzen).)
- "It is therefore my opinion that the manner of death in this case should have been classified an accident." (Melinek Ltr. at 2; Dkt 2-2 at Ex. 12.)

In contrast, the State has not identified a single expert willing to support Dr. McGee's conclusions in light of the recent shift in the science and medical literature regarding this subject.

III. Patrol Captain William Chandler.

To bolster Dr. McGee's incorrect testimony, the State relied on the objectively false testimony of Captain William Chandler. The State used Captain Chandler's testimony to demonstrate that Mr. Rhodes deliberately misled first responders about where Jane entered the water. *See Rhodes*, 657 N.W.2d at 829 (observing that "[t]he State offered the testimony of Patrol Captain William Chandler of the Hennepin County Sheriff's Office to support the theory that Rhodes intentionally misdirected the authorities.").

Captain Chandler testified that drowned bodies sink quickly, and will only resurface once they regain buoyancy from internal biological reactions.

Captain Chandler explained that cold water slows down the biological process, resulting in longer resurfacing times. (Dkt 17-8 at T.1112, 1117.)

Captain Chandler testified that the area of Green Lake where Mr. Rhodes told police his wife fell into the water is 40-feet deep and, at that depth, the temperature is "about 39.2 degrees at most." (*Id.* at T.1119; *see also* T.1117-18.) Captain Chandler testified that it would take a body three-to-four weeks to resurface. He told the jury his opinion was based on the colder water temperature:

> Q: What are the reasons for that opinion, Captain?
>
> A: *The biggest reason is the temperature.* It's like the bottom of a lake is colder . . . than a medical examiner's refrigerator, and it's going to preserve a person that's down there, and take considerable time on its own to refloat.

(*Id.* at T.1120 (emphasis added).)

Captain Chandler went on to testify that, because Jane's body was discovered floating near the shore line 13 hours after she fell into the lake, she must have drowned and resurfaced in shallower water (*i.e.,* not in the area where Mr. Rhodes directed first responders):

> Q: Now, if Jane Rhodes – if you were told that Jane Rhodes had surfaced within 13 hours of dying by drowning in a Minnesota lake, do you have an opinion as to the deepest she could have sunk?
>
> A: Yes, I do.

Q: What is that opinion?

A: Ten feet or less.

Q: And what are the reasons for that opinion?

A: Again, *it's because of the temperature.*

(*Id.* (emphasis added).)

Captain Chandler's testimony allowed the State to argue that Mr. Rhodes deliberately misled police about the location where Jane Rhodes entered the lake, suggesting guilt. *See Rhodes*, 657 N.W.2d at 840-41 (describing the "state's theory that Rhodes lied to the officials about the correct location to search"). But it is now undisputed that Captain Chandler's testimony about the water's temperature was false.

In 2013, the Innocence Project discovered that the Department of Natural Resources actually studied Green Lake *in August 1996*—the same month and year Jane drowned—and recorded that the temperature at a 40-foot depth was ***69 degrees***, not 39 degrees as Chandler testified. (Dkt 2-2 at Ex. 13.) The DNR, however, did not publish this information until eight years after Mr. Rhodes was convicted, and two years after he first moved for habeas relief. (*See id.*)

IV. Other evidence discovered post-conviction.

The new scientific evidence eroded the two pillars of the State's case: that Mr. Rhodes choked his wife and then lied to first responders about the

location where his wife fell into the water. But that is not all. At trial, the State presented evidence that, after the incident, Mr. Rhodes calmly beached his boat and walked to the hotel. But in another post-conviction petition, Mr. Rhodes presented newly discovered evidence from an eyewitness to the contrary.

Brian Hunter, another vacationer on Green Lake, had been sitting on the beach with his girlfriend, and saw the Rhodes' boat driving in circles about 200 yards from shore. (Dkt 2-1 at Ex. 3 at T.6.) Mr. Hunter watched the boat speed to the shore, where the driver quickly "beached" the boat, jumped out, and ran toward the hotel so fast he was "almost tripping forward because his feet couldn't keep up with how fast he was moving." (*Id.* at T.8-9.) Mr. Hunter went inside the hotel and saw Mr. Rhodes in the lobby. Mr. Rhodes was trying to tell the clerk something, but he was talking so fast that it was difficult to understand what he was saying. (*Id.* at T.9, 18.) Mr. Rhodes was soaking wet, shaking, and frantic; he appeared to be "out of his mind." (*Id.* at T.18) The jury never heard this evidence.

V. Post-conviction proceedings.

Based on the shift in scientific understanding of the forensics of drowning and the new evidence demonstrating that Captain Chandler's testimony was false, Mr. Rhodes petitioned the Eighth Circuit for leave to file a successive habeas petition. On July 7, 2017, the Eighth Circuit granted Mr. Rhodes' petition, concluding that Mr. Rhodes had presented *prima facie* evidence that his state-court murder conviction was unconstitutional.

The district court referred the petition to a magistrate judge. After briefing, the magistrate recommended denying the petition. The magistrate judge concluded that Mr. Rhodes "cannot satisfy the requirement that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty." (Pet. App. A-19-20.)

Fundamental to the magistrate's recommendation was its conclusion that the "universe of evidence" to be considered in connection with a successive habeas petition "is limited to 'the evidence presented at trial, properly adjusted for evidence [Petitioner] alleges was erroneously excluded *due to trial-related constitutional error*.'" (Pet. App. A-47 (emphasis in original) (quoting *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013)). Relying on *Case*, the magistrate determined that the court not consider "new facts that became available only after trial" that "are not rooted in constitutional errors occurring during trial." (Pet. App. A-48.) As the magistrate put it, "this Court is limited to reviewing the evidence presented at trial, plus the new evidence that is tied to Petitioner's allegations of constitution error. . . . No other evidence can be considered." (*Id.*)

Under this restricted standard, the magistrate found that the court could not consider expert testimony from numerous forensic pathologists from across the county that Dr. McGee erroneously classified post-mortem injuries as pre-mortem injuries. But the magistrate found that it *could* consider new evidence the State proffered in response

to Mr. Rhodes' new scientific evidence. (Pet. App. A-49, A-51-52, 54 (relying upon, among other things, "McGee Aff."[5] ¶¶11, 13, 14, 23-25).)

Applying this standard, the magistrate relied on "other evidence" of guilt to deny the petition, which included the very evidence Mr. Rhodes' experts refuted, such as the presence of a subgaleal hematoma on the undersurface of the frontal area of Jane's scalp, which the magistrate determined without an evidentiary hearing (and contrary to Mr. Rhodes' experts) were consistent with pre-mortem injuries. (Pet. App. A-54.) The court also relied on a post-conviction affidavit from Dr. McGee disagreeing with Mr. Rhodes' experts' application of the new scientific studies. (Pet. App. A-51.)

The district court adopted the magistrate's report and recommendation and denied Mr. Rhodes' petition. (Pet. App. A-11.) The court applied a similarly restrictive view of the "universe of evidence" that a court can consider in evaluating a successive habeas petition. As for Mr. Rhodes' new expert evidence, the district court, citing *Case*, held that it could not consider new facts "that became available only after trial" that "are not rooted in constitutional errors occurring during trial." (Pet. App. A-12.) As for the State's new evidence, however, the court took a different, more inclusive approach, stating, "nothing in the plain language of § 2244(b)(2)(B)(ii) limits the Court's inquiry to evidence proffered by the habeas petitioner." (Pet. App. A-11.)

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[5] The Affidavit of Dr. Michael McGee was dated June 30, 2014 and submitted to the district court at Dkt 8-5.

The district court nevertheless issued a certificate of appealability, reasoning that "[r]easonable jurists could find it debatable whether the Court's procedural ruling is correct and whether Rhodes has shown that he was denied a constitutional right." (*Id.*)

The Eighth Circuit affirmed. (Pet. App. A-1.) Although the court expressed that this was a "troubling case," (Pet. App. A-6), the court noted that it was constrained by the statute's "steep procedural hurdles." (Pet. App. A-3.) Like the district court and magistrate, the Eighth Circuit, citing *Case*, determined it was bound by the new evidence tied to a constitutional violation and the body of evidence presented at trial. (Pet. App. A-6-7.) With that limitation, the Eighth Circuit concluded that Mr. Rhodes could not establish that no reasonable factfinder would have found him guilty even in light of changes in scientific understanding regarding the forensics of drowning and the new water-temperature evidence. (Pet. App. A-9-10.)

REASONS FOR GRANTING THE PETITION

Seven renowned medical experts from across the country have reviewed this case pro bono and have concluded, based on recent scientific developments and studies, that there is no reliable way to classify Jane Rhodes's death a homicide. Indeed, in more than two decades since Thomas Rhodes was convicted, and after those scientific studies were published, no found medical expert anywhere agrees with Dr. McGee's conclusion that the hemorrhages *inside* of Jane's neck (with no trace at all of injury to the *exterior* of Jane's neck) were in

fact necessarily caused by compressive force, such as a "hand in the V position." *See Rhodes*, 875 N.W.2d at 794 (Anderson, J., dissenting) ("The opinions of Rhodes's experts as a whole . . . completely contradict Dr. McGee's critical trial testimony that Jane's neck hemorrhages were caused by external trauma.").

In addition, the State cannot contest that the testimony it introduced to establish that Thomas Rhodes lied to first responders about the location of Green Lake where his wife fell into the water—the water-temperature evidence—was demonstrably false. *Id.* at 797 ("[W]e now know that Captain Chandler testified incorrectly at trial regarding the water temperature."). Unimpeachable DNR data (published eight years after Rhodes's conviction) demonstrates the testimony was objectively wrong.

It is undeniable, then, that Thomas Rhodes has toiled away in prison for nearly a quarter century due to a conviction that was based on: (1) scientific testimony that Jane's internal neck hemorrhages must have been caused by compressive force—a conclusion science has now demonstrated to be wrong; and (2) testimony that allowed the State to paint Rhodes as a liar—the testimony everyone concedes is false.

The decisions below nevertheless concluded that the Constitution should offer no relief, principally because other (quite innocuous) evidence purportedly supports the conviction, and because the court cannot consider new evidence unrelated to the constitutional violation. This exceedingly narrow view of federal habeas relief is wrong.

This case shows why federal habeas relief exists. The newly discovered evidence erodes any confidence in the conviction. As one Minnesota Supreme Court Justice put it: "[T]he newly discovered evidence, if proven to be true, and considered in the light most favorable to Rhodes, would establish by a clear-and-convincing standard that no reasonable jury would have convicted Rhodes of first-degree premeditated murder beyond a reasonable doubt had the newly discovered evidence been presented at trial." *Id.* This is precisely what the federal statute requires.

I. The lower courts erred by applying a definition of "evidence as a whole" that is contrary to the plain meaning of 28 U.S.C. § 2244(b)(2)(B)(ii) and decisions from a majority of other circuits.

The determination whether to entertain a claim raised in a second or successive habeas petition is based upon the reasonableness of a guilty verdict given "the facts underlying the claim, if proven and viewed in light of *the evidence as a whole*." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). The circuit courts disagree about the proper construction of this language, leading to inconsistent application of the statute.

The Tenth Circuit narrowly limits "evidence as a whole" to encompass only the trial evidence, shorn of the constitutionally-deficient material. *See Case*, 731 F.3d at 1034. By contrast, the Fourth, Sixth, and (until *Rhodes*) Eighth Circuits give effect to the plain meaning of the phrase without importing any limitations, considering the "evidence as a whole,"

regardless of the evidence's relationship to the constitutional violation or whether it was introduced at trial. *See id.* at 1038 n.12 (acknowledging circuit split); *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011); *Lott v. Bagley*, 569 F.3d 547, 549 (6th Cir. 2008); *Nooner v. Hobbs*, 689 F.3d 921, 933 (8th Cir. 2012). The majority rule is compelled by the statute's language and structure, as well as fundamental fairness.

A. The magistrate judge and the district court followed the minority rule in narrowly circumscribing "evidence as a whole."

The lower courts here considered the facts underlying Mr. Rhodes' constitutional claim, which consisted of new scientific evidence regarding internal neck hemorrhaging among drowning victims as well as new evidence regarding the water temperature in Green Lake, all of which demonstrated the falsity of key testimony relied on by the State to secure Mr. Rhodes' conviction. For purposes of its decision, the court presumed that the State's evidence on these matters was false and that it violated Mr. Rhodes' due process rights.

Yet, as part of the "evidence as a whole," Mr. Rhodes also came forward with exculpatory scientific evidence refuting the State's expert trial testimony that the victim suffered pre-mortem injuries indicative of foul play. This evidence establishes that such injuries more likely occurred *post*-mortem, which, along with the new evidence described above, strongly supports Mr. Rhodes' longstanding contention that his wife's death was a tragic accident.

The lower courts refused, however, to consider any of Mr. Rhodes' exculpatory evidence other than "newly-discovered scientific evidence related to internal neck hemorrhaging in drowning victims and the water temperature in Green Lake." The magistrate expressly held that "[n]o other evidence can be considered" and "any newly-submitted opinion evidence unrelated to the science regarding internal neck hemorrhages is not relevant to this Court's analysis." (Pet. App. A-48, n. 9.) The district court adopted that conclusion. (Pet. App. A-11.)

In holding that Mr. Rhodes' additional scientific evidence was not part of "the evidence as a whole," the magistrate relied on the Tenth Circuit's decision in *Case*. (Pet. App. A-47-48.) The holding in *Case* requires that a habeas court limit itself to "engag[ing] in a counterfactual analysis – viewing the trial evidence as a whole, and accounting for the evidence that the petitioner alleges was erroneously admitted." 731 F.3d at 1034.

Nevertheless, the magistrate judge went beyond this mere "counterfactual analysis" called for in *Case* when she relied upon a new affidavit from the State's trial expert, in which he attempted to distinguish the injuries to Jane Rhodes from the injuries described in the studies cited by Petitioner. (Pet. App. A-12, A-49, A-51-52, A-54.) Under *Case*, once it was determined that Mr. Rhodes was convicted on false testimony in violation of his constitutional rights, the court's inquiry should have been limited to the trial record–false testimony excised—and nothing more.

In overruling Mr. Rhodes' objection to the magistrate judge's reliance on new evidence from the

State (despite the refusal to consider all of Mr. Rhodes' new evidence), the district court noted that "nothing in the plain language of § 2244(b)(2)(B)(ii) limits the Court's inquiry to evidence proffered by the habeas petitioner." (Pet. App. A-12.) For this proposition, the district court relied on *Nooner v. Hobbs*, 689 F.3d 921, 933 (8th Cir. 2012), even quoting with approval the *Nooner* Court's broad articulation of the "evidence as a whole" standard: "The phrase 'evidence as a whole' as used in § 2244(b)(2)(B)(ii) refers to the entirety of the trial evidence as well as new evidence offered in the collateral proceedings." *Id.* The district court does not explain how its refusal to consider all Mr. Rhodes' new evidence could be squared with the Eighth Circuit rule announced in *Nooner*.

The district court's rationale cannot be squared with the statute, either. The statute requires the district court to assume that the petitioner's claims will be "proven" at the evidentiary stage. In other words, the district court here comingled the inquiry under section 2244(b)(2) with the separate merits hearing. The court found that Mr. Rhodes could not meet the burden in 2244(b)(2) because the State's expert disagreed with Mr. Rhodes' (many) experts on the import of new scientific studies. That is the stuff of an evidentiary hearing, not of the preliminary burden under section 2244(b)(2).

As further justification for reliance on new evidence from McGee, the district court explained that McGee's affidavit addresses evidence underlying Petitioner's due process claim and is "therefore rooted in the constitutional errors that allegedly occurred at trial." (Pet. App. A-12.) The district court confused

the issue with a citation to *Case*, quoting the Tenth Circuit's holding that contradicts the Eighth Circuit's holding in *Nooner*: "[the §2244(b)(2)(B)(ii) factual universe] does not encompass new facts that became available only after trial and that are not rooted in constitutional errors occurring during trial." *Id.* In sum, the district court straddled both sides of the circuit split to Mr. Rhodes' detriment, relying on the narrow Tenth Circuit rule to exclude new evidence from Mr. Rhodes, while relying on the broad Eighth Circuit rule to consider new evidence from the State.

B. The Eighth Circuit followed the minority rule, overruling its precedent *sub silentio*.

The Eighth Circuit also refused to consider any of Mr. Rhodes' new evidence other than that relating to neck hemorrhaging and water temperature. In adopting without analysis this artificially narrow interpretation of "evidence as a whole," the Eighth Circuit did not reference its own conflicting decision in *Nooner*, nor did it cite any Eighth Circuit case law. Rather, the Eighth Circuit cited and seemed to adopt the Tenth Circuit's narrow interpretation of § 2244(b)(2)(B)(ii), which it describes as a "strict form of innocence." (Pet. App. A-8.) That is, the Eighth Circuit apparently overruled *Nooner sub silentio* in favor of the minority rule. As a result, in determining whether a "reasonable factfinder would have found Rhodes guilty of murdering his wife," the Eighth Circuit deprived the hypothetical factfinder of critical scientific evidence regarding the nature and cause of the victim's injuries. The only justification for doing so was its adoption of the minority Tenth Circuit rule,

under which "evidence as a whole" does not mean what it says.

C. The minority rule disregards the statute's plain language.

This Court has repeatedly admonished lower courts to apply the plain meaning of statutory language enacted by Congress. As this Court recently explained, "[w]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says what it . . . means and means . . . what it says.'" *Henson v. Santander*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005) (brackets in original). *See also Carcieri v. Salazar*, 555 U.S. 379, 392 (2009); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

"Evidence as a whole" needs no elucidation. It simply means all available evidence. It is difficult to imagine how Congress could have employed a more sweeping or inclusive term. *See, e.g.*, Merriam-Webster's Online Dictionary[6] (defining "whole" as "a complete amount or sum: a number, aggregate or totality *lacking no part*, member, or element") (emphasis added). For this reason, in conducting the analysis required by AEDPA for a successive habeas petition, most circuit courts have taken into consideration all evidence relevant to guilt or innocence.

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[6] Merriam-Webster Online Dictionary. 2020. https:www.merriam-webster.com (22 July 2020)

For example, in *Lott v. Bagley*, 569 F.3d 547 (6th Cir. 2008), the Sixth Circuit adopted the analysis of the Northern District of Ohio, which noted that habeas courts are obliged to "consider all evidence, both inculpating and exculpating, when reviewing an actual innocence claim" under Section 2244(b)(2)(B)(ii). *Lott v. Bagley*, No. 1:04 CV 822, 2007 WL 2891272, at *18 (N.D. Ohio Sept. 28, 2007). Relying on this Court's decision in *House v. Bell*, 547 U.S. 518 (2006), the *Lott* court indicated that the meaning of "the evidence as a whole" in Section 2244(b)(2)(B)(ii) was coextensive with the meaning of "all the evidence" in as used in *House* – including evidence whose exclusion from trial was not only unconnected to a constitutional violation but in fact might not even be admissible at trial. *See Lott*, 2007 WL 2891272, at *14 (citing *House*, 547 U.S. at 537-38; *Schlup v. Delo*, 513 U.S. 289, 327 (1995)).

In *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011), the Fourth Circuit reached the same conclusion, holding that a habeas court must consider new evidence of innocence, *even if unrelated to an alleged constitutional violation*: "Simply put, the 'evidence as a whole' is exactly that: all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) or § 2255(h)(1) evaluation." *McDonald*, 641 F.3d at 610. Noting that that AEDPA's "standards clearly incorporate features of the standards spelled out in the pre-AEDPA decisions" of this Court, the Fourth Circuit held as follows:

> [W]e cannot ignore the pre-AEDPA precedent in interpreting what constitutes the "evidence as a whole."

> Indeed, by its plain language, "the evidence as a whole" means, in the equivalent language of *Schlup*, "all the evidence." *See* 513 U.S. at 328. Thus, a court must make its § 2244(b)(2)(B)(ii) or § 2255(h)(1) determination – unbounded "by the rules of admissibility that would govern at trial" – based on "all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become available only after the trial."

MacDonald, 641 F.3d at 612.

In *Nooner v. Hobbs*, 689 F.3d 921 (8th Cir. 2012) (cited but not applied by the district court in this case, then disregarded by the Eighth Circuit), the Eighth Circuit likewise embraced the plain-meaning interpretation of Section 2244(b)(2)(B)(ii), holding that "evidence as a whole" refers to "the entirety of the trial evidence as well as new evidence offered in collateral proceedings," and citing precedent applying the *Schlup* "all the evidence" standard. *Nooner*, 689 F.3d at 933 (citing *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011)). In *Nooner*, the court examined all the allegedly new evidence proffered by the petitioner, including evidence not directly linked to his putative constitutional claim. *Id.* at 935-37.

In this case, the Eighth Circuit disregarded its own precedent and relied instead on *Case*, the outlier case from the Tenth Circuit. Because the Eighth Circuit panel offered no explanation for this

departure, one is left to analyze the Tenth Circuit's reasoning in *Case*.

Rather than apply the statute as written, the Tenth Circuit in *Case* concluded that the Section 2244(b)(2)(B)(ii) "inquiry is only concerned with the evidence presented at trial, properly adjusted for evidence that [a petitioner] alleges was erroneously excluded due to trial-related constitutional error." 731 F.3d at 1038. The Tenth Circuit expressly acknowledged its outlier status among the circuits on this issue. *Id.* at 1038 n.12. None of the Tenth Circuit's justifications for its assumption that Congress inadvertently used the phrase "evidence as a whole" where it meant to say "*trial* evidence as a whole" provides a basis to depart from the statute's plain meaning.

First, the Tenth Circuit deduced a Congressional intent to limit "evidence as a whole" to evidence presented at trial (or excluded from trial due to constitutional error) in light of the statute's employment of language from this Court's pre-AEDPA decision in *Sawyer v. Whitely*, 505 U.S. 333 (1992). According to the panel, the *Sawyer* Court's inquiry whether "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty," 505 U.S. at 348, notably "focused on the probable effect" of unconstitutionally suppressed evidence only. *Case*, 731 F.3d at 1033. But the *Sawyer* Court could hardly have done otherwise; the evidence allegedly suppressed due to constitutional error was the only new evidence the petitioner had.

Second, the Tenth Circuit panel inferred from "linguistic distinctions" between Section

2244(b)(2)(B)(ii) and a gateway requirement for *federal* prisoners, 28 U.S.C. § 2255(h)(1), that Congress meant for "evidence not rooted in constitutional error at trial" to be excluded from the Section 2244(b)(2)(B)(ii) inquiry. *Case,* 731 F.3d at 1035.[7] According to the Tenth Circuit, Section 2255(h)(1)'s omission of the phrase "but for constitutional error" reflects an intent to create a class of second or successive habeas applications that can be considered on the merits *for federal but not state* prisoners; claims of newly discovered constitutional errors by prisoners who have also uncovered separate compelling new evidence of their innocence. This conclusion does not withstand analysis of the structure and language of the relevant provisions.

The Tenth Circuit approach, adopted below, compares apples to oranges. Section 2255(h) addresses the standard for *certification* by the court of appeals of second or successive habeas motion, not the standard for avoiding dismissal by the district court prior to merits consideration. The analogue to Section 2255(h) for state prisoners, Section

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[7] The Tenth Circuit reasoned that "[t]here is good reason to think that these linguistic differences reflect purposeful action, and are not simply the result of indifferent drafting." *Case* at 1035. To provide further context for this observation, the panel notes that "one purpose of AEDPA is to enforce Congress's preference for a state's interest in finality of judgment over a prisoner's interest in additional review." *Id.* at 1027. Such divining of Congressional intent to alter the meaning of clear statutory language is precisely what this Court cautioned against in *Henson v. Santander*, 137 S. Ct. at 1725 ("We cannot replace the actual text with speculation as to Congress' intent") (quoting *Magwood v. Patterson*, 561 U.S. 320 (2010)).

2244(b)(3), arguably sets a *lower* bar for circuit court certification of petitions by state prisoners because it requires only a "prima facie showing that the application satisfies the requirements of this subsection" – rather than the "clear and convincing evidence" mandated by Section 2244(b)(2) and Section 2255(h)(1). It would be absurd for state prisoners filing successive habeas petitions to benefit from a *lower* standard for certification compared to their federal counterparts, while suffering from a *higher* bar when it comes to merits consideration.

In any event, even if Section 2244(b)(2) and Section 2255(h) were analogous, the statutory language actually at issue – the direction to consider new facts "in light of the evidence as a whole" – is identical in both provisions. It is unlikely that Congress used the exact same phrase in two related provisions of AEDPA while intending them to have two different meanings. The Tenth Circuit's view that Congress meant "the evidence as a whole" to be taken literally in Section 2255(h)(1) but to be read as "the *trial* evidence as a whole" in Section 2244(b)(2)(B)(ii) cannot be squared with each other or this Court's instruction to apply the plain meaning of statutory language enacted by Congress.

Thus, neither the language of the relevant provision, its context, nor the structure of AEDPA support the lower courts' restrictive interpretation of "evidence as a whole." It is therefore not surprising that, prior to the Eighth Circuit's *Rhodes* decision, the Tenth Circuit's approach was an outlier that stood in direct conflict with that of a majority of circuits to have addressed the issue. This Court should grant certiorari to resolve this circuit split

before the confusion introduced by *Case* and *Rhodes* infects other courts. On an issue as important as the evidentiary standard required to proceed with a habeas petition, this Court should weigh in.

D. The minority position forecloses consideration of meritorious habeas petitions by actually innocent individuals.

Even if one looks beyond the plain meaning of the phrase, the statutory framework and the interests of justice support construing "evidence as a whole" as "all the evidence." Section 2244(b) relieves district courts of the burden of evaluating the merits of abusive *second* or successive Section 2254 habeas petitions. It is clear, however, that Section 2244(b)(2)(B) offers a gateway to merits consideration of such petitions under circumstances of "actual innocence."

The gateway is narrow. A petitioner must demonstrate that his claim was not presented in a previous Section 2254 application; that the factual predicate for his claim could not have been discovered earlier; and that the facts underlying his claim, if proven, would clearly and convincingly establish that no reasonable juror could find him guilty. Such a demonstration, *which does no more than enable the prisoner's petition to be heard on its merits*, is satisfied in a vanishingly small number of cases, all of which by their very nature raise the troubling prospect that our state courts have convicted a person for a crime he did not commit and then refused to correct their mistake.

The public policy behind AEDPA does not suggest that the small pool of prisoners who can satisfy the exacting literal requirements of Section 2244(b)(2) should be winnowed any further. Just the opposite. Fundamental fairness and the need for confidence in our criminal justice system require special concern for those few prisoners who are able to uncover compelling new evidence that their criminal convictions were both constitutionally defective and factually incorrect. The fact that some newly discovered evidence may help establish that a conviction is wrongful, even though some of it may be untethered to an explicit constitutional violation, does not justify barring the "actual innocence" gateway to a prisoner with a colorable section 2254 claim.

Indeed, a review of several exoneration cases illustrates that the Tenth Circuit's reading of Section 2244(b)(2) is problematic in two key ways.

First, the Tenth Circuit's focus on evidence of constitutional error, to the exclusion of additional, new evidence of actual innocence, is pernicious in an era of advanced DNA testing. DNA evidence has the "unparalleled ability" to exonerate the wrongfully convicted and identify the guilty. *Dist. Attorney's Office v. Osborne,* 557 U.S. 52, 55 (2009). To date, *367 individuals* in the United States convicted of crimes they did not commit have been exonerated using DNA testing. *See* https://www.innocenceproject.org/dna-exonerations-in-the-united-states/.

Since the first DNA exoneration in 1989, DNA technology has continued to advance, enhancing the ability to conduct accurate testing on smaller and less

pristine DNA samples. *See* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues,* 76 Fordham L. Rev. 1453, 1469-70 & n. 107-09 (2007). There is a direct correlation between advances in DNA testing technology and the increase in the number of exonerations, and the testing of formerly inconclusive biological evidence has led to many exonerations. *See* Brandon L. Garrett, *Claiming Innocence,* 92 Minn. L. Rev. 1629, 1658-59 (2008). The Tenth Circuit rule as adopted *sub silentio* in *Rhodes* has the potential, in many cases, to force reviewing courts to ignore such evidence.

Second, the restrictive interpretation espoused in *Case* ignores the complex reality of wrongful convictions. Such cases rarely result from an isolated instance of constitutional error. Instead, the causes of wrongful conviction are myriad and exonerations occur following the revelation of several kinds of newly discovered evidence. Such evidence often takes years to come to light. The average time spent in prison in DNA-based exoneration cases is 14 years. *See* https://www.innocenceproject.org/dna-exonerations-in-the-united-states/. This Court has itself recognized that developing new evidence takes time, stating in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that ineffective-assistance-of-counsel claims "often require investigative work" that may be incompatible with "[a]bbreviated deadlines to expand the record on direct appeal." 132 S. Ct. at 1317-18. In other instances, the import of new evidence may not immediately be clear. For example, in *People v. Bermudez*, 667 N.Y.S.2d 901 (1st Dep't 1997), a New York court rejected the defendant's motion to vacate

judgment on the basis of affidavits from recanting eyewitnesses, stating that recantations suffer from "inherent unreliability." When the defendant's wrongful conviction was finally vacated – after he spent eighteen years in prison – the reviewing court credited the recantations in light of newly developed evidence, including evidence that the original identifications were the result of overly suggestive procedures and persuasive evidence of an alternate suspect. *See People v. Bermudez*, No. 8759/91, 2009 WL 3823270, at *13 (Sup. Ct. N.Y. Cnty. Nov. 9, 2009).

Examples abound where exonerations followed the discovery of multiple new forms of exculpatory evidence. Indeed, in allowing the petitioner in *House v. Bell* to proceed on remand with procedurally defaulted constitutional claims, this Court cited several kinds of newly discovered evidence that cast doubt on the verdict, including exculpatory DNA evidence, "disarray" surrounding forensic evidence, evidence of an alternate suspect developed over ten years after the crime, and various other details that called into question the petitioner's conviction. *See House*, 547 U.S. at 540-53. The facts of *House* illustrate that any approach that requires a reviewing court to turn a blind eye to newly developed evidence of innocence is a recipe for injustice.

In short, in the rare case that a wrongfully convicted prisoner finds newly discovered evidence that his constitutional rights were violated at trial, he may well, like Petitioner, also uncover other new evidence that clearly and convincingly demonstrates his innocence. Congress could not have intended for

the federal courts to refuse to consider such an individual's second or successive habeas petition on the merits simply because the some of the most persuasive evidence of his actual innocence – including exculpatory forensic evidence – was distinct from the evidence that was improperly admitted or suppressed at trial.

CONCLUSION

This Court should grant certiorari. The standard applicable to successive habeas claim is an important question that will certainly recur. The Fourth, Sixth and (formerly) Eighth Circuit's common-sense interpretation of AEDPA according to its plain meaning ensures that the "actual innocence" gateway to consideration of a second or successive petition remains open to the few actually innocent individuals for whose benefit Section 2244(b)(2)(B) exists.

Respectfully submitted,

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