No.

In the Supreme Court of the United States

Jaime Dean Charboneau, Petitioner

vs.

Tyrell Davis, Warden of the Idaho State Correctional Institution, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § (b)(2)(B)(ii)'s actual innocence standard requires the court to consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial, as determined by the United States Court of Appeals for the Ninth Circuit, or consists only of evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded but for constitutional error during trial proceedings, as determined by the United States Corut of Appeals for the Tenth Circuit.

2. Whether the standard for presuming factual findings correct, and that regarding what universe of evidence that can be considered in a second habeas petition, were appropriately applied in this case.

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Petitioner Jamie Dean Charboneau respectfully petitions for review of the Ninth Circuit Court of Appeal's decision affirming the United States District Court's dismissal of his second federal habeas corpus petition, which sought to set aside a 1984 first degree murder conviction in Idaho state court. The Ninth Circuit certified two issues for appeal: (1) "whether [Mr. Charboneau's] petition meets the standards of 28 U.S.C. § 2244(b)(2)," and, if so, (2) "whether the state violated [Mr. Charboneau's] right to due process by failing to disclose exculpatory evidence in violation of *Brady*." *Charboneau v. Davis*, 87 F.4th 443, 450 (9th Cir. 2023). The Circuit determined that Mr. Charboneau's successive habeas petition was barred by 28 U.S.C. § 2244(b)(2)(B).

OPINIONS BELOW

1. Opinion, United States Court of Appeals for the Ninth Circuit, *Jamie Dean Charboneau v. Tyrell Davis*, Court of Appeals No. 20-35875, affirming the district court, December 4, 2023. App. 1–40.

2. U.S. District Court, District of Idaho, Judgment, *Charboneau v. Ramirez*, Case No. 1:17-cv-00364-DCN (dismissing successive petition), September 23, 2020. App. 42.

3. U.S. District Court, District of Idaho, Memorandum Decision and Order, *Charboneau v. Ramirez*, Case No. 1:17-cv-00364-DCN (granting dismissal of successive petition). App. 43–74.

4. *Charboneau v. Idaho*, 395 P.3d 379 (Idaho 2017) (Idaho Supreme Court Opinion reversing trial court's grant of post-conviction relief and new trial), May 26, 2017. App. 75–97.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Idaho entered a Memorandum Decision and Order on September 23, 2020 granting Respondent's motion for summary dismissal, dismissing Petitioner's second petition for writ of habeas corpus, and declining to issue a certificate of appealability. App. 43–74. The district court filed the Judgment dismissing the case with prejudice the same day. App. 42. Mr. Charboneau timely appealed to the United States Court of Appeals for the Ninth Circuit and sought a certificate of appealability, which the Ninth Circuit granted. App. 19. On December 4, 2013, the Ninth Circuit entered an Opinion affirming the district court's dismissal and judgment. App. 1–40.

The United States District Court for the District of Idaho had jurisdiction in this case under 28 U.S.C. Sections 2244(b)(3) and (4) and 2253 because Petitioner is a person in custody pursuant to the judgment of a state court and he alleged a federal constitutional violation. The Ninth Circuit Court of Appeals issued a Certificate of Appealability and had jurisdiction pursuant to 28 U.S.C. Sections 1291 and 2253(c). *See also* Federal Rule of Appellate Procedure 22; 9 of the Rules Governing § 2254 Cases.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). Rule 13.1 of the Supreme Court allows ninety days to file a Petition for a Writ of

Certiorari after entry of the judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

CONSTITUTIONAL PROVISION AND STATUTE

28 U.S.C. § 2244:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) 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--
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (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.

U.S. Constitution, amend. XIV, § 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND FACTS

Petitioner Jamie Dean Charboneau is incarcerated in Idaho after a state jury found him guilty of the 1984 shooting murder of his ex-wife, Marilyn Arbaugh. He has spent decades asking courts to review the inadequacy of his representation at and before trial and other irregularities related to his conviction, including allegations that his pre-trial counsel—the same who recommended Mr. Charboneau testify at a pre-trial motion to dismiss hearing—relied on information from a clairvoyant in formulating the defense strategy.[1] These efforts, including a federal habeas petition filed in the 1990's, have most often been unsuccessful, with two exceptions. *See Charboneau v. Klauser*, 107 F.3d 15 (9th Cir. 1997) (unpublished table decision affirming denial of Mr. Charboneau's first request for federal habeas relief).

First, an Idaho court vacated Mr. Charboneau's initial sentence of death and he was resentenced to life in prison. *See State v. Charboneau*, 124 Idaho 497, 861 P.2d 67, 68–69 (1993). Second, in 2015, a state district court granted him post-conviction relief and ordered a new trial. *See Charboneau v. Idaho*, State of Idaho Fifth Judicial District Court, Memorandum Decision on Motion for Summary Judgment; App. 98–156. The Idaho Supreme Court reversed that trial court's grant of post-conviction relief and that court's opinion provided the grounds for Mr.

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[1] *See, e.g.*, App. 248; *Charboneau v. Klauser*, 107 F.3d 15 (9th Cir. 1997) (Bistline, J., dissenting) ("[W]here a guilty verdict might be . . . murder in the first [or] . . . second degree, or voluntary manslaughter, defense counsel's first strategic tactic was to utilize the results of a SEANCE conducted by a spiritualist; . . . [and] unquestionably believe[] that he had received the 'true facts.'").

Charboneau's second federal habeas petition, at issue here. *See Charboneau v. Idaho*, 395 P.3d 379 (Idaho 2017); App. 75–97.

Mr. Charboneau's second federal habeas petition alleged that Idaho officials violated their obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and his right to due process, *see* U.S. CONST. amend XIV. In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97.

Mr. Charboneau's murder trial in 1985 included testimony from Tira and Tiffnie Arbaugh, the daughters of the deceased, Marilyn Arbaugh. *Charboneau v. Davis*, 87 F.4th 443, 444 (9th Cir. 2023); App. 5. Mr. Charboneau alleged the State violated *Brady v. Maryland* by encouraging Tira Arbaugh "to provide false statements and testimony regarding her mother's death and to dispose of potentially exculpatory evidence." *Id.* To support these and other allegations, Mr. Charboneau relied on documents found in an envelope he received in 2011 "from a correctional officer, who discovered it 'in one of the prison offices.'" *Charboneau v. Davis*, 87 F.4th at 447 (citation omitted). The most significant document was a photocopy of a "letter written by Tira in 1989, four years after [Mr. Charboneau's] 1985 trial and nine years before Tira's death in 1998."[2] *Id.* Mr. Charboneau argued

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[2] Only a photocopy of the letter was introduced at the state court post-conviction proceedings; it is included in the Appendix. *See* 194–200. The state district court's post-conviction decision noted: "The State has conceded Tira Arbaugh wrote this letter." App. 103. That does not mean it agreed to the truth of the statements contained in it though.

that the contents of Tira's letter "support his contentions that Tiffnie also fired shots at Marilyn and that, as a result, there is reasonable doubt as to whether [he] caused Marilyn's death and as to whether he intended to kill Marilyn." *Charboneau v. Davis*, 87 F.4th at 444.

Charboneau brought a state petition for post-conviction relief case based on the Tira Letter and other materials found in the envelope. The state trial court issued two significant decisions in the case in 2014 (App. 157–193) and 2015 (App. 98–156), and concluded that the Tira Letter had been written by Tira and that it had been "suppressed or withheld by the State, either willfully or inadvertently, from at least 2003 on, and [that] prejudice to Charboneau ha[d] ensued." *Charboneau*, 395 P.3d at 390. The trial court granted Mr. Charboneau's petition and ordered a new trial. *Id.* at 389.

In May 2017, the Idaho Supreme Court reversed. The court held that, even if genuine, the Tira Letter was not material *Brady* evidence because there was not a "reasonable probability that [Mr. Charboneau's] conviction or sentence would have been different had the Tira Letter been disclosed." *Charboneau*, 395 P.3d at 391. In making this decision, the Idaho Supreme Court relied in part on its finding that "the claims made in the Tira Letter were inconsistent in several respects with Charboneau's testimony at the hearing on his motion to dismiss and that 'the forensic evidence contradicts both of their versions.'" *Charboneau v. Davis*, 87 F.4th 443, 449 (9th Cir. 2023) (quoting *Charboneau*, 395 P.3d at 382, 392)). The Idaho Supreme Court also noted that some "statements in the Tira Letter were

contradicted by testimony that had been offered by Tira's husband in the state post-conviction proceedings as well as with other evidence about the timing of events recounted in the letter." *Charboneau v. Davis*, 87 F.4th at 449 .

Mr. Charboneau sought federal court review of the Idaho Supreme Court's decision by filing a second habeas corpus petition in the District of Idaho. At issue in the federal district court, and then at the Ninth Circuit Court of Appeals, was the threshold requirements that Congress imposed on considering "second or successive" federal habeas petitions. *See* 28 U.S.C. § 2244(b)(2)(B). The Ninth Circuit Court of Appeals determined that Mr. Charboneau must show:

> (1) he could not have obtained Tira's letter earlier through the exercise of diligence; and
>
> (2) the statements recounted in that letter, 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 of the underlying offense of first-degree murder.

Charboneau v. Davis, 87 F.4th at 444 (citations and internal quotation marks omitted). It noted that the federal "district court assumed that Charboneau had satisfied the diligence prong, but it concluded that he had not made the showing of actual innocence required by the second prong." *Id.* For this reason, the showing of actual innocence was the focus on appeal.

Mr. Charboneau asked the Ninth Circuit Court of Appeals to consider the standard for showing actual innocence, as set forth in § 2244(b)(2)(B)(ii), which was

added to the statute by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220–21 (1996).

Section 2244 provides that courts should consider whether the "facts underlying the claim, if proven and viewed in the 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." 28 U.S.C. § 2244(b)(2)(B)(ii). Mr. Charboneau pointed the Ninth Circuit to authority from the Tenth Circuit Court of Appeals, its decision in *Case v. Hatch*, 731 F.3d 1015 (10th Cir. 2013), which held that "the universe of facts that enter into the subparagraph (B)(ii) analysis consists only of evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded but for constitutional error during trial proceedings." *Charboneau v. Davis*, 87 F.4th at 453 (quoting *Case v. Hatch*, 731 F.3d at 1038) (internal quotation marks omitted). Mr. Charboneau argued that applying the Tenth Circuit's standard would mean the federal district court reviewing his second or successive petition could not then "consider the testimony that he offered during a pretrial hearing in November 1984 that was not presented at his subsequent trial." *Id.*

The Ninth Circuit agreed "with *Case* insofar as it held that the statutory language unambiguously requires a nexus between the new factual predicate underlying the constitutional claim and the showing of actual innocence," *Charboneau v. Davis*, 87 F.4th at 454, but concluded that "the non-textual constraint that *Case* places on the evidence that may be considered under §

2244(b)(2)(B)(ii) would distort the application of the statutory standard in ways that threaten to significantly impede the statute's objectives," *id.* at 455. The Ninth Circuit noted its rejection of the Tenth Circuit's boundaries for the scope of evidence to be considered in assessing actual innocence and, instead, aligned itself with the Fourth and Sixth Circuits. *Charboneau v. Davis*, 87 F.4th at 456 (citing *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) and *Clark v. Warden*, 934 F.3d 483, 496 n.5 (6th Cir. 2019)).

REASONS FOR GRANTING THE WRIT

Mr. Charboneau recognizes that a "petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. Rule 10. He has asked CJA counsel to seek review[3] because the approach of the Ninth Circuit Court of Appeals is different from that of the Tenth Circuit Court of Appeals on the important matter of the standards to use when considering successive habeas corpus petitions, and the issue should be settled by this Court, and the appropriate standard applied to his case. *See* S. Ct. Rule 10(a)-(c).

A. The Ninth Circuit has recognized its construction of Section 2244(b)(2)(B) is different than that used in the Tenth Circuit regarding the universe of information that can be considered, and this Court should resolve the issue.

The Ninth Circuit Court of Appeals addressed the scope of the evidence courts should consider in applying Section 2244(b)(2)(B)(ii). *See Charboneau v. Davis*, 87 F.4th at 453. Section 2244(b)(2)(B) provides that the court must consider

[3] The Ninth Circuit Court of Appeals appointed the undersigned, James K. Ball, as counsel under the Criminal Justice Act to represent Mr. Charboneau in his appeal. Mr. Charboneau requested that counsel seek this Court's review.

whether the "facts underlying the claim, if proven and viewed in the 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." 28 U.S.C. § 2244(b)(2)(B)(ii). In this case, even though Mr. Charboneau did not testify at trial, the federal district court "consider[ed] his pretrial hearing testimony because all available evidence—whether admissible at trial or not—is relevant to whether [he had] shown actual innocence." App. 19 n.9. The Ninth Circuit agreed this pretrial testimony could be considered. *Charboneau v. Davis*, 87 F.4th at 453.

In *Case v. Hatch*, 731 F.3d 1015, however, the Tenth Circuit Court of Appeals held that "the universe of facts that enter into the subparagraph (B)(ii) analysis consists only of evidence presented at the time of trial, adjusted for evidence that would have been admitted or excluded 'but for constitutional error' during trial proceedings."[4] *Id.* at 1038. The Ninth Circuit considered the Tenth Circuit's decision in *Case v. Hatch* and explained its view of the standard:

> [I]n assessing whether this statutory nexus requirement has been satisfied, the federal habeas court should close its eyes to any other

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[4] Mr. Charboneau recognizes that, in *Case*, the Tenth Circuit was considering whether in reviewing a successive petition alleging a *Brady* violation, it should consider only the exculpatory evidence allegedly improperly withheld and the evidence presented at trial, without considering additional exculpatory evidence, such as "subsequently produced DNA evidence" and "post-trial witness recantations" that were unconnected to any alleged constitutional error. 731 F.3d at 1038–39. Here, Mr. Charboneau asked the court to exclude from its consideration his testimony from a pre-trial motion to dismiss hearing, testimony that was not repeated at the trial, but suggests that the proper universe of evidence in this case is the trial testimony and what he alleges was improperly suppressed and violated his due process rights, namely, the Tira Letter and other documents.

> evidence in the record. On that specific question, the statutory language points in the opposite direction. It says that, in determining whether the facts underlying the claim have the required connection to a showing of actual innocence, the court must view those facts in light of the evidence as a whole. 28 U.S.C. § 2244(b)(2)(B)(ii). Nothing in the broad wording of that italicized phrase suggests that, in determining whether the required nexus has been shown, a court may consider only the facts underlying the claim and the trial evidence as a whole. Had Congress intended to impose such a limitation, it could easily have added that simple word.
>
> . . . [A]dopting the Tenth Circuit's contrary construction of the statute would thwart the objectives of § 2244(b)(2)(B)(ii)'s demanding standard, which narrowly defines the class of cases in which refusal to entertain a second or successive petition could be said to result in a fundamental miscarriage of justice.
>
> . . . Put simply, the Tenth Circuit's constrictive view of the evidence that may be considered would require a court to treat as actually innocent, and deserving of a further habeas petition, a petitioner who, based on other evidence, was known to be actually guilty. . . .
>
> Accordingly, we hold that the statutory command . . . requires the court to consider the same scope of evidence as described under the *Schlup* test—namely, all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial. . . . On that point, we align ourselves with the Fourth and Sixth Circuits.

Charboneau v. Davis, 87 F.4th 443, 454–56 (9th Cir. 2023) (emphases and internal quotation marks and citations omitted) (citing *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), *MacDonald*, 641 F.3d at 612 (4th Cir. 2011); *Clark v. Warden*, 934 F.3d at 496 n.5 (6th Cir. 2019)).

Mr. Charboneau asks this Court to consider what evidence a federal court should consider in evaluating a petition brought under 28 U.S.C. § 2244(b)(2), resolve the differences in how the circuit courts apply the standard, and remand

this case for reconsideration under the appropriate standard, which he submits would exclude his pretrial testimony.

B. Any unexplained, implicit factual findings that reverse the state district court's findings without sufficient information should not be presumed correct.

The Ninth Circuit concluded that "a presumption of correctness attaches under § 2254(e)(1) to any specific factual findings made by the state court that bear on the reliability or authenticity of particular items of evidence that are presented to a federal court that is charged with applying § 2244(b)(2)(B)(ii)'s actual innocence standard." *Charboneau v. Davis*, 87 F.4th at 457. Applying this standard, it found that Mr. Charboneau had "not shown by clear and convincing evidence that the statements recounted in the Tira Letter, considered in light of all the evidence, suffice to show that no reasonable factfinder would have convicted him of first-degree murder." *Id.* at 458.

Mr. Charboneau had pointed out that the Idaho Supreme Court rejected some of the state trial court's findings by making just implicit findings without sufficient explanation for overturning the state trial court's credibility determinations. *See* App. 66 ("This constitutes an implicit factual finding by the Idaho Supreme Court that Tira's husband's testimony was, in fact, credible."); App. 70-71 ("This is an implicit factual finding that Shedd forged the emails in yet another attempt to help Petitioner with his case."). Mr. Charboneau asked the Ninth Circuit to consider, and now asks this Court to consider, whether federal courts should rely on implicit

factual findings made by state courts, particularly where, as here, the state appellate court was disregarding the state trial court's factual findings.

C. Mr. Charboneau submits the state violated his due process rights by failing to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963) and the federal district court should consider this claim on the merits.

The Ninth Circuit considered all the evidence, including implicit factual findings and Mr. Charboneau's pretrial testimony and concluded he "failed to show that the statements recounted in the Tira Letter would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of first-degree murder." *Charboneau v. Davis*, 87 F.4th at 460 (citing 28 U.S.C. § 2244(b)(2)(ii)) (internal quotation marks omitted). Mr. Charboneau submits that --- when only the evidence that should be properly considered under the standard is reviewed --- it is sufficient to allow the federal court to consider his *Brady v. Maryland* claim on the merits.

CONCLUSION

For the reasons explained above, the Petitioner urges the Court to grant certiorari and review this case. He seeks to have the opinion and judgment of the Ninth Circuit Court of Appeals vacated, the decision and judgment of the U.S. District Court for the District of Idaho reversed, the appropriate standards of law settled, and the case remanded for further consideration.

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Dated: March 4, 2024.

RESPECTFULLY SUBMITTED,

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