NO. 23-6939

IN THE SUPREME COURT OF THE UNITED STATES

JAIME DEAN CHARBONEAU,

Petitioner,

v.

TYRELL DAVIS, WARDEN OF THE IDAHO STATE CORRECTIONAL INSTITUTION,

Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Jaime Dean Charboneau raises the following questions before this Court:

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 Unites 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 exclude but for constitutional error during trial proceedings, as determined by the United States Corut [sic] 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 conserved in a second habeas petition, were appropriately applied in this case.

(Pet., i.)

Respondent Tyrell Davis ("state") wishes to rephrase the questions as follows:

1. In determining whether a petitioner has met the onerous gateway under 28 U.S.C. § 2244(b)(2)(B)(ii) for filing a successive habeas petition, which mandates that the petitioner establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty of the underlying offense, must the federal courts consider all the evidence and not just the evidence that was developed post-trial?

2. In determining whether a petitioner has met the burden of establishing that no reasonable factfinder would have been found guilty of the underlying offense under 28 U.S.C. § 2244(b)(2)(B)(ii), are the federal courts mandated under 28 U.S.C. § 2254(e)(1), to give deference to any factual findings made by the state court that issued the last reasoned state court decision as opposed to a lower state court?

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INTRODUCTION

The two questions Charboneau raises involve 28 U.S.C. § 2244(b)(2)(B)(ii) and what evidence the federal courts can consider when determining if a petitioner has met the burden of establishing, "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. § 2254(b)(2)(B)(ii).

Charboneau's argument regarding the first question is based upon the Tenth Circuit's decision in Case v. Hatch, 731 F.3d 1015, 1038 (10th Cir. 2013), which addressed the question of what evidence can be considered in determining "the evidence as a whole" under U.S.C. § 2244(b)(2)(B)(ii). Charboneau contends certiorari should be granted to resolve an alleged split between Case, and the Ninth, Fourth, Sixth, and Eighth Circuits. However, even if there is a circuit split, Charboneau is on neither side of it–none of the circuits he cites would find in his favor. The Ninth Circuit and the three others applying § 2244(b)(2)(B)(ii)'s instruction to consider "the evidence as a whole," would let both Charboneau and the state use evidence regardless of whether it was presented at trial. The Tenth Circuit would limit both a petitioner and the state to evidence that was either presented at trial or would have been presented but for some constitutional violation. But to prevail, Charboneau needs some third doctrine–a circuit that would consider a dead witness's post-trial recantation written years after the trial while still excluding his own contrary pretrial testimony. No such circuit or case exists.

Charboneau's argument regarding the second question involves which state court decision is presumed correct under 28 U.S.C. § 2254(e)(1). Charboneau contends that if the state's highest court rejects a lower state court's finding without sufficient explanation that it is still the lower court's finding that is presumed correct. Charboneau's position ignores this Court's precedent that,

when the federal courts presume a state court factual finding is correct under 28 U.S.C. § 2254(e)(1), it is the last reasoned decision that is reviewed, not the lower court's decision.

STATEMENT OF THE CASE

Because the facts are exceptionally important in this case, the state will provide a more detailed recitation of how Charboneau murdered his ex-wife more than 40 years ago, and the proceedings after his conviction. That discussion begins with the Idaho Supreme Court's recitation of the facts that resulted in Charboneau's conviction for Marilyn's first-degree murder, which are presumed correct absent clear and convincing evidence to the contrary. *See* Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (citing 28 U.S.C. § 2254(e)(1)); *see also* Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. 2254(e)(1)) ("[W]e presume the Texas court's factual findings to be sound unless Miller–El rebuts the 'presumption of correctness by clear and convincing evidence.'"). The Idaho Supreme Court found as follows:

> [Charboneau] and Marilyn lived together for approximately two years before they were married in June 1983. Marilyn had two teenage daughters, Tiffnie and Tira. The relationship between [Charboneau] and Marilyn was stormy. There is evidence that [Charboneau] physically abused Marilyn…. In the spring of 1984 Marilyn filed for divorce. A default judgment was granted on June 13, 1984. There is evidence that [Charboneau] and Marilyn continued to see each other and were sometimes intimate after the divorce.
>
> On June 21, 1984, [Charboneau] went to the cafe where Marilyn worked. They left in Marilyn's car. There is some dispute whether Marilyn went with [Charboneau] voluntarily. The next day Marilyn reported to the police that [Charboneau] had kidnapped and raped her and had stolen her car. There is evidence that [Charboneau] travelled to Nevada after June 21. The burned remains of Marilyn's car were found in southern Idaho in late June 1984. On June 25, 1984, [Charboneau] was charged in Jerome County, Idaho with first degree kidnapping of Marilyn and grand theft of her car.
>
> On June 28, 1984, [Charboneau] purchased a .22 caliber rifle from a hardware store in Gooding, Idaho. About mid-morning on Sunday, July 1, 1984, Marilyn returned to her residence on a ranch near Jerome, after being gone since the evening before. Some time after 11:00 o'clock that morning Marilyn went out

> to check some horses in a corral near her home. Shortly after that Marilyn's daughter Tiffnie heard shots outside, grabbed Marilyn's .22 pistol, and went to see what had happened. She found her mother sitting on the ground in the barn with blood on her. [Charboneau] was standing close to Marilyn with a .22 caliber rifle pointed at Marilyn. Tiffnie asked [Charboneau] to leave and told him she was going to call the police. [Charboneau] told Tiffnie that he would take Marilyn to the doctor. Both Marilyn and [Charboneau] told Tiffnie to leave.
>
> At 11:38 that morning Tiffnie called the Jerome County Sheriff's office and said that [Charboneau] had shot her mother. Tiffnie then told her sister Tira about the shooting, and they both got dressed. They heard more shots and ran outside where they hid behind a sheep wagon and called to their mother. Tiffnie had her mother's .22 caliber pistol with her, and it accidentally discharged behind her. She ran into the house, hid the gun, returned to the sheep wagon, and then ran to the barn. Tira followed close behind. Marilyn was lying on her back with her arms over her head. The girls ran back to call for an ambulance. At 11:42 a.m. Tira telephoned for assistance and reached the Jerome County Sheriff's office. She told them to get an ambulance and that her mother was dying. When the sheriff's deputies arrived at the scene, they found Marilyn's body in the barn and located [Charboneau] in a field near the barn with a .22 caliber rifle lying nearby. [Charboneau] was arrested and charged with first degree murder. At the time of his arrest, [Charboneau] acknowledged that he had shot Marilyn, although he stated that he did so because she was going to shoot him.

(App., 201-02); State v. Charboneau (Charboneau I), 774 P.2d 299, 302-03 (Idaho 1989).

Charboneau was charged with first-degree kidnapping and grand theft for abducting Marilyn and stealing her car, and her first-degree murder. (App., 202-03.) Prior to trial, Charboneau told his attorney he did not kidnap or rape Marilyn, and provided a different version of events prior to and during the morning of June 28, 1984, that involved Marilyn taking the .22 caliber Remington rifle he had purchased for Tira on June 28, into the house; returning to the barn; pointing the rifle at Charboneau and pulling the trigger without the rifle firing; Charboneau grabbing the rifle from Marilyn and pulling the trigger several times with his eyes closed while the rifle was on his hip; and then fleeing to a nearby field with the rifle. (App., 203.) Charboneau later modified the story to his attorney, contending that after he fired the shots at Marilyn he stayed near the end of the barn; heard Tiffnie talking to Marilyn; saw Tiffnie holding a pistol pointed at

Marilyn; heard Tiffnie say that Marilyn had "screwed up their lives"; and saw Tiffnie fire a shot from the pistol and "Marilyn's hair fly up." (App., 203.)

Charboneau testified at a pretrial hearing in support of his motion to dismiss the charges and provided another version of events surrounding Marilyn's murder. (App., 204-05.) Combining his two prior stories and adding additional facts, Charboneau testified that he arrived at Marilyn's house on Thursday with the .22 rifle that he had purchased for Tira as a graduation gift; talked to Marilyn who advised she didn't want the two girls to know he was there; and showed Marilyn the rifle. (App., 82-83); Charboneau v. State (Charboneau V), 395 P.3d 379, 384 (Idaho 2017). He stayed in the barn until Sunday when Marilyn woke him; they discussed where she had been the night before; and she then took the rifle into the house to remove the scope. (App., 83.) Five to fifteen minutes later, Marilyn returned with the .22 rifle and a handful of shells she put into the rifle. (App., 84.) After Charboneau again asked Marilyn where she was the night before, she picked up the gun and said, "You're dead. No other woman is going to have you." (App., 84.) Charboneau heard a "click" and grabbed the barrel of the gun, wrestling it from her while she was "screaming" to Tiffnie to bring another gun. (App., 84.) After Marilyn began running away, Charboneau saw Tiffnie coming with a pistol. (App., 84.) With the .22 rifle at his hip, Charboneau closed his eyes and "the gun went off" four or five times. (App., 84-85.) Opening his eyes, Charboneau saw Marilyn on her knees, bleeding from one leg and holding her hand on her shoulder. (App., 85.) Tiffney was told to call an ambulance. (App., 85.) As Charboneau was kneeling next to Marilyn, he saw Tiffney running toward them with a pistol, stating she hated them both and firing the gun two or three times. (App., 85.) Charboneau took off running; heard someone talking; eased back to the door of the barn; saw Tiffnie standing above Marilyn while yelling at her; and then heard the gun go off and saw Marilyn's hair "fly up close to the top of her

head." (App., 85.) Charboneau picked up the .22 rifle and ran out the barn into a wheat field 200 yards away where he threw the rifle, which is where he was found by police. (App., 85-86.)

Charboneau's stories were inconsistent with Tira's trial testimony, who explained that, on the morning of the murder, Marilyn went outside to make a telephone call; Tiffnie was running some bath water when Marilyn returned and asked Tira to put some horses in a different corral; and Marilyn then went outside. (App., 78.) Tira heard a yell and then heard Tiffnie jump off the bed. (App., 78.) A short time later Tiffnie came into the bathroom and, in a "scared and shaky voice," stated, "Tira, Jaimi's outside and he shot Mom." (App., 78.) After putting on some clothes and seeing Tiffnie grab her mom's .22 pistol, the two girls ran out behind the sheep wagon where Tiffnie accidentally fired a shot with the pistol that hit the side of the barn. (App., 78-79.) They returned to the house, and while changing her clothes, Tira heard more shots. (App., 79.) The two girls ran back outside to the barn where they found Marilyn lying on the ground with blood on her chest. (App., 80.) Tira then ran and called an ambulance. (App., 80.)

Although not discussed by the Idaho Supreme Court or the Ninth Circuit, Tiffnie's trial testimony was consistent with Tira's testimony. (Compare 4-ER-701-836 with 6-ER-1343-1415.)[1] After making a phone call, Marilyn asked if the girls had turned the horses loose, and then went outside. (4-ER-727-31, 734-44.) Tiffnie then heard gunshots that sounded like a ".22 shot" that were "really fast." (4-ER-744-45.) After hearing Marilyn scream, Tiffnie jumped out of bed; grabbed Marilyn's .22 pistol from Marilyn's purse; ran to the barn; and saw her mom laying on the ground with Charboneau holding a .22 rifle over her "just a couple of inches away." (4-ER-746-48.) Tiffnie ran to the shop and called police, and then returned to the house where she and Tiffnie

[1] "ER" refers to Charboneau's Excepts of Record filed with the Ninth Circuit. The number before "ER" is the volume of the excerpt, while the numbers following "ER" are the page numbers.

heard more shots. (4-ER-750-51.) The girls ran to the sheep wagon where Tiffnie accidentally fired a shot from the pistol, causing her to run back to the house and hide the pistol. (4-ER-750-52.) Tiffnie ran back to the sheep wagon and then into the barn with Tira following, finding Marilyn lying on the ground (4-ER-752); she did not see any weapons or Charboneau (4-ER-767-68). Both girls then left and called an ambulance. (4-ER-768.)

Charboneau's stories were also inconsistent with the forensic evidence. Marilyn was hit by at least 14 bullets,[2] none of which were to her head that would cause her hair to "fly up." (App., 87.) The fatal shots severed her autonomous artery, which could have been caused by one or two shots to Marilyn's upper chest. (App., 87.) Three shots hit her from the rear, and the pathologist testified that she was in "multiple positions during the process of the shootings." (App., 87.) Of the seven bullets recovered, five came from the .22 rifle, a sixth "probably" came from the rifle but "definitely" did not come from the pistol (App., 87), and the seventh was too "mangled" to opine anything other than it was "a Remington bullet" (App., 9 n.6).

At the conclusion of the state's case, the court dismissed the kidnapping and theft charges based upon a jurisdictional issue. (App., 205.) Although Charboneau did not testify, his defense focused upon the fact that he shot Marilyn but did not kill her or that he did not intend to kill her. (App., 206.) He was convicted of first-degree murder and sentenced to death. (App., 206-07.)

With the assistance of new counsel, Charboneau filed his first post-conviction petition, which the post-conviction court denied. (Appendix 207.) With the assistance of another new attorney, Charboneau then filed a successive post-conviction petition, which the court also denied. (App., 208.) In a consolidated appeal, the Idaho Supreme Court affirmed Charboneau's first-

[2] The Idaho Supreme Court initially said it was 15 shots (App., 87), but later recognized it was only 14 (App., 95). As noted by the Ninth Circuit, the pathologist's trial testimony "clearly states that 'the minimum number of intact projectiles which struck the body is fourteen'" (App., 8 n.5).

degree murder conviction and the denial of post-conviction relief but vacated his death sentence and remanded for resentencing. (*See generally* App., 201-68.) On remand, Charboneau was sentenced to fixed life without the possibility of parole, which the Idaho Supreme Court affirmed. *See generally* State v. Charboneau (Charboneau II), 861 P.2d 67 (Idaho 1993).

Charboneau filed a federal habeas petition, relief was denied, and the Ninth Circuit affirmed. *See generally* Charboneau v. Klauser, 1997 WL 55394 (9th Cir. 1997) (unpublished).

Charboneau returned to state court in 2002, and filed his third post-conviction petition contending, in part, that the state withheld exculpatory evidence, including (1) information in a letter allegedly written by Jerome County Sheriff Larry Gold; and (2) that, prior to Charboneau's trial, Tira had been directed by the prosecutor to remain silent regarding various things, including other guns allegedly involved in the shooting, and that she should only remember seeing the .22 rifle on the day of the murder. Charboneau v. State (Charboneau III), 102 P.3d 1108, 110 (Idaho 2004). Tira made these alleged disclosures to Betsy Charboneau Crabtree, Charboneau's mother. Id. While Charboneau contended Tira was willing to testify, she had died from an asthma attack. Id. The post-conviction court summarily dismissed the successive petition. Id. The Idaho Supreme Court reversed because the lower court failed to address Charboneau's request for counsel before dismissing his petition. Id. at 1111-13. On remand, after an attorney was appointed, the court denied relief because the third petition was untimely; the Idaho Supreme Court affirmed. *See generally* Charboneau v. State (Charboneau IV), 174 P.3d 870 (Idaho 2007)

In 2008, Charboneau filed his fourth post-conviction petition raising claims involving an abuse of discretion for not having an evidentiary hearing in prior post-conviction cases, ineffective assistance of trial counsel, denial of due process based upon the withholding of exculpatory evidence, actual innocence, and "plain error." (7-ER-1732-64.) The post-conviction court denied

relief, concluding the successive petition was untimely. (7-ER-1653-57.) Because he failed to pay the requisite fees for an appeal after the post-conviction court recommended the denial of a fee waiver, the Idaho Supreme Court dismissed Charboneau's appeal. (7-ER-1649-50.)

In June 2011, Charboneau filed his fifth post-conviction petition based upon an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963), and ineffective assistance of trial counsel. Charboneau contended that on March 18, 2011, he received a large envelope from a correctional officer containing numerous documents, including: (1) a photocopied letter dated September 6, 1989, allegedly written by Tira that was addressed to Judge Phillip Becker, the original trial judge; and (2) an envelope with a return address of 622 Highland Rd., Jerome, Idaho, with a post-mark from Bruneau, Idaho, dated the following day.[3] (App., 76-78).[4] The Tira Letter generally made the same accusations that Charboneau raised in his 2002 third post-conviction petition, contending that the prosecutor and an officer pressured Tira to testify falsely at Charboneau's trial, and that it was Tiffnie who fired the fatal shot killing Marilyn with the .22 rifle. (App., 194-200.) The letter stated that when she wrote her initial statement, Tira was told by an officer to "say certain things that were not really true," including a specific time she woke up the morning of the murder, and that Marilyn asked Charboneau to check on a horse that had been to the veterinarian a few days earlier. (App., 195-96.) Charboneau went outside and Marilyn came into Tira's bedroom and gave her a "big box wrapped in decorative paper" that contained a Remington .22 caliber rifle that was a "graduation gift from mom and Jamie." (App., 196.) Marilyn then told Tira and Tiffnie she was going outside to help Charboneau. (App., 196.)

[3] The envelope contained several other documents that were described by the Ninth Circuit (App., 1-15), one of which Charboneau conceded was a forgery (App., 14). However, the focus of Charboneau's Petition is the Tira Letter.

[4] The copied letter can be found at App., 194; the envelope is not part of Charboneau's appendices.

The Tira Letter also asserted that Tira told the officer that when she and Tiffnie first heard the scream, Marilyn was screaming for Tiffnie while Tira was still in the bathtub. (App., 196-97.) A "few second later," they "heard the gunshots" and "[Tiffnie] came running into the bathroom." (App., 197.) After Tira dressed, Tiffnie "grabbed [Tira's] new .22 rifle," gave Tira one of Marilyn's .22 pistols, and they went outside to the sheep wagon. (App., 197.) They could see Marilyn in the "alleyway by the feed corrals" but could not see Charboneau even though they could hear his voice. (App., 197.) Tira allegedly heard Tiffnie "shoot the rifle while [they] were behind the sheep wagon, after which Tira accidently fired the pistol. (App., 197.) Tiffnie allegedly told Tira that Marilyn had taken another rifle ("Calamity Jane") outside to help Charboneau. (App., 197-98.)

According to the Tira Letter, a few days later, another officer spoke with Tira, stating she forgot to put in her statement "the part about hearing more shots that day" after the two girls "went back into the house." (App., 198.) The officer allegedly told Tira "to write out another statement saying I had heard 6 or 8 more shots" while the two girls "were in the house changing our clothes," which, according to the letter, was not true. (App., 198.) One of the prosecutors told them to "get rid of mom's Calamity Jane," which was done with the help of their grandfather and uncle by burying the gun behind the potato cellar where some of Marilyn's "other things" had allegedly been buried in a crawl space a few weeks after the murder. (App., 198.)

The letter also contained a postscript stating Tira was in Bruneau, Idaho for a "cowboy benefit [and] street dance where Pinto Bennetts' band is providing the music," and she would return to Jerome early next week. (App., 200.)

Because the claims raised in the fifth post-conviction petition were the same as those in the third petition, the state moved for summary judgment, which the post-conviction court denied. (App., 90.) While the state later acknowledged that handwriting analysis determined the Tira

Letter (it was not an original, but a multigenerational copy) and the accompanying envelope "were in fact written by Tira," the state did not concede that the letter was "genuine or authentic," "that the letter is what it purports to be," or "that the contents of the letter are true, including the 1989 date or the claim that it was sent to Judge Becker." (SER-101-02.)[5]

After an evidentiary hearing, the post-conviction court concluded that three other documents from the large envelope were forgeries. (App., 174, 186-88.) Nevertheless, the court "conclude[d] the Tira Arbaugh letter was suppressed or withheld by the state either willfully or inadvertently, from at least 2003 on, and prejudice to Charboneau has ensued." (App., 190.) After another evidentiary hearing, the court concluded the Tira Letter was admissible under Idaho's rules of evidence (App., 106-22), and granted relief because withholding the Tira Letter was prejudicial under Brady (App., 129-56).

Recognizing Charboneau's fifth post-conviction petition "asserts the same issues made in [his] third petition," and that the issue "is not Tira's Letter" but "her alleged post-trial recantation of her trial testimony and her allegations that she had lied during Charboneau's trial at the direction of the prosecution and law enforcement" (App., 92), the Idaho Supreme Court reversed because "[Charboneau] cannot raise the same issue over thirteen years later based upon the same statements by Tira in a different form" (App., 93-94). The court noted that Charboneau's mother earlier contended Tira recanted; Tira passed away on September 24, 1998; and "there were over fourteen years between Tira's alleged recantation and her death, and the issue of her alleged recantation was not raised." (App., 94.) The court concluded there was no Brady violation, explaining, "There is no showing that the prosecutors in Charboneau's case or others acting on the State's behalf in the case, whether law enforcement or the investigator, knew of the Tira letter," and Charboneau failed

[5] "SER" refers to the state's Supplemental Excerpts of Records before the Ninth Circuit.

to establish materiality because "[t]he statements in the letter so contradicted Charboneau's own incriminating testimony that the alleged suppression of the letter did not undermine confidence in the outcome of the trial or in his sentence." (App., 94-95.)

Relying in part upon the Tira Letter, Charboneau filed a successive federal habeas petition contending the state withheld exculpatory evidence in violation of Brady, with an application to file a successive petition. (App., 17.) A three-judge panel granted Charboneau's application and authorized filing of the petition. (App., 17-18.) However, the district court recognized that the panel's decision regarding whether the requirements for filing a successive petition under 28 U.S. § 2244(b)(2)(B) have been met must be reevaluated under 28 U.S.C. § 2244(b)(4). (App., 53-56.) The court "assume[d], without deciding, that [Charboneau] acted diligently for purposes of § 2244(b)(2)(B)(i)." (App., 57.) "However, under § 2244(b)(2)(B)(ii), [Charboneau] has not established that, considering all the evidence–including the new evidence–no reasonable factfinder would have found him guilty beyond a reasonable doubt." (App., 57-58.) The court considered Tira's trial testimony (App., 58-61); Charboneau's testimony from the pretrial hearing (App., 61-64); the Tira Letter and some of the other documents in the envelope (App., 64-71); and post-conviction testimony from Tira's former husband that information in the Tira Letter and on the envelope was wrong (App., 71). Ultimately, the court reasoned that Charboneau failed to meet his burden of establishing no reasonable factfinder would have found him guilty, particularly because of Tira's husband's testimony; the inconsistency between the Tira Letter and Charboneau's pretrial testimony; the forensic evidence establishing Marilyn was not shot with the pistol, let alone in the head; and the inconsistency between the Tira Letter and Tira's trial testimony. (App., 71-73.)

Like the district court, the Ninth Circuit found it "unnecessary to address the diligence issue, because we conclude that the new materials presented by Charboneau, 'viewed in light of

the evidence as a whole,' do not suffice to make the showing of actual innocence required by § 2244(b)(2)(B)(ii)." (App., 20.) The court meticulously reviewed the history of the actual innocence gateway, including the changes imposed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). (App., 21-24.) Because Charboneau contended his pretrial testimony could not be considered in determining actual innocence, the court then addressed "the scope of the evidence that we should consider in applying § 2244(b)(2)(B)(ii)." (App., 24-30.) Rejecting Charboneau's argument, the court reasoned it would 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," including Charboneau's pretrial testimony. (App., 30) (quoting House v. Bell, 547 U.S. 518, 538 (2006)).

The court also addressed the clause, "the facts underlying the claim, if proven," and concluded, "a habeas court remains free, after taking those particular proffered 'facts' as 'proven,' to then assign little probative weight to those statements, either because they are ultimately deemed to be unreliable or because their probative force is outweighed by other evidence." (App., 30-32.)

Finally, the court addressed the degree of deference to findings made by the state courts, explaining 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." (App., 32-33.) The court presumed, "in accordance with the state court's findings, only that Tira authored the Tira Letter," but "independently assess[ed] its ultimate reliability and probative value." (App., 34) (emphasis in original). Ultimately, the court reasoned that Charboneau failed to meet the threshold requirement of § 2244(b)(2)(B)(ii):

> Given the uncontested evidence that Charboneau shot Marilyn multiple times; his statements admitting possession of the rifle at the relevant times; the forensic

> evidence tying at least five shots to that rifle; and the substantial conflicts between the Tira Letter and the testimony of Tira herself, her husband, and Charboneau, we hold that the Tira Letter's statements lack sufficient probative force and reliability to establish—much less clearly and convincingly—that no reasonable factfinder would have convicted Charboneau.

(App., 39-40.)

REASONS FOR DENYING THE WRIT

A. The *Case* Decision, Upon Which Charboneau Relies, Does Not Establish A "Split" In The Federal Court That Is Relevant Here, And Is A Mere Outlier

1. Introduction

Certiorari is granted only for "compelling reasons," which generally include: (1) a United States court of appeals entering "a decision in conflict with the decision of another United States court of appeals on the same important matter"; or (2) "a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10.

Charboneau's argument is based upon the Tenth Circuit's decision in Case, 731 F.3d at 1038, which addressed the question of what evidence can be considered in determining "the evidence as a whole" under U.S.C. § 2244(b)(2)(B)(ii). His petition should be rejected because: (1) to the extent there is a split, neither side of the split supports Charboneau's position, which is that the *petitioner* may rely on evidence (the post-trial Tira Letter) neither presented in nor wrongfully excluded from the trial, but the state may not meet that evidence with evidence not presented at trial; (2) there is only one case on one side of the alleged split, making Case a mere outlier; and (3) this is an intensely factual case that is ill-suited for review in certiorari.

2. General Legal Framework For Successive Habeas Petitions

After passage of AEDPA, the power of federal courts to award relief to state prisoners who file successive habeas petitions is greatly restricted. Tyler v. Cain, 533 U.S. 656, 661 (2001); Banister v. Davis, 590 U.S. 504, 515 (2020). If a petitioner raises a claim that was not presented in the previous petition, it must be dismissed unless it falls within one of the two narrow exceptions articulated in 28 U.S.C. § 2244(b)(2). Id. Relevant here is the second exception that requires the petitioner to demonstrate:

> (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.

28 U.S.C. § 2244(b)(2)(B).

While this gatekeeping function must first be made by a three-judge circuit panel, Felker v. Turpin, 518 U.S. 651, 657 (1996), if the petitioner makes a prima facie showing that the application meets the requirements, the district court is then tasked with acting as a second gatekeeper by finding that the petitioner has actually met the requirements of § 2244(b)(2)(B). 28 U.S.C. § 2244(b)(4); *see also* Tyler, 533 U.S. at 661 n.3 ("[T]o survive dismissal in district court, the applicant must actually 'sho[w]' that the claim satisfies the standard."). This is a "narrow exception," Calderon v. Thompson, 523 U.S. 538, 553 (1998), that is even more stringent than the "abuse of the writ" doctrine, *see* Banister, 590 U.S. at 512, and the "actual innocence" exception that provides a gateway to address the merits of procedurally defaulted claims, which is "demanding and permits review only in the 'extraordinary' case," House, 547 U.S. at 538 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); *see also* Cooper v. Woodford, 358 F.3d 1117, 119 (9th

Cir. 2004) (en banc) (explaining the difference between the Schlup standard and § 2244(b)(2)(B)(i) and (ii)). Based upon this onerous standard, the requirements to file a successive habeas petition under § 2244(b)(2)(B) have been described as "almost insurmountable." Douglas v. Workman, 560 F.3d 1156, 1192-93 (10th Cir. 2009).

3. Because The Tira Letter Is Post-Trial Evidence, *Case* Does Not Support Charboneau's Position

In Case, the defendant was convicted of the murder and sexual penetration of Nancy Mitchell based, in part, on the testimony of two witnesses, Audrey Knight and Paul Dunlap. 731 F.3d at 1022-23. Case eventually filed a state habeas petition that included affidavits from Knight and Dunlap recanting their trial testimony. Id. at 1023. Case's investigator also discovered a recorded statement of another trial witness, Bobby Autry, which Case's trial attorney contended had not been provided prior to trial. Id. Additional DNA testing was done that detected no male DNA or sperm cells in the evidence taken from Mitchell's body. Id. Case supplemented his petition, contending the state withheld Autry's recorded statement in violation of Brady. Id. After an evidentiary hearing, the state court denied relief, which the New Mexico Supreme Court affirmed. Id. at 1025. Because he had previously been denied federal habeas relief, id. at 1023, Case sought permission from the Tenth Circuit to file a successive habeas petition, which was granted, id. at 1026. Once the successive petition was authorized, the district court held another evidentiary hearing, found that Knight and Dunlap's recantations were credible, and that Case had "satisfied the procedural hurdle erected by 28 U.S.C. § 2244(b)(2)(B)." Id. Reviewing the merits of the Brady claim, the court granted Case a conditional writ of habeas corpus. Id.

After addressing the parameters of § 2244's first gatekeeping function before the circuit court, id. at 1026-30, the Tenth Circuit discussed the requirements under the second gate before the district court, id. at 1030-44. Concluding it would focus its analysis on § 2244(b)(2)(B)(ii),

the court declined to address the due diligence standard under § 2244(b)(2)(B)(i). Id. at 1031. Addressing the clause, "evidence as a whole," the court opined it was necessary to determine "the universe of evidence we can consider in evaluating the claim," with two possibilities: (1) only evidence presented at trial; or (2) "newly developed facts that only became available after trial and that are not linked to constitutional errors occurring during trial." Id. at 1032-33 (emphasis omitted). The court concluded "that the § 2244(b)(2)(B)(ii) inquiry is only concerned with the evidence presented at trial, properly adjusted for evidence that Case alleges was erroneously excluded due to trial-related constitutional error." Id. at 1033 (emphasis omitted). Consequently, the court considered only the state's failure to disclose Autry's recorded interview and the other evidence presented at trial, refusing to consider the two witnesses' post-trial recantations or the new DNA evidence. Id. at 1039.

It is because of the Tenth Circuit's refusal to consider any post-trial evidence, including the witness recantations and DNA evidence, that Charboneau's case fails even under the Tenth Circuit's analysis. Tira's recantation occurred years after Charboneau's trial. Therefore, under Case, it cannot be considered as part of the "universe of evidence" under § 2244(b)(2)(B)(ii) as alleged by Charboneau. *See* Case, 731 F.3d at 1033. Case also has no application to Charboneau's case because his testimony was given *prior* to trial, and pretrial evidence that was not presented during a trial was not addressed in Case. Further, Case involved the *defendant* trying to use evidence developed post-trial to pass the § 2244(b)(2)(B)(ii) gateway. Here, it is the *state* relying upon Charboneau's pretrial testimony to refute his contention that Tira's post-trial recantation provided clear and convincing evidence that no reasonable factfinder would have found him guilty. It would be strange that the state is barred from presenting evidence, especially pretrial testimony

from a defendant, that could refute a post-trial recantation, an issue Case did not address because it involved only trial and post-trial evidence developed by the petitioner.

Consequently, because neither side of the "split" supports Charboneau's theory that a petitioner may pass the gateway under § 2244(b)(2)(B)(ii) with evidence not presented at trial nor wrongfully excluded, but the state cannot meet a petitioner's evidence with evidence not presented at trial, certiorari should be denied.

4. Certiorari Is Generally Not Granted For Outlier Cases

Case is an outlier because every other circuit that has addressed the issue of whether post-trial evidence can be "viewed in light of the evidence as a whole" has concluded such evidence can be used under a § 2244(b)(2)(B)(ii) analysis. In addition to the Ninth Circuit's decision (App., 24-30), the Fourth, Eighth, and Sixth Circuits have held otherwise. Importantly, this Court denied certiorari in Case, Case v. Hatch, 571 U.S. 908 (2013), and the alleged "split" has not broadened since then as no other court, at least as identified by Charboneau, has adopted the approach applied in Case. Because Charboneau relies on a single case for one side of his split, and that one case is a mere outlier, he has failed to demonstrate that certiorari should be granted.

In U.S. v. MacDonald, 641 F.3d 596, 612-13 (4th Cir. 2011), the Fourth Circuit examined §§ 2244(b)(2)(B)(ii) and 2255(h)(1), which both contain the clause, "viewed in light of the evidence as a whole."[6] Recognizing that both statutes incorporate features of the standards established by this Court in Murray v. Carrier, 477 U.S. 478 (1986), Sawyer v. Whitley, 505 U.S. 333 (1992), and Schlup, 513 U.S. 298 (1995), the Fourth Circuit reasoned, "by its plain language,

[6] Although McDonald filed a successive § 2255 petition, the district court relied upon § 2244(b)(2)(B)(ii), instead of § 2255(h)(1), to access the gateway for filing the successive petition. McDonald, 641 F.3d at 607. The Fourth Circuit opined that, because the two statutes "are quite similar," the same analysis would apply to the relevant clause found in both statutes. Id. at 609.

'the evidence as a whole' means, in the equivalent language of Schlup, 'all the evidence,' … 'old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules].'" MacDonald, 641 F.3d at 612 (quoting Schlup, 513 U.S. at 328) (brackets in original). The district court had confined its analysis to the trial record, refusing to consider post-trial evidence, including DNA evidence, inculpatory statements Helena Stoeckley made to her boyfriend, fibers on a hairbrush in the victims' home that incriminated Stoeckley, an affidavit from Stoeckley's mother who averred that Stoeckley twice stated she was present when the murders were committed, and three affidavits describing confessions made by another person, Greg Mitchell. Id. at 613. Because the district court failed to "treat[ ] the proffered evidence as part of the 'evidence as a whole," the Fourth Circuit reversed and remanded. Id. at 614.

In Nooner v. Hobbs, 689 F.3d 921, 927 (8th Cir. 2012), the petitioner filed a successive habeas petition based upon the recantation of co-defendant Robert Rocket who did not testify at trial but, after the trial, contended he was the shooter, id. at 927-98; the recantation of trial witness Antonia Kennedy, who contended she falsely testified that Nooner had confessed to the murder when it was actually Rocket who confessed to her, id. at 928-29; and a computer expert who asserted he could accurately measure the height of the shooter from a grainy and unclear videotape spliced together from three surveillance cameras to establish Nooner was not the shooter, id. at 929-31. Considering all the evidence, the Eighth Circuit reasoned, "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. at 933.

In Clark v. Warden, 934 F.3d 483, 496 n.5 (6th Cir. 2019), the Sixth Circuit recognized the district court relied, in part, on recantations that were neither part of the trial record nor the root of the claimed constitutional violation. However, the Sixth Circuit followed the Fourth Circuit's lead

in MacDonald, 641 F.3d at 610, that "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," particularly since it comported with Sixth Circuit precedent "that recantations may be considered in the § 2244(b)(2)(B)(ii) calculus even when those recantations do not themselves give rise to the constitutional claim." Clark, 934 F.3d at 496 n.5.

Certiorari is generally not granted where the petition is based on a case that is a mere outlier from the mainstream and not from a developed split. *See* Buffington v. McDonough, 143 S.Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (explaining a court's decision was "something of an outlier. And maybe that is a reason to deny review of this case"); Ponte v. Real, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring in part) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket."); In Re Williams, 898 F.3d 1098, 1110 (11th Cir. 2018) (recognizing this Court does not generally review outlier cases); Strayhorn v. Wyeth Pharmaceuticals, Inc., 737 F.3d 378, 405-06 (6th Cir. 2013) (declining to follow an outlier case); *cf.* George v. McDonough, 596 U.S. 740, 749 (2022) (noting that "[o]ne uncertain outlier does not come close to moving the mountain of contrary regulatory authority"). And generally, if the Court reviews legal principles from an outlier case, it is the outlier case that is before the Court, not a case from another circuit. *See e.g.*, Davis v. U.S., 589 U.S. 345, 347 (2020) (reviewing the "Fifth Circuit's outlier practice of refusing to review certain unpreserved factual arguments for plain error"); Manuel v. City of Joliet, Ill., 580 U.S. 357, 363 (2017) (reviewing the Seventh Circuit's position that "makes it an outlier among the Courts of Appeals"). Because Case is a mere outlier that this Court has already declined to review, certiorari should be denied.

5. Charboneau's Case Is A Poor Vehicle To Address The Question He Raises

This case is a poor vehicle to address the question Charboneau raises based upon an outlier case from the Tenth Circuit. Because the Tira Letter involves an unreliable post-trial recantation and conflicts with the evidence presented at trial, even if the recantation is considered and Charboneau's pretrial testimony is not considered, he has failed to establish that the facts underlying his Brady 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 of [Marilyn's first-degree murder.]" 28 U.S.C. § 2244(b)(2)(B)(ii).

First, "[r]ecantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction." Dobbert v. Wainwright, 468 U.S. 1231, 1233-34 (1984) (Brennan, J., dissenting from denial of a motion to stay); *see also* Gable v. Williams, 49 F.4th 1315, 1323 (9th Cir. 2022) (cleaned up) ("Witness recantations are generally viewed with suspicion, as they are easy to find but difficult to confirm or refute. To measure a recantation's likely effect on a juror, we consider its context, the circumstances and timing of the recantation, the original testimony and evidence, and the credibility and testimony of other witnesses."); Case, 731 F.3d at 1041-42 (quoting Carriger v. Stewart, 132 F.3d 463, 483 (9th Cir. 1997) (Kozinski, J., dissenting)) ("Recanting testimony has long been disfavored as the basis for a claim of innocence. Appellate courts, even on direct review, look upon recantations with extreme suspicion.") (citing cases). Likewise, for decades, Idaho has viewed recantations as being exceptionally unreliable. State v. Morrison, 11 P.2d 619, 623 (Idaho 1932) (citing cases).

Here, because Tira has died, the Tira Letter is even more unreliable. Tira has never been questioned regarding the authenticity of the letter that is a multi-generational copy, under what circumstances it was allegedly written, why it was written, when it was written, from where it was mailed, or a myriad of other questions surrounding the letter. It cannot be forgotten that Tira first orally recanted decades ago to her mother-in-law, who is also Charboneau's mother, and who has been intricately involved in his case. Charboneau III, 102 P.3d at 1110. Additionally, Jimmy Griggs, Tira's former husband and Charboneau's brother, testified at the evidentiary hearing that the Tira Letter was not written by Tira, but was "written to look like her handwriting"; was signed in Tira's maiden name, which was unusual; and the return address was her grandparents' address, not her own, which was also strange. (15-ER-4118-19.) Moreover, Griggs testified that the couple was living in Wells, Nevada, at that time (15-ER-4117), making it unreasonable for Tira to state she would "be back in Jerome early next week" as alleged in the letter. Griggs denied Tira attended a street dance in Bruneau, Idaho on September 6, 1989 (15-ER-4117-18, 4120-21) as alleged in the letter, and the Idaho Supreme Court found the "street dance did not occur until ten days after the date of the letter" (App., 77).

Further, during the evidentiary hearing, Charboneau's attorney agreed, ""we'll never know" if Tira "wrote this in a drunken stupor and everything in it is wrong and a lie." (15-ER-4191.) Even during the post-conviction evidentiary hearing, the post-conviction court stated:

> Tira is dead. We can't now go back and ask her whether the letter is true or what she knew about it. She cannot be cross-examined. All she has is the letter.
>
> If the letter in all respects was true … the letter would raise a reasonable probability of a change in the outcome of trial, in big capital letters, if everything in the letter was true. We don't know that, we don't know that, and a new trial won't tell us that. It's too late. There's too much evidence gone, files gone, witnesses, reports, statements. We will never know whether the claims in the letter are true.

(15-ER-4189.) In its written findings, the post-conviction court recognized "[t]here are many questions left unresolved, and many parts of this evidentiary puzzle that do not fit neatly together," and then lists many of the unanswered questions. (App., 188-89.)

Second, the Tira Letter is inconsistent with the forensic and ballistic evidence presented at Charboneau's trial. (App., 86-87.) The pathologist testified that, while Marilyn was hit by at least 14 bullets, none were to her head. (App., 87.) The Remington .22 rifle that Charboneau had purchased a day earlier was identified as the murder weapon because, of the seven bullets recovered from Marilyn's body, all but one was determined to have been fired from the Remington .22 rifle, and the remaining bullet was "probably" fired from the rifle, but "definitely" was not fired from the pistol recovered from the scene. (App., 8, 87, 95.)

Third, the Tira Letter is inconsistent with Tira and Tiffnie's trial testimony. Tira testified that Marilyn returned home about 10:00 to 10:30 am, woke Tira and Tiffnie, and took a bath. (6-ER-1371-72.) Marilyn went to corral some horses while Tira took a bath. (6-ER-1373-74.) After Tira heard a yell, Tiffnie came into the bathroom and, in a "scared" and "shaky" voice, said, "Tira, [Charboneau's] outside and he shot Mom. Get out of the bathtub and hurry up." (6-ER-1374-76.) Tira jumped out of the bathtub, got dressed, and ran to the sheep wagon with Tiffnie who had grabbed a .22 pistol. (Id.) After Tiffnie accidentally fired a shot, they then went back into the house. (6-ER-1377-78.) While Tiffnie was standing behind her, Tira heard "about five or so" shots. (6-ER-1378-79.) Both girls returned to the sheep wagon and began hollering for their mom. (6-ER-1380.) They then found Marilyn laying on the floor of the barn and saw "a lot of blood and stuff on her chest." (6-ER-ER-1380-81.) Tira called an ambulance. (6-ER-1381-82.)

While Tiffnie's testimony is inconsistent with the Tira Letter, it is consistent with the forensic evidence and Tira's testimony. Tiffnie testified that on the morning of the murder, Marilyn

came home between 10:00 a.m. and 10:30 a.m. and woke both girls. (4-ER-725.) After bathing, Marilyn left, and then came in from talking on the telephone to her dad, James Arbaugh, and asked if the girls had turned the horses loose. (4-ER-727-31.) Marilyn left to put the horses in while the girls were still in the house. (4-ER-743-44.) Tiffnie heard multiple gunshots that sounded like a ".22 shot" that were "really fast." (4-ER-744-45.) After hearing Marilyn scream, Tiffnie jumped out of bed, grabbed Marilyn's .22 pistol from Marilyn's purse, ran to the barn, and saw her mom laying on the ground with Charboneau holding a .22 rifle over her "just a couple of inches away." (4-ER-746-48.) Tiffnie ran to the shop and called police, and then ran and got Tira when they heard more shots. (4-ER-750-51.) The girls ran to the sheep wagon where Tiffnie accidentally fired one shot from the pistol behind her back, resulting in her running back to the house and hiding the pistol. (4-ER-750-52.) Tiffnie ran back to the sheep wagon and then into the barn (4-ER-752) and found Marilyn lying on the ground with her arms over her head; she did not see any weapons or Charboneau (4-ER-767-68). She picked up her mom's head, told her how much she loved her, and Marilyn then died. (4-ER-768.) The girls then left and called an ambulance. (Id.)

Fourth, other corroborating evidence supporting Tira and Tiffnie's trial testimony was presented at Charboneau's trial. Ladonna Jones, Marilyn's neighbor, testified that in April 1984, she heard Marilyn state, "just get out of my life, leave me alone, just leave us alone and get out of my house." (3-ER-436.) Charboneau responded, "If I can't have you, no damn man will ever have you." (3-ER-438.) The night before Marilyn's murder, Jones and fifteen others were packing to move and went into the potato cellar but did not see Charboneau in the area. (3-ER-438-42.) That same night, Marilyn told Jones, "I hate to see you go. I don't know who will help me if you leave, if [Charboneau] comes back out here." (3-ER-444.) James Arbaugh confirmed he received a phone call from Marilyn on the morning of her murder. (4-ER-694-97.) A Jerome County

Dispatcher confirmed she received a dispatch call from a "very hysterical female" (Tiffnie) stating, "[Charboneau] just shot my mom, and he's got a gun; they're out in the barn." (4-ER-841-43.) Tiffnie made this call after Charboneau fired the first set of shots. (4-ER-750; 841-43.) It is unreasonable to believe Tiffnie shot her mom and then called police and hysterically claimed that Charboneau "just shot my mom," especially considering Charboneau's testimony regarding the deliberate nature in which Tiffnie allegedly shot Marilyn two or three times after stating, "I hate both of you guys." (8-ER-1942.)

As Justice Sotomayor recognized in Kansas v. Carr, 577 U.S. 108, 128 (2016) (Sotomayor, J., dissenting) (quotation and citation omitted), "Even where a state court has wrongly decided an important question of federal law, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing." *See also* Hittson v. Chatman, 576 U.S. 1028 (2015) (Ginsburg, J., concurring in the denial of certiorari) ("I am convinced that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst* [*v. Nunnemaker*, 501 U.S. 797 (1991].") Moreover, as recently explained by Justice Sotomayer, where "[t]he record in this case is complex, contested, and thousands of pages long" with an "'extensive record' and 'intricate procedural history,'" it is not an appropriate case to reach and settle a fact-sensitive issue.'" Thornell v. Jones, 2024 WL 2751215, *10 (2024) (Sotomayer, J., dissenting) (cleaned up) (quoting CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 435 (2016)); *see also* U.S. v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Resolution of the question Charboneau raises, is not necessary to resolve his case, because even under the Case standard, he has failed to establish that "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 [him] guilty of [Marilyn's first-degree murder]." 28 U.S.C. § 2244(b)(2)(B)(ii). Consequently, this Court should not use its limited resources to address such a fact and procedurally bound case that involves an outlier case from the Tenth Circuit and where the results would not change even if the Court adopted the analysis of the Tenth Circuit.

B. Charboneau Has Failed To Establish That His Claim Involving The Idaho Supreme Court's Factual Findings Warrants This Court's Discretionary Review

In a brief and confusing argument, Charboneau invites 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." (Pet., 12-13.) Although not clear, it appears Charboneau's complaint centers on the Idaho Supreme Court's rejection of two of the post-conviction court's factual findings, including: (1) the post-conviction court's refusal to credit Tira's husband's post-conviction testimony; and (2) the post-conviction court's finding that there was no evidence suggesting that two emails could have been prepared by someone friendly to Charboneau and that there was no evidence explaining how Charboneau accomplished that feat. (App., 12-13.) Charboneau has provided no argument establishing there is a split among the circuits, that the issue involves "an important question of federal law," or any other "compelling reason" warranting this Court to address this question. Indeed, there is serious question whether the issue was even raised before the Ninth Circuit.

Under 28 U.S.C. §2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Before the Ninth Circuit, Charboneau conceded that § 2254(e)(1) applies to all factual determinations made by the state courts, but, without citing any authority, contended federal courts are mandated to defer to the

post-conviction court since it "was in the best position to make factual findings because of its ability to observe demeanor and determine credibility of some witnesses based on observations during an evidentiary hearing." (Opening Brief, p.18.) He obviously raised this issue because the Idaho Supreme Court rejected the post-conviction court's two factual findings.

However, that is not the question Charboneau raises here, which is based upon the Idaho Supreme Court's "implicit factual findings" allegedly made "without sufficient information." This Court does not consider issues raised for the first time in a petition for certiorari. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 412 (1982) (citing U.S. v. Ortiz, 422 U.S. 891, 898 (1975) (declining to address a due process claim because the petitioner "did not present this argument to the Court of Appeals"); *see also* Hopkins v. Reeves, 524 U.S. 88, 94 n.3 (1998) (declining to address an argument raised by the state "for the first time in its petition for a writ of certiorari").

Moreover, Charboneau ignores controlling precedent from this Court. Even prior to passage of AEDPA, the Supreme Court looked "to the last reasoned decision" that explains the state court judgment on the claim. Ylst v. Nunnemaker, 501 U.S. 797, 804-05 (1991). Relying upon Ylst, the Ninth Circuit (and apparently every other circuit) has reasoned that lower state court decisions are considered only "[w]hen the last reasoned decision is a state appellate court decision which adopts or substantially incorporates lower state court decisions." Amado v. Gonzalez, 758 F.3d 1119, 1130 (9th Cir. 2014) (cleaned up). However, when the state appellate court does not agree with the lower court, the federal court reviews only the state appellate court's decision and not the lower court opinion. Id.; *see also* Williams v. Johnson, 840 F.3d 1006, 1011 (9th Cir. 2016) ("The state appellate court was entitled to make its own factual findings, unconstrained by what the trial court did.").

Since enactment of AEDPA, this Court has reaffirmed that, "[u]nder the statute's terms, we assess the reasonableness of the 'last state-court adjudication on the merits of' the petitioner's claim." Brown v. Davenport, 596 U.S. 118, 141 (2022) (quoting Greene v. Fisher, 565 U.S. 34, 40 (2011)). Indeed, the last state court's decision on the merits is not even required to "give reasons before its decision can be deemed to have been 'adjudicated on the merits,'" Harrington v. Richter, 562 U.S. 86, 100 (2011), let alone state it is rejecting a lower court's factual findings where those findings are not supported by the record. Nevertheless, contrary to Charboneau's contention (Pet., 12), the Idaho Supreme Court explained its rationale for rejecting the lower court's findings.

Addressing Tira's husband's post-conviction testimony, the post-conviction court merely stated, "For a variety of reasons, the Court does not accept (and in fact rejects) his testimony." (App., 4275.) The Idaho Supreme Court recognized it was not obligated to accept this finding because "the [post-conviction] court did not state what those reasons were." (App., 77.) The federal district court opined, "This constitutes an implicit factual finding by the Idaho Supreme Court that Tira's husband's testimony was, in fact, credible." (App., 66.) Addressing the issue of whether "anyone friendly to Charboneau could have prepared the emails, the Idaho Supreme Court reviewed the record and recognized, "Mr. Shedd had access to the e-mail system, and he forged the Balzer Statement to benefit Charboneau."[7] (App., 90.) As recognized by the federal district court, this was "an implicit factual finding that Shedd forged the emails in yet another attempt to help [Charboneau] with his case." (App., 70-71.)

While Charboneau disagrees with the Idaho Supreme Court's findings (whether implicit or express), he does not contend the post-conviction court's decision was the last reasoned decision

[7] The "Balzer Statement" is one of the three documents found in the envelope that the post-conviction court found was a forgery. (App., 174, 186-88; *see* p.9 above.)

to resolve his Brady claim. Therefore, pursuant to Ylst, Charboneau's argument that federal courts should defer to the post-conviction court's factual findings fails. More importantly, Charboneau has failed to establish any compelling reason for this Court to review the question and upset this Court's prior precedent. Charboneau has also failed to explain why either of the Idaho Supreme Court's findings are even relevant to the Ninth Circuit's conclusion that he failed to demonstrate by clear and convincing evidence that the statements in the Tira Letter establish that no reasonable factfinder would have convicted him of first-degree murder. And even if either finding has some minimal relevance, when considered in light of the other problems with the Tira Letter detailed above, those two findings are of de minimus value in ascertaining whether the requirements of 28 U.S.C. § 2244(b)(2)(B)(ii) have been met.

CONCLUSION

The state respectfully requests that Charboneau's Petition for a Writ of Certiorari be denied.

DATED this 18th day of June, 2024.

Respectfully submitted,
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