NO. 24-5673 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN EUGENE BRUNSON, PETITIONER,

VS.

JOHN HERRING, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

(ACTUAL INNOCENCE)

JONATHAN EUGENE BRUNSON 0493187

BERTIE CORRECTIONAL INSTITUTION

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QUESTIONS PRESENTED

WHEN THE LOWER COURTS OUTRIGHT DENY HABEAS PETITIONERS RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT BY FAILING TO ADJUDICATE THE SCHLUP V. DELO, 513 U.S. 298 (1995) ACTUAL INNOCENCE ISSUE AS REQUIRED TO MAKE A GATEWAY DETERMINATION, IT BEGS THE QUESTIONS OF:

1. WHETHER THE LOWER COURTS VIOLATED THE FOURTEENTH AMENDMENT BY DENYING JONATHAN EUGENE BRUNSON'S RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT?

2. WHETHER THE LOWER COURTS VIOLATED THE FOURTEENTH AMENDMENT BY FAILING TO ADJUDICATE BRUNSON'S SCHLUP ACTUAL INNOCENCE ISSUE?

3. WHETHER BRUNSON'S NEW EXCULPATORY EVIDENCE OF INNOCENCE MET THE SCHLUP STANDARD BY PROVING CONCLUSIVELY THAT "NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT," 513 U.S. AT 329?

4. WHETHER BRUNSON'S NEW EXCULPATORY EVIDENCE OF INNOCENCE MET THE SCHLUP STANDARD BY PROVING CONCLUSIVELY THAT "A COURT CANNOT HAVE CONFIDENCE IN THE OUTCOME OF THE TRIAL [NOR BE] SATISFIED THAT THE TRIAL WAS FREE OF NONHARMLESS CONSTITUTIONAL ERROR, 513 U.S. AT 316?

5. WHETHER THE LOWER COURTS VIOLATED THE FOURTEENTH AMENDMENT BY FAILING TO ADJUDICATE BRUNSON'S FEDERAL CONSTITUTIONAL CLAIM AFTER HIS NEW EXCULPATORY EVIDENCE OF INNOCENCE ESTABLISHED SCHLUP GATEWAY?

6. WHETHER, UNDER THE TUMEY V. OHIO (BIASED TRIAL JUDGE) STANDARD OF REVIEW, THE STATE TRIAL JUDGE VIOLATED THE FOURTEENTH AMENDMENT AND DEPRIVED BRUNSON OF DUE PROCESS OF LAW BY HAVING "A DIRECT, PERSONAL, [AND] SUBSTANTIAL IN[VOLVEMENT] IN REACHING A CON[VICTION] AGAINST HIM IN HIS CASE," 273 U.S. AT 523?

LIST OF PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE. PETITIONER, JONATHAN S. BRUNSON, IS AN INMATE. RESPONDENT, JOHN HERRING, IS A WARDEN OF A NORTH CAROLINA CORRECTIONAL FACILITY.

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PETITIONER RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT BELOW.

OPINIONS BELOW

THE OPINION OF THE UNITED STATES COURT OF APPEALS APPEARS AT APPENDIX A TO THE PETITION.

THE OPINION OF THE UNITED STATES DISTRICT COURT APPEARS AT APPENDIX B TO THE PETITION.

JURISDICTION

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE WAS JUNE 4, 2024.

A TIMELY PETITION FOR REHEARING WAS DENIED BY THE UNITED STATES COURT OF APPEALS ON JULY 9, 2024, AND A COPY OF THE ORDER DENYING REHEARING APPEARS AT APPENDIX C.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT : "NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW ; NO DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

STATEMENT OF THE CASE

A NORTH CAROLINA JURY CONVICTED BRUNSON OF ATTEMPTED STATUTORY RAPE OF A THIRTEEN YEAR OLD; EIGHT COUNTS OF SEXUAL ACTIVITY BY A SUBSTITUTE PARENT BY CUNNILINGUS AND FELLATIO; SEVEN COUNTS OF TAKING INDECENT LIBERTIES WITH A CHILD; STATUTORY SEXUAL OFFENSE OF A FOURTEEN YEAR OLD BY CUNNILINGUS, FELLATIO, AND PENETRATION; FOUR COUNTS OF COMMITTING A CRIME AGAINST NATURE BY CUNNILINGUS AND FELLATIO; FOUR COUNTS OF STATUTORY SEXUAL OFFENSE OF A FIFTEEN YEAR OLD BY CUNNILINGUS, FELLATIO, AND PENETRATION; AND ATTEMPTED STATUTORY RAPE OF A FIFTEEN YEAR OLD. SEE STATE V. BRUNSON, 221 N.C. APP. AT 615-16, 727 S.E.2d AT 918; PET. 1-2. IN FEDERAL HABEAS CORPUS PROCEEDINGS BELOW, BRUNSON ASSERTED ACTUAL INNOCENCE AS A PROCEDURAL GATEWAY TO REVIEW THE MERITS OF HIS CONSTITUTIONAL STRUCTURAL ERROR BY A BIASED TRIAL JUDGE CLAIM. SEE PET. AT 4. BRUNSON PRESENTED NEW EXCULPATORY EVIDENCE OF INNOCENCE, INCLUDING EXCERPTS FROM THE TRIAL TRANSCRIPT (JUNE 16, Tpp. 8-10) (APPENDIX F) AND AN AFFIDAVIT BY BRUNSON (APPENDIX G) PROVING CONCLUSIVELY THAT THE TRIAL JUDGE FOUND THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE". PET. AT EXHIBITS B AND C. BRUNSON ALSO PRESENTED SUPPORTING EXCULPATORY EVIDENCE OF INNOCENCE OF THE CUMBERLAND COUNTY SHERIFF'S OFFICE PHYSICAL EVIDENCE REPORT PROVING CONCLUSIVELY THAT THERE IS NO PHYSICAL EVIDENCE IN THE CASE (APPENDIX E). BRUNSON'S NEW AND SUPPORTING EXCULPATORY EVIDENCE OF INNOCENCE CONCLUSIVELY PROVED BOTH HIS ACTUAL INNOCENCE AND FEDERAL CONSTITUTIONAL CLAIMS. THE RECORD SHOWS THE FOLLOWING:

A. STATE TRIAL PROCEEDINGS

1. THE CRIME:

THE CUMBERLAND COUNTY SHERIFF DEPARTMENT REPORTED THAT THERE IS NO PHYSICAL EVIDENCE OF A CRIME. SEE APPENDIX E. THE TRIAL JUDGE FOUND THAT THE SOLE PROSECUTING WITNESS' "TESTIMONY IS NOT TRUE." (JUNE 16, T pp. 8-10). SEE APPENDIX F. THUS, THE FACE OF THE RECORD SHOWS CONCLUSIVELY, IN THE AFFIRMATIVE, THAT BRUNSON DID NOT COMMIT A CRIME AND THAT NO CRIMES EXIST IN HIS CASE.

2. TRIAL PROCEEDINGS:

BRUNSON WAS TRIED IN CUMBERLAND COUNTY IN 2011. THE EVIDENCE SHOWED THAT BRUNSON DID NOT COMMIT SEX ACTS UPON HIS MINOR STEPDAUGHTER. THERE IS NO PHYSICAL EVIDENCE IN HIS CASE. SEE APPENDIX E. THE PSYCHOLOGIST WHO REPORTED ABUSE TO DSS WAS A NO SHOW AT TRIAL. THE LEAD DSS INVESTIGATOR WAS A NO SHOW AT TRIAL. THE PSYCHIATRIST OF THE SOLE PROSECUTING WITNESS WAS TOO A NO SHOW AT TRIAL. THERE WAS NO SCIENTIFIC, FORENSIC, OR EXPERT EVIDENCE PRESENTED AT TRIAL TO PROVE THE PROSECUTIONS CASE. BRUNSON DID NOT TESTIFY. THE SOLE PROSECUTING WITNESS TESTIFIED UNTRUTHFULLY ABOUT ABUSE SO MUCH SO THAT THE TRIAL JUDGE FOUND HER "TESTIMONY IS NOT TRUE". (JUNE 16, T pp. 8-10). SEE APPENDIX F. THE TRIAL JUDGE THEN IMPROPERLY ENTERED AN ORAL AND TRANSCRIBED AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS FOR HIS CONVICTION BY STATING THAT "[SHE] WAS IN A QUANDARY ABOUT WHAT TO DO WITH [THE PERJURY]" AND IMPROPERLY ASKED THE PROSECUTOR "DO YOU HAVE ANY SUGGESTIONS?" IN RESPONSE, THE PROSECUTOR CONCEDED THAT THE SOLE PROSECUTING WITNESS "LIED UNDER OATH" AND IMPROPERLY SUGGESTED TO THE JUDGE THAT THE KNOWN PERJURED TESTIMONY REMAIN AS "A CREDIBILITY

ISSUE FOR THE JURY TO DISCERN". THE TRIAL JUDGE THEN IMPROPERLY AGREED BY RESPONDING "ALL RIGHT" (JUNE 16, Tpp. 8-10). SEE APPENDIX F. THE FACE OF THE RECORD SHOWS CONCLUSIVELY THAT THE TRIAL JUDGE THEN EXECUTED THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION BY (1) KNOWINGLY FAILING TO GIVE A CURATIVE JURY INSTRUCTION TO DISREGARD THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS BASED UPON THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST HIM TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION; (2) KNOWINGLY ALLOWING THE JURY TO DELIBERATE AND CONVICT HIM BASED UPON THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS BASED UPON THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST HIM TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION; AND (3) KNOWINGLY ENTERING THE JURY'S GUILTY VERDICT BASED UPON THE KNOWN PERJURED TESTIMONY BASED UPON THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST HIM TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION. THE TRIAL JUDGE'S DIRECT AND PERSONAL INVOLVEMENT IN REACHING A CONVICTION AGAINST BRUNSON IN HIS CASE VIOLATED THE FOURTEENTH AMENDMENT AND DEPRIVED HIM OF DUE PROCESS OF LAW AND HIS RIGHT TO A FAIR TRIAL.

3. APPEAL:

BRUNSON APPEALED. SEE BRUNSON, 221 N.C. APP. AT 616, 727 S.E.2d AT 918; PET. AT 2. ON JULY 17, 2012, THE NORTH CAROLINA COURT OF APPEALS FOUND NO ERROR. SEE id AT 622, 727 S.E. 2d AT 922.

B. STATE POST-CONVICTION PROCEEDINGS

BRUNSON FILED A MOTION FOR APPROPRIATE RELIEF (MAR) ON DECEMBER 13, 2021 ON THE GROUNDS OF A TUMEY V. OHIO, 273 U.S. __, 47 S.Ct. 437 (1927) BIASED TRIAL JUDGE. ON DECEMBER 19, 2022, THE MAR COURT DENIED THE MOTION WITHOUT ADJUDICATING THE TUMEY BIASED TRIAL JUDGE ISSUE. THE NORTH CAROLINA COURT OF APPEALS AFFIRMED AND THE NORTH CAROLINA SUPREME COURT DENIED REVIEW, SEE PET. AT 2-3.

C. FEDERAL HABEAS CORPUS PROCEEDINGS IN THE DISTRICT COURT

ON JANUARY 9, 2014, BRUNSON FILED A SECTION 2254 PETITION, WHICH THE COURT DISMISSED AS UNTIMELY ON JANUARY 26, 2015. SEE BRUNSON, 2015 WL 331496, AT *2; PET. AT 7. ON SEPTEMBER 6, 2016, BRUNSON FILED A SECOND HABEAS PETITION, WHICH THE COURT DISMISSED AS SUCCESSIVE ON AUGUST 26, 2017. SEE ORDER, BRUNSON V. TAYLOR, NO. 5:16-HC-2222, [D.E. 12] (E.D.N.C. AUG. 26, 2017). ON JULY 3, 2023, BRUNSON FILED THIS THIRD HABEAS PETITION ON THE GROUNDS OF (1) ACTUAL INNOCENCE PURSUANT TO THE DUE PROCESS CLAUSE UNDERLYING MCQUIGGIN V. PERKINS, 569 U.S. 383, 386 (2013) AND SCHLUP V. DELO, 513 U.S. 298, 329 (1995); AND (2) TUMEY V. OHIO, 273 U.S. __, 47 S.Ct. 437 (1927) CONSTITUTIONAL STRUCTURAL ERROR BY A BIASED TRIAL JUDGE. SEE PET. AT 4. ON NOVEMBER 1, 2023, THE DISTRICT COURT DISMISSED THE PETITION AS SUCCESSIVE AND, IN DOING SO, FAILED TO ADJUDICATE BRUNSON'S SCHLUP ACTUAL INNOCENCE ISSUE. SEE ORDER, BRUNSON V. HERRING, NO. 5:23-HC-2152-D, [D.E. 6] (E.D.N.C. NOV. 1, 2023). SEE APPENDIX B.

1. THE NEW EXCULPATORY EVIDENCE PROVING BRUNSON'S ACTUAL INNOCENCE INCLUDES EXCERPTS FROM THE TRIAL TRANSCRIPT (JUNE 16, Tpp. 8-10) (APPENDIX F) AND AN AFFIDAVIT BY BRUNSON (APPENDIX G).

THE HABEAS RECORD SHOWS:

a. BRUNSON'S NEW EXCULPATORY EVIDENCE ESTABLISHED HIS ACTUAL INNOCENCE UNDER THE SCHLUP v. DELO ACTUAL INNOCENCE STANDARD OF REVIEW BY PROVING CONCLUSIVELY "NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT", 513 U.S. AT 329, SEE PET. AT 10-11.

IN BRUNSON'S CASE, TWO BASIC FACTS CONSPIRE TO CONCLUSIVELY PROVE HIS ACTUAL INNOCENCE. FIRST, THE SUPPORTING EXCULPATORY EVIDENCE OF INNOCENCE PROVES CONCLUSIVELY THAT THERE IS NO PHYSICAL EVIDENCE IN HIS CASE, SEE PET. AT EXHIBIT A, CUMBERLAND COUNTY SHERIFF'S OFFICE PHYSICAL EVIDENCE REPORT, SEE ALSO APPENDIX E. SECOND, THE NEW EXCULPATORY EVIDENCE OF INNOCENCE PROVES CONCLUSIVELY THAT THE TRIAL JUDGE FOUND THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE". (JUNE 16, Tpp. 8-10). SEE PET. AT EXHIBIT B, EXCERPTS FROM THE TRIAL TRANSCRIPT. SEE ALSO APPENDIX F. CONSEQUENTLY, UNDER THESE CIRCUMSTANCES, THE JURY DID NOT HAVE ANY EVIDENCE TO FIND BRUNSON "GUILTY BEYOND A REASONABLE DOUBT". ZILCH. ACCORDINGLY, THE TRIAL JUDGE SHOULD HAVE DISMISSED THE CASE ON HER OWN MOTION OR, ALTERNATIVELY, GIVEN A CURATIVE JURY INSTRUCTION TO DISREGARD THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS. THE JUDGE CHOSE NEITHER OPTION. INSTEAD, THE TRIAL JUDGE KNOWINGLY ALLOWED THE JURY TO DELIBERATE

AND CONVICT BRUNSON ON THE KNOWN PERJURED TESTIMONY WITHOUT GIVING A CURATIVE JURY INSTRUCTION. EXCEPT, THE TRIAL JUDGE HAD A CONSTITUTIONAL DUTY TO GIVE A CURATIVE INSTRUCTION AND BRUNSON HAD A CONSTITUTIONAL RIGHT TO SHOW THIS PERJURY TO THE JURY AND A RIGHT TO AN ACQUITTAL. A JURY PROPERLY INSTRUCTED TO DISREGARD THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS AFTER THE TRIAL JUDGE FOUND HER "TESTIMONY IS NOT TRUE" (JUNE 16, T pp. 8-10) COULD NOT CONCLUDE SOLE PROSECUTING WITNESS TRUSTWORTHY AND THUS WOULD NOT RELY ON HER TESTIMONY AS EVIDENCE "BEYOND A REASONABLE DOUBT" THAT BRUNSON ABUSED HER. SCHLUP, 513 U.S. AT 329, CONSEQUENTLY, WITHOUT PHYSICAL EVIDENCE AND MINUS THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS THERE WOULD NOT HAVE BEEN ANY EVIDENCE FOR JURORS TO BASE A VERDICT OF "GUILTY BEYOND A REASONABLE DOUBT". PROPERLY INSTRUCTED JURORS WOULD HAVE THEREFORE BEEN COMPELLED TO VOTE TO ACQUIT BRUNSON AS AN ONLY OPTION. IF THE TRIAL JUDGE PLANTED THE SEED OF REASONABLE DOUBT IN THE MINDS OF THE JURORS BY PROPERLY INSTRUCTING THEM TO DISREGARD THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS AFTER SHE FOUND HER "TESTIMONY IS NOT TRUE" AND CONSIDERING NO PHYSICAL EVIDENCE THEN "NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND [BRUNSON] GUILTY BEYOND A REASONABLE DOUBT." SCHLUP, 513 U.S. AT 329. WHAT'S MORE IS THAT IF A REASONABLE JUROR KNEW THAT THE TRIAL JUDGE, FIRST, FOUND THE SOLE PROSECUTING WITNESS' "TESTIMONY IS NOT TRUE" THEN, SECOND, MADE AN ORAL AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THEM TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION AND, THIRD, EXECUTED THE ORAL AGREEMENT AGAINST BRUNSON BY KNOWINGLY FAILING TO GIVE THEM A CURATIVE INSTRUCTION TO DISREGARD THE KNOWN PERJURED TESTIMONY

BASED UPON THE ORAL AGREEMENT AND THEN KNOWINGLY ALLOWING THEM TO DELIBERATE AND CONVICT BRUNSON BASED UPON THE KNOWN PERJURED TESTIMONY BASED UPON THE ORAL AGREEMENT THEN, AGAIN, "NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND [BRUNSON] GUILTY BEYOND A REASONABLE DOUBT," id. UNDER THESE CIRCUMSTANCES, "A COURT CANNOT HAVE CONFIDENCE IN THE OUTCOME OF THE TRIAL," id AT 316. THUS, BRUNSON'S NEW EXCULPATORY EVIDENCE PROVED HIS ACTUAL INNOCENCE UNDER THE FOREGOING SCHLUP STANDARD OF REVIEW THAT, AS A RESULT, JUSTIFIED THE DISTRICT COURT'S REVIEW OF HIS FEDERAL CONSTITUTIONAL CLAIM THAT RESULTED IN HIS WRONGFUL CONVICTION AND IMPRISONMENT.

b. BRUNSON'S NEW EXCULPATORY EVIDENCE ESTABLISHED HIS ACTUAL INNOCENCE UNDER THE SCHLUP V. DELO ACTUAL INNOCENCE STANDARD BY PROVING CONCLUSIVELY "A COURT CANNOT HAVE CONFIDENCE IN THE OUTCOME OF THE TRIAL [NOR BE] SATISFIED THAT THE TRIAL WAS FREE OF NONHARMLESS CONSTITUTIONAL ERROR," 513 U.S. AT 316. SEE PET. AT 12-16.

THIS HONORABLE SUPREME COURT HAS "FOUND AN ERROR TO BE 'STRUCTURAL' AND THUS SUBJECT TO AUTOMATIC REVERSAL ONLY IN A VERY LIMITED CLASS OF CASES." JOHNSON V. UNITED STATES, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (CITING ... TUMEY V. OHIO, 273 U.S. __ 47 S.Ct. 437 (1927) (BIASED TRIAL JUDGE) ....). STANDARD OF REVIEW: THIS HONORABLE SUPREME COURT HELD THAT "IT CERTAINLY VIOLATES THE FOURTEENTH AMENDMENT AND DEPRIVES A DEFENDANT IN A CRIMINAL CASE OF DUE PROCESS OF LAW TO SUBJECT HIS LIBERTY OR PROPERTY TO THE JUDGMENT OF A COURT, THE JUDGE OF WHICH HAS A DIRECT, PERSONAL, SUBSTANTIAL PECUNIARY INTEREST IN REACHING A CONCLUSION AGAINST HIM IN HIS CASE," TUMEY V. OHIO, 273 U.S. AT 523, 47 S.Ct. 437 (1927). IN BRUNSON'S

CASE, THE NEW AND SUPPORTING EXCULPATORY EVIDENCE, INCLUDING THE FACE OF THE RECORD, PROVED CONCLUSIVELY (1) THAT THE TRIAL JUDGE "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" MADE A FINDING THAT THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" (JUNE 16, Tp. 8), SEE APPENDIX F; (2) THAT THE TRIAL JUDGE THEN "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" AND IMPROPERLY ENTERED AN ORAL AND TRANSCRIBED AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS FOR HIS CONVICTION BY "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" STATING THAT "[SHE] WAS IN A QUANDARY ABOUT WHAT TO DO ABOUT [THE PERJURY]" AND "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" AND IMPROPERLY ASKING THE PROSECUTOR, "DO YOU HAVE ANY SUGGESTIONS?" (IN RESPONSE, THE PROSECUTOR CONCEDED THAT THE SOLE PROSECUTING WITNESS "LIED UNDER OATH" AND THEN IMPROPERLY SUGGESTED TO THE TRIAL JUDGE THAT THE KNOWN PERJURED TESTIMONY REMAIN AS "A CREDIBILITY ISSUE FOR THE JURY TO DISCERN."); (3) THAT THE TRIAL JUDGE THEN "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" AND IMPROPERLY AGREED WITH THE PROSECUTORS SUGGESTION AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS FOR HIS CONVICTION BY STATING "ALL RIGHT" (JUNE 16, Tpp. 8-10) (APPENDIX F); AND (4) THAT THE TRIAL JUDGE THEN "DIRECT[LY], PERSONAL[LY], [AND] SUBSTANTIAL[LY]" AND IMPROPERLY EXECUTED THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION BY (a) "DIRECT[LY], PERSONAL[LY], [AND], SUBSTANTIAL[LY]" AND KNOWINGLY FAILING TO GIVE A CURATIVE JURY INSTRUCTION TO DISREGARD THE KNOWN PERJURED TESTIMONY BASED UPON THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION, AND (b) "DIRECT[LY], PERSONAL[LY], [AND]

SUBSTANTIAL[LY]" AND KNOWINGLY ALLOWING THE JURY TO DELIBERATE AND CONVICT BRUNSON BASED UPON THE KNOWN PERJURED TESTIMONY OF THE SOLE PROSECUTING WITNESS BASED UPON THE ORAL AGREEMENT WITH THE PROSECUTOR AGAINST BRUNSON TO ALLOW THE JURY TO DELIBERATE ON THE KNOWN PERJURED TESTIMONY FOR HIS CONVICTION. THEREFORE, THE NEW AND SUPPORTING EXCULPATORY EVIDENCE AND THE FACE OF THE RECORD PROVED CONCLUSIVELY THAT CONSTITUTIONAL STRUCTURAL ERROR BY A BIASED TRIAL JUDGE DID IN FACT OCCUR BY PROVING CONCLUSIVELY THAT THE TRIAL JUDGE HAD "A DIRECT, PERSONAL, [AND] SUBSTANTIAL IN[VOLVEMENT] IN REACHING A CON[VICTION] AGAINST [BRUNSON] IN HIS CASE. TUMEY AT 523, 47 S. Ct. 437. THUS, THE NEW AND SUPPORTING EXCULPATORY EVIDENCE AND THE FACE OF THE RECORD PROVED CONCLUSIVELY THAT THE TRIAL JUDGE "VIOLATE[D] THE FOURTEENTH AMENDMENT AND DEPRIVE[D] [BRUNSON] OF DUE PROCESS OF LAW." UNDER THESE CIRCUMSTANCES OF CONSTITUTIONAL STRUCTURAL ERROR BY A BIASED TRIAL JUDGE, IT IS COMPLETELY IMPOSSIBLE FOR "A COURT [TO] HAVE CONFIDENCE IN THE OUTCOME OF [BRUNSON'S] TRIAL [AND/OR] BE SATISFIED THAT THE TRIAL WAS FREE OF NONHARMLESS CONSTITUTIONAL ERROR." SCHLUP, 513 U.S. AT 316. THUS, BRUNSON'S NEW EXCULPATORY EVIDENCE TWICE PROVED HIS ACTUAL INNOCENCE UNDER THE FOREGOING SCHLUP STANDARD OF REVIEW THAT, AS A RESULT, TWICE JUSTIFIED THE DISTRICT COURT'S REVIEW OF HIS FEDERAL CONSTITUTIONAL CLAIM THAT RESULTED IN HIS WRONGFUL CONVICTION AND IMPRISONMENT.

2. THE DISTRICT COURT FINDINGS (APPENDIX B)

THE DISTRICT COURT FAILED TO ADJUDICATE BRUNSON'S SCHLUP ACTUAL INNOCENCE ISSUE AND THUS OUTRIGHT DENIED HIS RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT. THUS, THE DISTRICT

COURT DID NOT REACH THE MERITS OF HIS FEDERAL CONSTITUTIONAL CLAIM. INSTEAD, THE DISTRICT COURT ADDRESSED THE SUCCESSIVE PETITION ISSUE BY INCORRECTLY COUNTING BRUNSON'S FIRST AND SECOND HABEAS PETITIONS DISMISSED ON PROCEDURAL GROUNDS TO INCORRECTLY CONCLUDE AND DISMISS THIS THIRD PETITION AS SUCCESSIVE UNDER § 2244 (b)(2).

D. THE U.S. COURT OF APPEALS DECISION (APPENDIX A)

THE PANEL (1) AFFIRMED DISMISSAL OF THE PETITION AS SUCCESSIVE UNDER § 2244(b)(2); AFFIRMED THE DISTRICT COURT'S DENIAL OF BRUNSON'S RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT; AND AFFIRMED THE DISTRICT COURT'S FAILURE TO ADJUDICATE BRUNSON SCHLUP ACTUAL INNOCENCE ISSUE; AND (2) FAILED TO DETERMINE WHETHER THE DISTRICT COURTS RULING WAS DEBATABLE AND WHETHER THE PETITION STATED A DEBATABLE CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT, GONZALEZ V. THALER, 565 U.S. 134, 140-41 (2012) (CITING SLACK V. MCDANIEL, 529 U.S. 473, 484 (2000)).

SUMMARY OF ARGUMENT

JONATHAN EUGENE BRUNSON HAS PRESENTED STRONG EVIDENCE OF ACTUAL INNOCENCE THAT MEETS THAT REQUIRED BY THIS COURTS HOLDING IN SCHLUP V. DELO TO ALLOW A HABEAS PETITIONER TO PASS THROUGH THE PROCEDURAL GATEWAY AND PERMIT FEDERAL COURTS TO REVIEW THE MERITS OF OTHERWISE PROCEDURALLY DEFAULTED CONSTITUTIONAL CLAIMS.

THE LOWER COURTS ERRED AND ABUSED THEIR DISCRETION BY FAILING TO ADJUDICATE BRUNSON'S SCHLUP ACTUAL INNOCENCE ISSUE.

ARGUMENT

BRUNSON PRESENTED A COMPELLING CASE OF ACTUAL INNOCENCE WHICH WARRANTS RELIEF UNDER SETTLED LAW. HE PRODUCED NEW EXCULPATORY EVIDENCE OF EXCERPTS FROM THE TRIAL TRANSCRIPT THAT PROVED CONCLUSIVELY THAT THE TRIAL JUDGE FOUND THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" (JUNE 16, Tp. 8). APPENDIX F. HE ALSO PRODUCED SUPPORTING EXCULPATORY EVIDENCE OF A PHYSICAL EVIDENCE REPORT FROM THE CUMB. CO. SHERIFF'S OFFICE THAT PROVED CONCLUSIVELY THAT THERE IS NO PHYSICAL EVIDENCE IN HIS CASE. APPENDIX E. THUS, BRUNSON HAS SURELY MET THE REQUIREMENTS OF SCHLUP.

I. THE LOWER COURTS COMPLETE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS GUARANTEED HABEAS PETITIONERS ASSERTING ACTUAL INNOCENCE AS A PROCEDURAL GATEWAY VIOLATES THE FOURTEENTH AMENDMENT.

A. SCHLUP ESTABLISHED A STANDARD FOR GATEWAY CLAIMS OF ACTUAL INNOCENCE WHICH AFFORDS PETITIONERS PRESENTING NEW EVIDENCE A MEANINGFUL AVENUE FOR REVIEW OF FEDERAL CONSTITUTIONAL VIOLATIONS THAT CONTRIBUTED TO A WRONGFUL CONVICTION.

SCHLUP V. DELO, 513 U.S. AT 298, CONFIRMED THAT A FEDERAL HABEAS COURT MAY REACH THE MERITS OF A PETITIONER'S OTHERWISE DEFAULTED CONSTITUTIONAL CLAIMS — THAT IT MAY ALLOW THE PETITIONER TO PASS THROUGH THE PROCEDURAL "GATEWAY" TO THE UNDERLYING CLAIMS — IF THE PETITIONER PRESENTS NEW, RELIABLE EVIDENCE WHICH UNDERMINES CONFIDENCE IN THE TRIAL VERDICT TO SUCH AN EXTENT THAT THE HABEAS COURT FINDS IT MORE LIKELY THAN NOT NO REASONABLE JUROR WOULD HAVE VOTED TO CONVICT IN LIGHT OF THE NEW EVIDENCE, SEE SCHLUP, 513 U.S. AT 327, 329. THE SCHLUP COURT EMBRACED THE STANDARD SET FORTH IN MURRAY V. CARRIER, 477 U.S. 478, 496 (1986), AND KUHLMANN V. WILSON, 477 U.S. 436 (1986), FOR EVALUATING GATEWAY INNOCENCE CLAIMS: THAT THE CONSTITUTIONAL ERROR COMPLAINED OF "PROBABLY" RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT. SEE SCHLUP, 513 U.S. AT 322. IN EXPLAINING ITS ADOPTION OF THE CARRIER STANDARD FOR GATEWAY CLAIMS OF ACTUAL INNOCENCE, THE COURT EMPHASIZED THE "EQUITABLE NATURE OF HABEAS CORPUS," 513 U.S. AT 319, AND CONCLUDED THAT IT WAS CRITICALLY IMPORTANT TO MAINTAIN A STANDARD FOR EVALUATING GATEWAY INNOCENCE CLAIMS WHICH AFFORDS A PETITIONER IN THE "EXTRAORDINARY" CASE PRESENTING PERSUASIVE EVIDENCE OF MISTAKEN IDENTITY A "MEANINGFUL AVENUE BY WHICH TO AVOID A MANIFEST INJUSTICE." id AT 327.

AFTER ANNOUNCING THAT THE CARRIER STANDARD APPLIES TO GATWAY INNOCENCE CLAIMS, THIS COURT PROVIDED THE LOWER COURTS WITH SEVERAL GUIDING PRINCIPLES FOR EVALUATING SUCH CLAIMS. FIRST, THE PETITIONER SHOULD SUCCEED UNDER SCHLUP ONLY IF HE PERSUADES THE DISTRICT COURT THAT "IN LIGHT OF THE NEW EVIDENCE, NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT." SCHLUP, 513 U.S. AT 329. SECOND, THE PETITIONER MUST PRESENT RELIABLE NEW EVIDENCE SUCH AS CREDIBLE EYEWITNESS ACCOUNTS, EXCULPATORY

SCIENTIFIC EVIDENCE, OR OTHER CRITICAL PHYSICAL EVIDENCE. id. AT 324. THIRD, THE HABEAS COURT MUST MAKE A GATEWAY DETERMINATION IN LIGHT OF ALL THE EVIDENCE — BOTH THAT ADDUCED AT TRIAL AND THAT NEWLY PRESENTED — AND MUST DETERMINE WHETHER SUFFICIENT EVIDENCE OF GUILT REMAINS UNAFFECTED BY THE NEW EVIDENCE SO THAT A REASONABLE JUROR WOULD STILL FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT. id AT 327-328, 331-332. FOURTH, THIS COURT WAS EXPLICIT THAT THE HABEAS COURT MUST NOT SUBSTITUTE ITS OWN JUDGMENT FOR A JURY BUT MUST CONSIDER THE EVIDENCE OF INNOCENCE FROM THE PERSPECTIVE OF A "REASONABLE, PROPERLY INSTRUCTED JUROR" CONSCIENTIOUSLY FOLLOWING INSTRUCTIONS TO CONSIDER ALL THE EVIDENCE FAIRLY AND TO HOLD THE STATE TO ITS BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT. id. AT 329, 331.

IN BRUNSON'S CASE, THESE PRINCIPLES HAVE BEEN COMPLETELY DISREGARDED BY THE LOWER COURTS BY FAILURE TO ADJUDICATE HIS SCHLUP ISSUE. UNDER SCHLUP, BRUNSON'S PRESENTATION OF (1) NEW EXCULPATORY EVIDENCE OF EXCERPTS FROM THE TRIAL TRANSCRIPT PROVING THE TRIAL JUDGE FOUND THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" (JUNE, 16, Tp. 8), AND (2) SUPPLEMENTAL EXCULPATORY EVIDENCE OF THE CUMBERLAND COUNTY SHERIFF'S OFFICE PHYSICAL EVIDENCE REPORT PROVING THERE IS NO PHYSICAL EVIDENCE IN THE CASE SHOULD HAVE LED THE COURTS BELOW TO FIND THAT SUCH A SHOWING UNDERMINES CONFIDENCE IN THE OUTCOME OF HIS TRIAL SUFFICIENTLY THAT "NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT." id AT 329. BRUNSON'S NEW EXCULPATORY EVIDENCE SHOULD HAVE THEN WARRANTED PASSAGE THROUGH THE SCHLUP GATEWAY. IN CASES WHERE THERE IS ONLY ONE WITNESS TO A CRIME, IMPEACHMENT OF THE LINCHPIN WITNESS IS OFTEN ENOUGH TO PERMIT PASSAGE THROUGH THE SCHLUP GATEWAY.

SEE CARRIGER, 132 F 3d AT 478; REASONOVER, 60 F. SUPP. 2d AT 962-963, 964; RICHTER, 973 F. SUPP. AT 1130; BRAGG, 128 F. SUPP. 2d AT 601, 603.

THERE IS NO OTHER CASE IN WHICH A COURT HAS BEEN PRESENTED WITH NEW AND SUPPORTING EXCULPATORY EVIDENCE OF INNOCENCE DISPROVING THE CASE FOR GUILT AT TRIAL, YET HAS FAILED TO ADJUDICATE THE SCHLUP ACTUAL INNOCENCE ISSUE. TO ALLOW THIS ABERRATIONAL PRECEDENT TO STAND WOULD BETRAY SCHLUP'S PROMISE OF A MEANINGFUL AVENUE FOR REVIEW FOR THE HANDFUL OF HABEAS PETITIONERS PRESENTING CREDIBLE CLAIMS OF ACTUAL INNOCENCE AND PROCEDURALLY DEFAULTED CONSTITUTIONAL CLAIMS.

B. NEW EXCULPATORY EVIDENCE OF INNOCENCE EXCEEDS SCHLUP REQUIREMENT

BRUNSON PROVIDED THE DISTRICT COURT WITH EVIDENCE SCHLUP CITED AS NECESSARY TO ESTABLISH A "CREDIBLE" GATEWAY CLAIM OF ACTUAL INNOCENCE "... CRITICAL PHYSICAL EVIDENCE." SCHLUP, 513 U.S. AT 324. HIS NEW CRITICAL PHYSICAL EVIDENCE INCLUDED AN EXCERPT FROM THE TRIAL TRANSCRIPT (JUNE 16, TP. 8) PROVING CONCLUSIVELY THE TRIAL JUDGE'S CREDIBILITY DETERMINATION THAT THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" THAT CONCLUSIVELY EXCLUDED BRUNSON AS THE SOURCE OF SEXUAL ABUSE AND THEREBY OBLITERATED THE MOST INCRIMINATING TESTIMONIAL EVIDENCE ADDUCED AT TRIAL TO LINK HIM TO SEXUAL ABUSE OF HIS STEPDAUGHTER. THE TRIAL JUDGE'S CREDIBILITY DETERMINATION THAT THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" INSOFAR AS IT PURPORTED TO IDENTIFY BRUNSON AS HER ABUSER CUT THE CORE OUT OF THE STATES CASE AND DESTROYED IT. IT ADMINISTERED THE COUP DE GRÂCE TO THE STATES CASE. ACCORDINGLY, WHEN

THE DISTRICT COURT MAKES ITS GATEWAY DETERMINATION IN LIGHT OF ALL THE EVIDENCE, INCLUDING BRUNSON'S SUPPORTING CRITICAL PHYSICAL EVIDENCE OF THE SHERIFF'S OFFICE PHYSICAL EVIDENCE REPORT PROVING CONCLUSIVELY THAT THERE IS NO PHYSICAL EVIDENCE IN THE CASE, THERE IS NO EVIDENCE OF GUILT REMAINING [ON THE TABLE AND/OR] UNAFFECTED BY THE NEW CRITICAL PHYSICAL EVIDENCE SO THAT A REASONABLE JUROR WOULD STILL FIND BRUNSON GUILTY BEYOND A REASONABLE DOUBT. id.

IN SUM, BRUNSON'S NEW CRITICAL PHYSICAL EVIDENCE OF THE TRIAL TRANSCRIPT PROVING CONCLUSIVELY THE TRIAL JUDGE'S CREDIBILITY DETERMINATION THAT THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRUE" DISMANTLED THE PROSECUTIONS CASE FOR GUILT. YET, THE DISTRICT COURT AND THE FOURTH CIRCUIT FAILED TO MAKE A GATEWAY DETERMINATION IN LIGHT OF ALL THE EVIDENCE AS REQUIRED BY SCHLUP FOR ESTABLISHING A GATEWAY CLAIM OF ACTUAL INNOCENCE.

II. THE FOURTH CIRCUIT'S DECISION TO AFFIRM THE DISTRICT COURTS DECISION TO DENY BRUNSON'S RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT BY FAILURE TO ADJUDICATE THE SCHLUP V. DELO ACTUAL INNOCENCE ISSUE IS IN DIRECT CONFLICT WITH ITS OWN DECISION IN WOLFE V. JOHNSON AND THE RELEVANT DECISION OF THIS COURT IN BOUSLEY V. UNITED STATES.

THE DISTRICT COURT VIOLATED THE FOURTEENTH AMENDMENT BY DENYING BRUNSON'S DUE PROCESS RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT. THIS HONORABLE COURT AND THE FOURTH

CIRCUIT HAS PREVIOUSLY DECIDED THAT BRUNSON IS ENTITLED TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT, MORE SPECIFICALLY, "[A] § 2254 PETITIONER IS ENTITLED TO HAVE THE ACTUAL INNOCENCE ISSUE ADDRESSED AND DISPOSED OF IN THE DISTRICT COURT." WOLFE V. JOHNSON, 565 F. 3d 140, 160, 164 (4th Cir. 2009) (CITING BOUSLEY V. UNITED STATES, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). THE BOUSLEY SUPREME COURT HELD "THE DISTRICT COURT FAILED TO ADDRESS PETITIONER'S ACTUAL INNOCENCE .... ACCORDINGLY, ... REMAND OF THIS CASE [IS NECESSARY] TO PERMIT PETITIONER TO ATTEMPT TO MAKE A SHOWING OF ACTUAL INNOCENCE; IF ON REMAND, PETITIONER CAN MAKE THAT SHOWING [UNDER SCHLUP], HE WILL THEN BE ENTITLED TO HAVE HIS DEFAULTED CLAIM ... CONSIDERED ON THE MERITS .... [PETITIONER] WAS ENTITLED TO ATTEMPT TO MAKE A SHOWING OF ACTUAL INNOCENCE." BOUSLEY, 523 U.S. AT 614. "THE DISTRICT COURT'S FAILURE TO ADJUDICATE THE SCHLUP ACTUAL INNOCENCE ISSUE CONSTITUTES AN ERROR OF LAW, AND THUS AN ABUSE OF DISCRETION ... REMAND [IS NECESSARY] FOR RESOLUTION OF SCHLUP ISSUE." WOLFE, 565 F. 3d AT 163-170. HERE, BRUNSON IS ACTUALLY INNOCENT AND INVOKED THE ACTUAL INNOCENCE EXCEPTION AND DUE PROCESS CLAUSES UNDERLYING MCQUIGGIN V. PERKINS, 569 U.S. 383, 386 (2013) AND SCHLUP V. DELO, 513 U.S. 298 (1995). SEE PET. AT 4, 8-10. BRUNSON PRESENTED NEW AND SUPPORTING EXCULPATORY EVIDENCE OF INNOCENCE. SEE PET. AT EXHIBIT A (PHYSICAL EVIDENCE REPORT); EXHIBIT B (EXCERPTS FROM THE TRIAL TRANSCRIPT, JUNE 16, Tpp. 8-10); AND EXHIBIT C (AFFIDAVIT BY BRUNSON). SEE ALSO APPENDICES E, F, G. BRUNSON SATISFIED THE THRESHOLD REQUIREMENT UNDER THE GOVERNING SCHLUP STANDARD OF REVIEW BY MAKING "A CREDIBLE SHOWING OF ACTUAL INNOCENCE," MCQUIGGIN V. PERKINS, 569 U.S. 383, 386 (2013). SEE PET. AT 10-16. IN TURN, THE DISTRICT COURT SHOULD HAVE THEN ADJUDICATED BRUNSON'S SCHLUP ACTUAL INNOCENCE ISSUE IN ORDER TO MAKE A GATEWAY DETERMINATION, EXCEPT THAT IS NOT THE CASE HERE. THE DISTRICT COURT,

INSTEAD, DISMISSED BRUNSON'S PETITION AS SUCCESSIVE WITHOUT ADJUDICATING HIS ACTUAL INNOCENCE AND THUS DENIED HIS RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT IN DIRECT CONFLICT WITH THE FOURTH CIRCUIT IN WOLFE AND THIS SUPREME COURT IN BOUSLEY. THUS, THE FOURTH CIRCUIT'S AFFIRMING THE DISTRICT COURT'S DENIAL OF BRUNSON'S RIGHT TO SHOW ACTUAL INNOCENCE IN THE DISTRICT COURT BY FAILING TO ADJUDICATE HIS SCHLUP ACTUAL INNOCENCE ISSUE IS IN DIRECT CONFLICT WITH IT'S OWN DECISION IN WOLFE AND THE RELEVANT DECISION OF THIS SUPREME COURT IN BOUSLEY.

III. THE FOURTH CIRCUITS DECISION TO AFFIRM THE DISTRICT COURTS DECISION TO APPLY A § 2244 SECOND OR SUCCESSIVE PETITION PROCEDURAL BAR TO BRUNSON'S ACTUAL INNOCENCE GATEWAY CLAIM AS AN IMPEDIMENT TO HIS GATEWAY PASSAGE IS IN DIRECT CONFLICT WITH IT'S OWN DECISIONS IN REID V. TRUE AND WOLFE V. JOHNSON AND THE RELEVANT DECISION OF THIS COURT IN MCQUIGGIN V. PERKINS.

THE DISTRICT COURT VIOLATED THE FOURTEENTH AMENDMENT BY APPLYING A SECOND OR SUCCESSIVE PETITION PROCEDURAL BAR AS AN IMPEDIMENT TO BRUNSON'S PASSAGE THROUGH ACTUAL INNOCENCE GATEWAY. THIS HONORABLE COURT AND THE FOURTH CIRCUIT HAS PREVIOUSLY DECIDED THAT A PROCEDURAL BAR CANNOT BE APPLIED TO IMPEDE BRUNSON'S SHOWING OF ACTUAL INNOCENCE. HERE, BRUNSON ESTABLISHED HIS ACTUAL INNOCENCE. SEE PET. AT 10-16. "[A]CTUAL INNOCENCE, IF PROVED, SERVES AS A GATEWAY THROUGH WHICH A PETITIONER MAY PASS WHETHER THE IMPEDIMENT IS A [§ 2244(b) SECOND OR SUCCESSIVE PETITION] PROCEDURAL BAR, AS IT WAS IN SCHLUP V. DELO, 513 U.S. 298 (1995) AND HOUSE V. BELL, 547 U.S. 518 (2006), OR [§ 2244(d)] EXPIRATION OF THE AEDPA STATUTE OF LIMITATIONS." MCQUIGGIN V. PERKINS, 569 U.S. 383, 386 (2013). "A CREDIBLE

SHOWING OF ACTUAL INNOCENCE MAY ALLOW [BRUNSON] TO PURSUE HIS CONSTITUTIONAL CLAIMS . . . ON THE MERITS NOTWITHSTANDING THE EXISTENCE OF A PROCEDURAL BAR TO RELIEF." id. " A SHOWING OF ACTUAL INNOCENCE CAN SERVE AS A GATEWAY" INSOFAR AS IT "MAY BE UTILIZED BY A § 2254 PETITIONER TO SECURE THE ADJUDICATION OF HIS OTHERWISE DEFAULTED CLAIMS." WOLFE V. JOHNSON, 565 F. 3d 140, 164 (4th CIR. 2009). HOWEVER, " TENABLE ACTUAL-INNOCENCE GATEWAY PLEAS ARE RARE'; ' [A] PETITIONER DOES NOT MEET THE THRESHOLD REQUIREMENT UNLESS HE PERSUADES THE DISTRICT COURT THAT, IN LIGHT OF THE NEW EVIDENCE, NO JUROR, ACTING REASONABLY, WOULD HAVE VOTED TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.'" MCQUIGGIN, 569 U.S. AT 386. (ALTERATION IN ORIGINAL) (QUOTING SCHLUP V. DELO, 513 U.S. 298, 329 (1995)). IN OTHER WORDS, PETITIONER "MUST PRESENT 'NEW EVIDENCE OF INNOCENCE SO STRONG THAT A COURT CANNOT HAVE CONFIDENCE IN THE OUTCOME OF THE TRIAL UNLESS THE COURT IS ALSO SATISFIED THAT THE TRIAL WAS FREE OF NONHARMLESS CONSTITUTIONAL ERROR," REID V. TRVE, 349 F 3d. 788, 806 (4th CIR. 2003) (QUOTING SCHLUP, 513 U.S. AT 316)). HERE, BRUNSON PRESENTED NEW AND SUPPORTING EXCULPATORY EVIDENCE THAT ESTABLISHED HIS ACTUAL INNOCENCE UNDER THE FOREGOING STANDARD. SEE PET. AT EXHIBIT A: PHYSICAL EVIDENCE REPORT; EXHIBIT B: EXCERPTS FROM THE TRIAL TRANCRIPT (JUNE 16, Tpp. 8-10); AND EXHIBIT C: AFFIDAVIT BY BRUNSON, SEE ALSO APPENDICES E, F, G. BRUNSON'S NEW EXCULPATORY EVIDENCE OF AN EXCERPT FROM THE TRIAL TRANSCRIPT SHOWING THE TRIAL JUDGE'S CREDIBILITY DETERMINATION THAT THE SOLE PROSECUTING WITNESS'S "TESTIMONY IS NOT TRVE" (JUNE 16, Tpp 8-10) AND HIS SUPPORTING EXCULPATORY EVIDENCE OF THE CUMBERLAND COUNTY SHERIFF'S OFFICE PHYSICAL EVIDENCE REPORT SHOWING THAT THERE IS NO PHYSICAL EVIDENCE IN THE CASE MORE THAN SUFFICIENTLY ESTABLISHED HIS ACTUAL INNOCENCE. BASED UPON BRUNSON'S "CREDIBLE SHOWING OF ACTUAL INNOCENCE" UNDER SCHLUP STANDARD, THE DISTRICT COURT SHOULD HAVE THEN "ALLOW[ED] HIM

TO PURSUE HIS CONSTITUTIONAL CLAIM[] ... ON THE MERITS NOTWITHSTANDING THE EXISTENCE OF A PROCEDURAL BAR TO RELIEF." MCQUIGGIN, 569 U.S. AT 383. INSTEAD, THE DISTRICT COURT, FIRST, FAILED TO MAKE A GATEWAY DETERMINATION BY FAILING TO ADJUDICATE BRUNSON'S SCHLUP ISSUE AND THEN, SECOND, APPLIED A § 2244 SECOND OR SUCCESSIVE PETITION PROCEDURAL BAR TO HIS ACTUAL INNOCENCE GATEWAY CLAIM AS AN IMPEDIMENT TO HIS SHOWING AND GATEWAY PASSAGE IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT IN REID AND WOLFE AND THE RELEVANT DECISION OF THIS SUPREME COURT IN MCQUIGGIN. THUS, THE FOURTH CIRCUIT'S AFFIRMING THE DISTRICT COURT'S APPLYING THE § 2244 SECOND OR SUCCESSIVE PROCEDURAL BAR TO BRUNSON'S ACTUAL INNOCENCE GATEWAY CLAIM AS AN IMPEDIMENT TO HIS SHOWING AND GATEWAY PASSAGE IS IN DIRECT CONFLICT WITH IT'S OWN DECISION IN REID AND WOLFE AND THE RELEVANT DECISION OF THIS SUPREME COURT IN MCQUIGGIN.

IV. THE FOURTH CIRCUIT'S DECISION TO AFFIRM THE DISTRICT COURT'S DECISION TO COUNT BRUNSON'S PREVIOUS TWO PETITIONS DISMISSED ON PROCEDURAL GROUNDS TO DETERMINE SUBSEQUENTLY FILED THIRD PETITION SUCCESSIVE IS IN DIRECT CONFLICT WITH IT'S OWN DECISION IN SHARPE V. BELL AND THE RELEVANT DECISION OF THIS COURT IN SLACK V. MCDANIEL.

THE DISTRICT COURT VIOLATED THE FOURTEENTH AMENDMENT BY COUNTING THIS PETITION AS SUCCESSIVE. THIS HONORABLE COURT AND THE FOURTH CIRCUIT HAS PREVIOUSLY DECIDED THAT A § 2244 SECOND OR SUCCESSIVE PETITION PROCEDURAL BAR CANNOT BE APPLIED WHEN A PETITION IS DISMISSED ON PROCEDURAL GROUNDS, " PETITIONS DISMISSED ON PROCEDURAL GROUNDS ... DO NOT CONSTITUTE

A DISMISSAL ON THE MERITS AND THUS NOT COUNTED FOR PURPOSES OF DETERMINING WHETHER A SUBSEQUENTLY FILED PETITION IS SECOND OR SUCCESSIVE." SHARPE V. BELL, NO. 06-6825 --- FED. APPX. ---, --- 2007 WL 1180306 AT *1, 2007 U.S. APP. LEXIS 9165 AT * 3 (4th CIR. APRIL 20, 2007) (CITING SLACK V. MCDANIEL, 529 U.S. 473, 487, 120 S.CT. 1595, 146 L. ED. 2d 542 (2000)). THE SLACK SUPREME COURT HELD " A PETITION WHICH IS FILED AFTER AN INITAL PETITION WAS DISMISSED WITHOUT ADJUDICATION ON THE MERITS FOR FAILURE TO EXHAUST STATE REMEDIES IS NOT A 'SECOND OR SUCCESSIVE' PETITION AS THAT TERM IS UNDERSTOOD IN THE HABEAS CORPUS CONTEXT." SLACK, 529 U.S. AT 473. HERE, IN BRUNSON'S CASE, THE DISTRICT COURT FOUND THAT " ON JANUARY 9, 2014, BRUNSON FILED A SECTION 2254 PETITION, WHICH THE COURT DISMISSED [ON PROCEDURAL GROUNDS] AS UNTIMELY ON JANUARY 26, 2015" ... AND THAT " ON SEPTEMBER 6, 2016, BRUNSON FILED A SECOND HABEAS PETITION, WHICH THE COURT DISMISSED [ON PROCEDURAL GROUNDS] AS SUCCESSIVE ON AUGUST 26, 2017." THE DISTRICT COURT THEN COUNTED THE TWO PREVIOUS PETITIONS DISMISSED ON PROCEDURAL GROUNDS AND DETERMINED THIS THIRD PETITION AS SUCCESSIVE UNDER § 2244(b). SEE ORDER, D.E.6. BUT BECAUSE BRUNSON'S FIRST PETITION WAS "DISMISSED ON PROCEDURAL GROUNDS" AS UNTIMELY AND " D[ID] NOT CONSTITUTE A DISMISSAL ON THE MERITS," IT IS " NOT COUNTED FOR THE PURPOSES OF DETERMINING WHETHER [HIS] SUBSEQUENTLY FILED [SECOND] PETITION IS SECOND OR SUCCESSIVE." LIKEWISE, BECAUSE BRUNSON'S SECOND PETITION SHOULD NOT HAVE BEEN BUT WAS TOO " DISMISSED ON PROCEDURAL GROUNDS" AS SUCCESSIVE AND " D[ID] NOT CONSTITUTE A DISMISSAL ON THE MERITS," IT TOO IS " NOT COUNTED FOR PURPOSES OF DETERMINING WHETHER [THIS] SUBSEQUENTLY FILED [THIRD] PETITION IS SECOND OR SUCCESSIVE." IN OTHER WORDS, PETITIONER'S FIRST AND SECOND PETITIONS, BOTH " DISMISSED ON PROCEDURAL GROUNDS" AND NOT " ON THE MERITS," CANNOT BE " COUNTED FOR THE PURPOSES OF DETERMINING WHETHER [THIS]

SUBSEQUENTLY FILED [THIRD] PETITION IS SECOND OR SUCESSIVE." CONSEQUENTLY, THIS THIRD PETITION CANNOT BE DETERMINED SECOND OR SUCCESSIVE. NOTWITHSTANDING, THE DISTRICT COURT COUNTED BRUNSON'S TWO PREVIOUS PETITIONS DISMISSED ON PROCEDURAL GROUNDS AND DETERMINED THIS THIRD PETITION AS SUCCESSIVE IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT IN SHARPE AND THE RELEVANT DECISION OF THIS SUPREME COURT IN SLACK. THUS, THE FOURTH CIRCUIT'S AFFIRMING THE DISTRICT COURT'S COUNTING BRUNSON'S PREVIOUS TWO PETITIONS DISMISSED ON PROCEDURAL GROUNDS TO DETERMINE THIS THIRD PETITION SUCCESSIVE IS IN DIRECT CONFLICT WITH IT'S OWN DECISION IN SHARPE AND THE RELEVANT DECISION OF THIS SUPREME COURT IN SLACK.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE JUDGMENT BELOW SHOULD BE REVERSED.

RESPECTFULLY SUBMITTED

JONATHAN EUGENE BRUNSON

SEPTEMBER 4, 2024.