24-6868

No. _____

ORIGINAL

In the Supreme Court of the United States

IN RE JAMES ERIC MANSFIELD

ON PETITION FOR A WRIT OF HABEAS CORPUS
TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF HABEAS CORPUS

JAMES ERIC MANSFIELD
Jefferson City Correctional Center
8200 No More Victims Road, 2D206
Jefferson City, MO 65101

Petitioner, Pro Se

QUESTIONS PRESENTED

1. Whether a federal court violates the Tenth Amendment by commandeering state evidentiary law and adding a heightened provision for the admissibility of defense evidence to deny habeas relief, and where the State has expressly rejected the federal provision in question.

2. Whether and to what extent the restrictions of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 apply to habeas petitions filed as original matters pursuant to 28 U.S.C. § 2241.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, James Eric Mansfield, was the petitioner in a habeas corpus proceeding before the Eighth Circuit Court of Appeals.

Kelly Morriss is Warden of the Jefferson City Correctional Center, who has custody of petitioner and was the respondent in the Eighth Circuit Court of Appeals.

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INTRODUCTION

Exercising its sovereign authority under the Tenth Amendment, the Missouri Supreme Court established its direct-connection doctrine for criminal trials, which holds "Evidence that another person had an opportunity or motive for committing the crime for which the defendant is being tried is not admissible without proof that such other person committed some act directly connecting him with the crime." *State v. Umfrees,* 433 S.W.2d 284, 287-288 (Mo. banc 1968). When federal habeas review involves consideration of this doctrine, the federal courts are bound by its legal interpretation made by the Missouri Supreme Court. *See e.g., Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975)("[S]tate courts are the ultimate expositors of state law, and we are bound by their constructions.")(hereinafter "the deference rule"). Petitioner's first habeas application involved this doctrine.

Petitioner's odyssey through the courts started at trial when he sought to present evidence that pointed to three state witnesses as the actual perpetrators of Mark Trader's murder. The trial court excluded the evidence after his attorney failed to present it in an offer of proof during pretrial motions, which hamstrung petitioner's defense and led to his conviction.

In deciding petitioner's first application for habeas relief, in which he argued his attorney's failure to present third-party-guilt evidence violated his Sixth Amendment right to effective assistance of counsel, the United States Western District of Missouri ignored the deference rule and instead commandeered Missouri's direct-connection doctrine in violation of the Tenth Amendment, then

heightened the doctrine's threshold requirement to include a clear-exoneration provision. Pet. App. D11. The court then denied petitioner relief reasoning his evidence would not be admissible because while it directly connected other people to the crime, it did not "clearly exonerate" petitioner, suggesting he may have acted with the other parties. Pet. App. D12.

By the time petitioner's habeas proceedings came to an end, seven federal judges had issued four opinions on the matter (Pet. App. B1, B10, C1, D1), all agreeing petitioner's evidence directly connected others to the crime. Four of those judges in two of the opinions properly deferred to how the Missouri Supreme Court interprets its doctrine, and found petitioner's trial counsel was ineffective. Pet. App. B10-B12, C1-C4. The Eighth Circuit's two-judge majority, however, chose to excuse the district court's illegal provision by positing evidence that points to another as the guilty party *generally* exonerates the accused. Pet. App. B7.

Thereafter, Missouri rejected the illegal provision when it decided *State ex rel. Kostner v. McElwain,* 340 S.W.3d 221, 249-250 (Mo. App. 2011). In light of this rejection, the decision of the district court cannot continue to stand because it violated Missouri's Tenth Amendment right to define its own laws, and denied petitioner due process by depriving him of a fair constitutional review of his underlying Sixth Amendment claim.

The "exceptional circumstances" required by Rule 20.4(a) for justifying the issuance of the writ are present in this case where a Tenth Amendment violation was the sole cause for denying petitioner's initial habeas application, leaving

petitioner no other avenue for relief but to file this second application before the Court. As such, petitioner's continued incarceration constitutes a concrete injury caused by his conviction and sentence, which gives him a personal stake in the outcome of his habeas proceedings and standing to raise a Tenth Amendment claim. This case also presents a profound quandary for addressing petitioner's Tenth Amendment claim since habeas law prevents him from seeking redress under 42 U.S.C. § 1983, and instead forcing upon him the AEDPA restrictions to which this Court has twice left unanswered whether those restrictions even apply to original petitions.

Exceptional circumstances to consider this case also exist since respondent argued in the Missouri Supreme Court that only this Court has "supervisory jurisdiction" to consider whether the district court lacked authority to "expand" Missouri evidentiary law. Pet. App. I2.

OPINIONS BELOW

The Eighth Circuit's judgment denying authorization to file a second habeas application (Pet. App. A1) is unpublished. The opinion of the Eighth Circuit affirming the denial of habeas relief (Pet. App. B1-B12) is reported as *Mansfield v. Dormire,* 202 F.3d 1018. The order of the Eighth Circuit granting a certificate of appealability (Pet. App. C1-C4) is unpublished. The opinion of the district court denying habeas relief (Pet. App. D1-D37) is unpublished. The order of the Eighth Circuit denying rehearing (Pet. App. E1) is unpublished but is reported at 2000 U.S. App. LEXIS 6746. The relevant order of the Missouri Supreme Court denying

habeas relief (Pet. App. F1) is unpublished. The opinion of the Missouri Court of Appeals affirming conviction (Pet. App. G1-G4) is reported as *State v. Mansfield*, 891 S.W.3d 854.

JURISDICTION

The judgment of the Eighth Circuit denying authorization to file a second application for habeas relief (Pet. App. A1) was entered on November 22, 2024, and is not appealable. The jurisdiction of this Court is invoked under 28 U.S.C. § 2241(a).

STATEMENT OF THE REASONS FOR NOT MAKING THE APPLICATION IN THE DISTRICT COURT

As required by Rule 20.4(a) and 28 U.S.C. § 2242, petitioner states he has not applied to the district court because the Eighth Circuit prohibited such an application on November 22, 2024, when the court denied petitioner's request to file a second application. Having exhausted his state remedies and having been denied permission by the Eighth Circuit to file a second application, petitioner cannot obtain relief in any other form or from any other court.

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES INVOLVED

The Tenth Amendment of the United States Constitution provides in relevant part:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

28 U.S.C. § 2244(a) provides in relevant part:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus into the detention of a person

> pursuant to a judgment of a court of the United States ... except as provided in section 2255."

28 U.S.C. § 2244(b)(1) provides in relevant part:

> "A claim presented in a second ... habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."

28 U.S.C. § 2244(b)(2) provides in relevant part:

> "A claim presented in a second ... habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed..."

28 U.S.C. § 2244(b)(3)(E) provides in relevant part:

> "The grant or denial of an authorization by a court of appeals to file a second ... application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."

28 U.S.C. § 2244(d)(1) provides in relevant part:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

STATEMENT OF THE CASE

I. Factual Background

On the night of April 28, 1992, Mark Trader and others were gathered at Papa Leone's, a small Italian deli and bar in Independence, Missouri. Among those who were present were petitioner, Dave Couzens (the owner of Papa Leone's), Jon Couzens (his son), John Hertlien, and J.R. Howerton. Both Hertlien and Howerton were employees of Papa Leone's. Late in the evening, Trader was assaulted by Jon Couzens and Howerton. Because of this, Papa Leone's closed early around 1:20 a.m. Trader was too drunk to drive, so a cab was called to take him home. While waiting

for the cab to arrive, Howerton gave instructions to Jon Couzens to make sure the cab driver took Trader straight home and nowhere else. Howerton then left Papa Leone's, and his whereabouts from this moment forward are unaccounted for.

A Yellow Cab eventually arrived at or around 1:40 a.m. Instead of placing Trader in the cab, Jon Couzens told petitioner to do it. He then gave petitioner Trader's address and instructed petitioner to tell the driver to take Trader straight home. After the cab left with Trader, petitioner and Hertlien got into petitioner's car and drove off in the opposite direction to locate the home of Andy Leone, Jon Couzens' uncle. After locating Leone's home, Hertlien requested petitioner to let him drive back to Papa Leone's. Petitioner obliged.

After dropping off Trader, the cabdriver, Scott Blanz, saw Trader with another man at the front door to Trader's apartment. Blanz described the man as being white with long curly hair and having a mustache, and wearing a long-sleeve collared shirt. This description matched the physical description and attire of Howerton, one of the two men who had just assaulted Trader (Tr. 759-760). However, Blanz also claimed he thought the man he saw with Trader was the same man who helped Trader into the back of the cab. Blanz then picked petitioner out of a photo array that did not include a photo of Howerton. Petitioner's arrest photo showed that he had short hair above the collar and no mustache. It was also undisputed that petitioner was wearing a short-sleeve crewneck tee shirt on the night of the murder.

At or around 2:10 a.m., petitioner and Hertlien arrived back at Papa Leone's. After speaking with Jon Couzens, Hertlien drove petitioner across the street to a Shop-N-Go for gas, then drove back to Papa Leone's and got out of petitioner's car. Petitioner then left in his car and arrived at his home in Raytown, Missouri, at around 2:20 a.m., (Tr. 1217-18), where he was seen by his mother in the hallway of their home as he headed to bed. (Tr. 1272-77; PCR Tr. 22-27).

From 2:10 until 3:30 a.m., the whereabouts of Hertlien, Jon Couzens, and Howerton are unaccounted for. Mark Trader was stabbed to death in front of his apartment at approximately 2:34 a.m. (Tr. 685, 1054-55).

At around 3:30 a.m., Hertlien visited the residence of his cousin, Angela Cascone. Hertlien and another person entered Cascone's home, used her bathroom, borrowed a shirt, and then left. Cascone never saw who was with Hertlien (Tr. 1032), nor did she see a car in her driveway. However, she did see what Hertlien was wearing, and her description of the clothes Hertlien had been wearing, specifically blue jeans, was completely contradictory of the gray sweatpants Hertlien claimed he had worn that night. (Tr. 1045). Jon Couzens also provided statements that Hertlien had been wearing blue jeans.

Later in the morning of April 29, Hertlien went back to Papa Leone's, and then drove to the Couzens' residence to meet with Jon Couzens. There, the two men conversed in private. Afterwards, Hertlien drove to the home of Alex West, another employee of Papa Leone's. After speaking privately with West, Hertlien was contacted by a family member, Sergeant John Passiglia of the Independence Police

Department (IPD). Passiglia asked Hertlien if he knew anything about the murder, and Hertlien indicated he did. Passiglia then picked up Hertlien and drove him to IPD to speak with homicide detective Kenneth Cavanah. There, Hertlien made a lengthy statement implicating petitioner in the crime.

Jon Couzens then came forward and claimed to have seen petitioner covered in blood, and that petitioner had confessed to killing Mark Trader. Alex West also came forward and provided a statement claiming that petitioner had bragged to him about owning the kind of knife Hertlien alleged petitioner had used to kill Trader.

Detective Cavanah then summoned petitioner's girlfriend, Joanna Mortallaro, to IPD to provide information about petitioner. However, prior to interviewing her, detectives allowed Jon Couzens to sit down with Ms. Mortallaro and speak with her privately. Thereafter, Ms. Mortallaro gave a statement claiming to have seen a knife in petitioner's possession that was identical to the knife Hertlien said was used to kill Trader.

Based on these statements, IPD arrested petitioner, seized his car and clothes, and searched his house. Police failed to recover any physical evidence, fingerprints, or DNA linking petitioner to the killing of Mark Trader. In fact, the State's extensive forensic testing conducted that same day, including its use of Luminol on petitioner's body, his car, and the clothes he had been wearing the night of the murder produced negative results for the presence of blood on these items. (Tr. 181-82, 877, 1017-20). No murder weapon was ever recovered, and no proof was

ever established that petitioner ever owned a knife like the one described by Hertlien that was used to kill Trader.

Detectives also had Hertlien sit in an adjacent jail cell to petitioner, conceal a tape recorder, and try to elicit incriminating information from petitioner. Before petitioner was placed in the cell, Hertlien had bragged to three men about his involvement with killing Trader, and admitted to stabbing Trader nine times with the help of two other people. Pet. App.J1-J2.

After being arraigned for murder, petitioner posted bond and was released from custody. On May 7, 1992, a grand jury indicted petitioner for first-degree murder and armed criminal action.

During the pretrial discovery, an abundance of evidence came to light through the depositions of several state witnesses and the victim's family, which revealed Dave Couzens, Jon Couzens, Howerton, and Hertlien had killed Mark Trader over a $4,000 botched drug deal and $1,000 in personal debts.[1] In the fall of 1991, Trader was cheated out of $4,000 in a botched drug deal, and out of fear for his life he went into hiding. In January of 1992, Trader came out of hiding and phoned his ex-wife, Phyllis Winters, to tell her about the botched drug deal and that he would have to ask his family for the money to pay off the drug debt to get him out of trouble with Dave Couzens. Later that same month, Trader, Winters, and a friend of Trader's named Mark Holcomb were together at Papa Leone's. Dave Couzens called Trader into the back office to discuss Trader's debts. At some point

[1] This evidence is included in the private investigator's report following his interview of Phyllis Winters (pgs. 91, 92, 94-100); Winters' deposition (pgs. 14-15, 19, 20, 21, 22, 23, 50, 53); Hertlien's deposition (p. 98); and Jon Couzens' deposition (p. 60).

in the meeting, Howerton was called into the back office because "the numbers didn't jive." The money Trader reportedly owed to Papa Leone's was $4,000 for the botched drug deal, $800 to Dave Couzens, $135 to Jon Couzens, and $50 to Howerton for a total of $4,985.

On April 27, 1992, Trader finally persuaded his brother, John Trader, to pay off the botched drug deal and other debts that Trader owed Couzens. John Trader accordingly wrote a check for $5,000 and gave it to Dave Couzens. Two days were required for the check to clear. On that second day, Mark Trader was killed.

On the night of April 28, 1992, and into the early morning hours of April 29, Trader was at Papa Leone's with his ex-wife. Dave Couzens took Trader away from Winters, and the two went outside for a private conversation. Trader returned to the bar nervous. Later in the night, Trader was assaulted by Jon Couzens, and then by Howerton. Dave Couzens left the state of Missouri following his private conversation with Trader, presumably to establish his alibi, and the whereabouts of Howerton and Jon Couzens at the time of the murder are unknown. The victim's father, Harley Trader, told detectives Papa Leone's was responsible for his son's death. (Tr. 984).

Before placing Hertlien in the jail cell next to petitioner, Detective Robert West instructed Hertlien to leave his coat with the booking personnel. When Hertlien refused and instead attempted to leave his coat with Joanna Mortallaro, Detective West became suspicious, recalling that Hertlien had been wearing the coat on the night of the murder. Detective West then seized Hertlien's coat and

discovered a piece of paper in the pocket with writing that identified a red, two-door Honda Prelude and its tag number. Pet. App. K1. Witnesses say they saw a red, foreign, two-door sports car on the night of the murder, but couldn't make out the make or model. Petitioner owned a red, two-door Nissan Sentra.

During the time Hertlien was at the Independence City Jail, he bragged to Leonard Berryman that three of them killed Trader. He then told Jessie Kessler that he had stabbed Trader nine times while two others helped. Hertlien then told Nick Nichols that he and two others killed Trader. Pet. App. J1-J2.

II. State Court Proceedings

Trial commenced on January 28, 1992, in the Circuit Court of Jackson County, Missouri, before the Honorable Edith Messina. The prosecution's case rested upon the credibility of its star witness, John Hertlien, who received immunity in exchange for his testimony. To salvage their witness' questionable testimony, the State filed a motion *in limine* seeking to exclude the defense from introducing any evidence that someone other than petitioner was responsible for Mark Trader's death, specifically all evidence that Hertlien, Howerton, and Jon Couzens committed the crime. The State's motion rested on Missouri's direct-connection doctrine, which requires third-party-guilt evidence to be of such proof as directly connects the other person with the crime. *See Umfrees*, 433 S.W.2d at 287-288.

Petitioner's counsel failed to make an offer of proof that would point out Howerton, Hertlien, and Jon Couzens as the actual killers, and directly connect those men to the crime with evidence of Hertlien confessing to being at the crime

scene and destroying evidence at the Cascone residence, along with his bragging about killing Trader with two other people; Howerton and Couzens having assaulted Trader just an hour before the murder; and Blanz's description of a man with Trader at the crime scene that matched Howerton's description. Rather, counsel kept his response to the State's challenge vague, stating:

> "The victim spent his last hours in a bar in Independence called Papa Leone's. Several people in the bar. And it is my contention that what transpired between the victim and those people in the bar, specifically assaults, fights, drunken behavior, bad language, invitations to step outside and settle the matter and ultimately a cab being called to put the victim into it to send home, are relevant to the whole issue of who did it."

(Tr. 26-27). Absent any evidence directly connecting these men to the crime, the trial court had no choice but to grant the State's motion. This effectively hamstrung petitioner's defense, and prevented him from introducing any viable evidence that would impeach Hertlien and Jon Couzens. But ultimately, it prevented petitioner from answering the most logical question a juror could ask: "if petitioner didn't kill Mark Trader, who did?"

Although the State called thirty-four witnesses, primarily police officers, detectives, and crime-scene technicians, the crux of its circumstantial case was the testimony of Hertlien and Jon Couzens, who both testified to seeing petitioner inside his car covered in blood. However, the State's forensic specialists, Vernon Wilson and Jon Lonkausky, testified if there was any blood in petitioner's car they would have found it with the Luminal testing, even if the car had been cleaned up. All tests for blood being inside petitioner's car or on the clothes he had been wearing

produced negative results. (Tr. 181-82, 484, 493, 503-05, 653-54, 658-59, 1007-11, 1016-20).

Petitioner presented an alibi defense, and testified on his own behalf, admitting to the jury that he and Hertlien drove off together in his car after Trader left Papa Leone's in Blanz's cab, but denying they went to Trader's apartment or that he had anything at all to do with the murder. In closing argument, the State admitted to the jury it had no plausible theory for why petitioner would have wanted to kill Trader.

After deliberating for five hours, the jury returned a guilty verdict for first-degree murder and armed criminal action. Judge Messina then sentenced petitioner to concurrent terms of life without parole and life, respectively, and later denied petitioner's motion for post-conviction relief.

Thereafter, the Missouri Court of Appeals denied petitioner's direct appeal. Pet. App. G4.

III. First Federal Habeas Proceedings

On April 22, 1996, two days prior to the enactment of the AEDPA, petitioner filed his first application for habeas relief in the United States Western District of Missouri under 28 U.S.C. § 2254. Among other claims, petitioner asserted his attorney was ineffective under the Sixth Amendment for failing to present third-party-guilt evidence in an offer of proof that would withstand the threshold requirement of Missouri's direct-connection doctrine.

While petitioner's case was pending, the Missouri Supreme Court handed down its decision in *State v. Butler*, 951 S.W.2d 600 (Mo. banc 1997), which reversed

a capital murder conviction after finding defense counsel was ineffective for failing to investigate and present third-party-guilt evidence. *Id.* at 608-610. The Missouri Supreme Court weighed Butler's evidence under the controlling guidance of *Umfrees,* and held his evidence satisfied the doctrine's threshold requirement for admissibility. *Id.* at 609. *Butler*'s interpretation of the doctrine echoed the court's original interpretation in *Umfrees.*

On September 16, 1997, the district court denied petitioner habeas relief. Pet. App. D1-D37. In considering petitioner's Sixth Amendment claim and whether his evidence satisfied Missouri's threshold requirement as interpreted in *Umfrees* and *Butler,* the district court ignored the federal deference rule enunciated in *Mullaney,* 421 U.S. at 691, and instead commandeered Missouri's doctrine by adding a "clear exoneration" provision that raised the doctrine's threshold. Pet. App. D11. The district court then reasoned petitioner's evidence would not be admissible because while it directly connected Howerton and Hertlien to the crime, it did not "clearly exonerate" petitioner, suggesting he may have acted with the other parties. Pet. App. D12. Thereafter, the district court denied petitioner a certificate of appealability (COA).

On November 30, 1998, the Eighth Circuit granted petitioner a COA on three interrelated claims of third-party-guilt, which included his Sixth Amendment claim. The three-judge panel properly deferred to the Missouri Supreme Court's interpretation of its doctrine, then structured the COA around *Butler* and concluded that petitioner had an abundance of evidence directly connecting third parties to

the crime, and his attorney's representation amounted to ineffective assistance of counsel, stating "Mansfield could have made an offer of proof under *Umfrees* and would have been free to mount a defense." Pet. App.C3-C4.

On the merits of petitioner's appeal, a split panel ruled against him. Although all three judges agreed petitioner's evidence directly connected other people to the crime, the two-judge majority excused the district court's illegal provision instead of deferring to the Missouri Supreme Court's interpretation of its doctrine. In a footnote, the majority rationalized the intrusion into state law:

> "[w]hatever the subtle distinctions between 'evidence that clearly exonerates,' and 'evidence that points to others as the guilty persons,' the import is the same—the evidence must tend to show that someone else did it. Such evidence generally exonerates the accused."

Pet. App. B7. Judge Heaney respectfully dissented, and issued a comprehensive breakdown of petitioner's evidence that properly deferred to *Umfrees*, then concluded petitioner had received ineffective assistance of counsel, which entitled him to a new trial. Pet. App. B10-B12. Afterward, Chief Judge Wollman, Judge R. Arnold, and Judge McMillan all voted to rehear petitioner's appeal before the entire Eighth Circuit en banc. Pet. App. E1. Thereafter, this Court denied certiorari. 531 U.S. 1154 (2001).

IV. Subsequent Tenth Amendment Proceedings

On February 7, 2008, Petitioner filed in the Missouri Supreme Court an application for a writ of habeas corpus pursuant to Missouri Rule 91. *In Re Mansfield v. Dormire,* No. 89090 (Mo. S.Ct. 2008). Among other claims, Petitioner raised a Tenth Amendment claim challenging the federal courts' intrusion into

Missouri doctrine, arguing the United States District Court failed to abide by the federal deference rule when it illegally commandeered Missouri's direct-connection doctrine to deny his federal habeas application. Pet. App. H1-H7. In its suggestions in opposition, respondent posited that the Missouri Supreme Court did not have "supervisory jurisdiction" to consider whether the federal court lacked authority to "expand" Missouri evidentiary law; only the United States Supreme Court did. Pet. App. I2. On March 18, 2008, the Missouri Supreme Court summarily denied the petition. Pet. App. F1. This Court then denied a writ of certiorari. 555 U.S. 900 (2008); *re'hr denied,* 555 U.S. 1089 (2008).

The following year, the Eighth Circuit barred private parties from raising Tenth Amendment claims. *United States v. Hacker,* 565 F.3d 522, 525-527 (8th Cir. 2009).

In 2011, respondent presented the Missouri Western District Court of Appeals with an original proceeding in certiorari to review a circuit court's entry of a writ of habeas corpus to Missouri inmate Dale Helmig, whose conviction was vacated based on third-party-guilt evidence that directly connected his father to the crime. *State ex rel. Kostner v. McElwain,* 340 S.W.3d 221, 249-250 (Mo. App. 2011)(hereinafter *Helmig*). As the *Helmig* court pointed out, respondent tried to argue that although Helmig's evidence directly connected his father to the crime, it only showed that his father attempted to cover up Helmig's crime, and therefore did not exonerate Helmig or exclude him from the murder. Here, respondent was attempting to end-run the Missouri Supreme Court's lower threshold by advocating

for the federal court's higher threshold enacted against petitioner in order to have Helmig's conviction reinstated. The court of appeals acknowledged that Helmig was not exonerated and remained eligible for retrial, *id.* at 227, then stated it could very well be true the evidence only showed that the father attempted to help cover up Helmig's involvement, *id.* at 250, but then held:

> "However, the fact that there may be other explanations for [the evidence] does not relieve us of the obligation to acknowledge that [the father] has now been connected to [material evidence in the murder case]. The connection of the [evidence to the father] opens the door to the admissibility of *all* evidence suggesting that [the father] had the motive and opportunity to kill [the mother]." *Id.*

Petitioner asserts that *Helmig* was an expressed rejection of the district court's "clear exoneration" provision. Indeed, subsequent to *Helmig*, the Missouri Eastern District Court of Appeals followed suit, showing us that the doctrine's threshold is not a "clear exoneration" of a defendant's guilt, but just a "clear link" between the alleged alternative perpetrator and the crime. *See State v. McKay,* 459 S.W.3d 450, 458 (Mo. App. 2014)(following *Helmig*).

Immediately after the *Helmig* decision, this Court handed down its decision in *Bond v. United States,* 564 U.S. 211 (2011), holding that a private-party criminal defendant has standing to raise a Tenth Amendment claim, and that their incarceration constitutes a concrete injury caused by their conviction, which satisfies the case-or-controversy requirement. *Id.* at 217 (abrogating the Eighth Circuit's *Hacker* decision).

On November 4, 2024, petitioner sought authorization from the Eighth Circuit to file a second habeas application to raise his Tenth Amendment claim. The

State responded on November 14, 2024, and suggested that petitioner was merely attempting to re-litigate his previous Sixth Amendment claim by bootstrapping it to a Tenth Amendment claim in violation of the AEDPA, 28 U.S.C. § 2244(b)(1). The Eighth Circuit denied petitioner's request on November 22, 2024. Pet. App. A1.

REASONS FOR GRANTING THE PETITION

The question in this case is whether a federal court violates the Tenth Amendment by adding heightened provisions to state evidentiary laws it doesn't like or deems weak in order to deny a state prisoner federal habeas relief. The answer to that question must turn on whether an integral operation in an area of traditional function was involved, and whether the federal court's action involved an unpermitted interference with the State's decision making. Because a private-party criminal defendant has a personal stake in the outcome of his own habeas proceedings and is asserting his own rights and interests, Article III of the Constitution does not bar a petitioner from raising a Tenth Amendment claim. The final aspect is redressability: if the illegal provision were removed, would the petitioner's underlying claim be granted and his conviction vacated. And as respondent argued in the Missouri Supreme Court, only this Court has "supervisory jurisdiction" to consider these questions. Pet. App. I2.

I. The Tenth Amendment prohibits a federal court from invading the sovereign authority of a state and heightening its laws.

This Court's first experience with illegal commandeering occurred in the 1970's when it was still a "novel phenomenon." *Printz v. United States*, 521 U.S. 898, 925 (1997)(describing a string of EPA cases illegally commandeering states).

See also New York v. United States, 505 U.S. 144, 174-177 (1992)(deciding whether federal legislation illegally commandeered states into taking position of nuclear waste); *Hodel v. Virginia Surface Mining Recl. Assn.,* 452 U.S. 264, 288 (1981)(deciding whether the Surface Mining Act of 1977 illegally commandeered state legislation). Prior to 1985, the test for what constituted an illegal commandeering of state law was determined by *National League of Cities v. Usery,* 426 U.S. 833 (1976). At that time, whether the federal government illegally commandeered the states involved a determination of whether an integral operation in areas of traditional functions was involved, and whether state decision-making was displaced. If so, the action of the federal government was unconstitutional as violative of the Tenth Amendment.

Creating and enforcing evidentiary laws are integral operations of the Missouri courts in areas of traditional functions, and when the district court added its heightened provision in petitioner's case it took over Missouri's direct-connection doctrine, violating *National League of Cities.* In addition, the district court did not give Missouri a choice whether or not to adopt the heightened provision; the district court simply enacted it. *Cf. Hodel,* 452 U.S. at 288 (avoiding a Tenth Amendment violation by giving the State the choice of whether to enforce federal regulation). Even though Missouri remained free to reject the illegal provision and not enforce it, as was the case in *Helmig,* under the terms of finality the federal courts were not allowed to then reopen *sua sponte* petitioner's case eleven years later to undo its violation. *Cf. Atlanta Gas Light v. U.S. Dep't of Energy,* 666 F.2d 1359, 1369 (11th

Cir. 1982)(if any state refused to implement the federal regulation, the Secretary of Energy had no choice but to rescind the delegation). Had the Missouri courts acquiesced to the district court's illegal provision, it would have directly impaired Missouri's ability to structure its own evidentiary laws without federal interference.

However, in 1985 this Court overruled *National League of Cities* with its decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court reasoned *National League of Cities* did not offer a general explanation of how a "traditional" function was to be distinguished from a "nontraditional" one, which was causing federal and state courts to struggle with the task of identifying a traditional function. *Id.* at 530. Those courts' attempts proved to be "impracticable and doctrinally barren," *id.* at 557, requiring a clearer and more descriptive test of "separate and independent existence."

What *Garcia* found problematic wasn't the perception that the Constitution's federal structure imposes limitations, but rather the nature and content of those limitations. *Id.* at 547. To define the limits on Congress' authority to regulate the States under the Commerce Clause, the Court reverted to a century-old test of identifying certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." *Id.* at 547-548 (quoting *Lane County v. Oregon*, 74 U.S. 76 (1869)). This test, the Court believed, underlaid its use of the "traditional governmental function" concept in *National League of Cities.*

1. The district court's action meets *Garcia*'s definition of an illegal commandeering violative of the Tenth Amendment.

Garcia holds that the states unquestionably "retain a significant measure of sovereign authority," *id.* at 549 (citing *EEOC v. Wyoming,* 460 U.S. 226, 269 (1988)(Powell, J., dissenting)), but they do so only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. Petitioner believes this "separate and independent existence" test is entirely operable for habeas litigation. For example, "federal supervision over ... the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference[,] except as permitted, is an invasion of the authority of the State and ... a denial if its independence." *Id.* at 549-550 (referencing Justice Field's dissenting opinion in *Baltimore & Ohio R. Co. v. Baugh,* 149 U.S. 368 (1893)); *see also Alden v. Maine,* 527 U.S. 706, 754 (1999)(quoting the "any interference" prong)(internal citations omitted).

Applying *Garcia* to petitioner's claim, it is clear the Constitution has not divested Missouri of its powers to create and enforce evidentiary laws even though the federal courts retain supervisory authority to assure such laws do not violate the Constitutional rights of criminal defendants. *See e.g., Clark v. Groose,* 16 F.3d 960, 963 (8th Cir. 1994)(habeas relief may be granted on an issue of state law if it "infringes upon a specific constitutional protection or is so prejudicial that it amounts to a denial of due process.")(internal citations omitted). Nor is there any authority that transfers Missouri's power to the federal courts for the purpose of

heightening any state law it dislikes or deems weak. *Garcia,* 469 U.S. at 546 (discussing the democratic fears of how an unelected federal judiciary may make decisions about state policies it dislikes).

Respondent will most assuredly take the position that the illegal provision was nothing more than a misinterpretation of Missouri law, and not an illegal commandeering or displacement of the State's decision making. But respondent does not speak for the district court, and cannot say why the court added its heightened provision. Even so, such a position would run afoul of *Garcia,* which makes clear *any unpermitted interference* with Missouri's direct-connection doctrine is an invasion of the State's authority and a denial of its independence, making the district court's prior action violative of the Tenth Amendment. Indeed, the deference rule enunciated in *Mullaney* was intended to prevent the district court from misinterpreting the doctrine by binding the court to the doctrine's interpretation in *Umfrees* and *Butler,* and thereby not creating an erroneous evidentiary ruling that would rise to the level of a due process violation. *See e.g., Montana v. Egelhoff,* 518 U.S. 37, 53 (1996); *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973). Regardless of why the district court added its heightened provision, it constituted an "unpermitted interference" that precludes any end-run around *Garcia* by relabeling the interference as a misinterpretation.

II. Petitioner has a personal stake in the outcome of the proceedings, and has suffered an injury in fact that is traceable to the district court's action.

As a prefatory note, petitioner is precluded from seeking redress under 42 U.S.C. § 1983 because this Court holds that habeas corpus is the exclusive remedy

for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983. *Preiser v. Rodriquez,* 411 U.S. 475 (1973). Despite this, petitioner is still subject to the Article III requirements, as well as prudential rules, applicable to all litigants and claims. *Bond,* 564 U.S. at 225.

This Court requires petitioner to have suffered an "injury in fact"—an actual or imminent invasion of a legally protected interest that affected him in a personal and individual way. There must also be a casual connection between the injury and the conduct complained of that is "fairly traceable" to the district court's prior action. Finally, it must be likely that petitioner's injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)(collecting cases). "Injury in fact" is the one constant element in judicial statements concerning standing, requiring a "personal stake" in the outcome. *See e.g., Bond,* 564 U.S. at 217; *Camreta v. Greene,* 563 U.S. 692, 701 (2011); *Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261 (1977); *Warth v. Seldin,* 422 U.S. 490, 501 (1975); *Baker v. Carr,* 369 U.S. 186, 204 (1962).

It is without argument petitioner has a personal stake in his own habeas litigation: his freedom versus his continued incarceration. *See e.g., Bond,* 564 U.S. at 217 (a petitioner's incarceration constitutes a concrete injury caused by the conviction). By having his first application denied for not satisfying an illegally added provision to state law despite all seven federal judges who reviewed his case finding he had directly connected third parties to the crime as required, petitioner

suffered an actual invasion of his due process rights to a fair constitutional review of his underlying Sixth Amendment claim, which has now sealed him behind bars for the rest of his life for a crime he did not commit. Petitioner's injury is easily traceable to the district court's prior action. This was not the action of the Missouri courts. No, it was contrived entirely by the district court then excused by the Eighth Circuit's two-one majority, but then rejected by Missouri in *Helmig*.

1. Petitioner is asserting his own constitutional interests.

The prudential standing rule normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves. *See e.g., Warth*, 422 U.S. at 499. To avoid this bar, petitioner asserts his own constitutional interests. *Bond,* 564 U.S. at 220 (private-party criminal defendant seeks to vindicate her own constitutional interests).

Private-party criminal defendants are the best proponents to assert their own rights and interest in habeas litigation, *cf., Singleton v. Wulff,* 428 U.S. 106, 114 (1976), which is to say respondent cannot reasonably be expected to forego the State's own interests to rise up and challenge the constitutionality of petitioner's continued incarceration after the district court's unpermitted interference with Missouri doctrine or after Missouri rejected the illegal provision in *Helmig.* Respondent has no incentive to object to the federal intrusion that serves to relieve the State from having to retry or even release petitioner. Because respondent acquiesced to the district court expanding Missouri doctrine, he cannot be relied upon to protect petitioner's interests. *See e.g., New York,* 505 U.S. at 182 (noting

"powerful incentives" that might lead state officials "to view departures from the federal structure to be in their personal interests").

2. Petitioner's injury would be redressed if the district court's illegal provision were removed, entitling him to a writ of habeas corpus.

If petitioner was the object of the action at issue, then there is little question the action caused him injury, and that a judgment preventing the action will redress it. *Lujan,* 504 U.S. at 561-562. No one can seriously question whether petitioner was the object of the action at issue—the action stemmed from the review of his first habeas application and underlying Sixth Amendment claim.

The four previous opinions of the seven federal judges who reviewed petitioner's underlying Sixth Amendment claim all held his evidence directly connected third parties to the crime. For instance, the district court's order held "[l]inking those men to the murder ... suggested that Howerton [and] Hertlien ... were involved[.]" Pet. App. D12. The COA panel's order found the evidence implicating third parties would have satisfied *Umfrees.* Pet. App. C3. The majority panel held "Mansfield's purported evidence, [w]hile it may point to others...." Pet. App. B7. Judge Heaney's dissenting opinion held "[a]ll the statements have a common thread: all directly link Hertlien to the crime, meeting Missouri's threshold evidentiary requirement." Pet. App. B11. When the illegal provision is removed there is no option left but to grant petitioner habeas relief and vacate his conviction in accordance with the Missouri Supreme Court's holdings in *Umfrees* and *Butler,* and the subsequent court of appeals decisions in *Helmig* and *McKay. See also Holmes v. South Carolina,* 547 U.S. 319, 326 (2006)(prohibiting the exclusion of

third-party-guilt evidence under rules that serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote).

The "clear exoneration" provision to which petitioner is subjected to, and the continued incarceration he suffers would not have come about if this matter had been left to Missouri's interpretation and application of its direct-connection doctrine. *Cf. Bond,* 564 U.S. at 224-225 (discussing how petitioner's federal prosecution and conviction may not have come about had her legal troubles been left to the State).

III. The AEDPA restrictions do not apply to petitions filed as original matters pursuant to 28 U.S.C. § 2241.

When petitioner sought authorization from the Eighth Circuit to file a second application for habeas corpus relief to raise his Tenth Amendment claim, respondent argued in opposition that he should be denied authorization because the AEDPA requires it under 28 U.S.C. § 2244(b)(1).

In *Felker v. Turpin,* 518 U.S. 651 (1996), the Court addressed the restrictions Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposed upon habeas corpus, but expressly left open the question of whether and to what extent the AEDPA applies to petitions filed as original matters under § 2241, and how it affects the requirements petitioner must satisfy to show he is entitled to a writ of habeas corpus from this Court. *Id.* at 662-663; *see also, In Re Davis,* 557 U.S. 952 (2009)(noting that *Felker* left open the question of AEDPA's restrictions to original matters under § 2241).

The AEDPA restrictions were meant to punish state prisoners for abusing the writ with successive petitions that assert claims not previously raised, and when they seek to establish a claim by developing facts they opted not to establish during previous proceedings. *McClesky v. Zant,* 499 U.S. 467, 484-485 (1991); *Felker*, 518 U.S. at 652 (AEDPA constitutes a restraint on what is called "abuse of the writ"); *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 19 (1992). However, the restrictions were not meant to punish a prisoner for when a federal court abuses its power over habeas review by illegally commandeering state law to deny an application. For this reason alone, the AEDPA restrictions should not apply to petitioner's Tenth Amendment claim.

1. 28 U.S.C. § 2244(a) does not extend to state court judgments, or to Supreme Court justices entertaining applications for a writ of habeas corpus.

Section 2244(a) explicitly addresses judgments of a United States court and the provisions of § 2255. State prisoners obtain habeas relief under § 2254, whereas federal prisoners obtain habeas relief under § 2255. *In re Bowe,* 144 S.Ct. 1170 (2024). Based on this explicit language, it is clear § 2244(a) only applies towards federal prisoners, not state prisoners and state court judgments. Furthermore, § 2244(a) explicitly states it only extends to the requirements of circuit and district court judges entertaining applications for habeas relief, not to Supreme Court justices.

2. 28 U.S.C. §§ 2244(b)(1) and (2) are not applicable because they are explicitly restricted to applications filed pursuant to § 2254.

Section 2244(b)(1) requires dismissal when a claim presented in a second application under § 2254 was presented in a prior application. For two reasons, this section is not enforceable against petitioner. First, petitioner's Tenth Amendment claim was not presented in his first application because the claim did not come into existence until after the district court issued its decision. More to the point, § 2244(b)(1) explicitly states it only extends to applications filed "under section 2254." It does not mention applications filed under § 2241. The same limitation exists in § 2244(b)(2), which states it extends only to applications filed "under section 2254." *Cf. Felker,* 518 U.S. at 662 (holding that § 2244(b)(3) is not enforceable because it explicitly states it only extends to applications "filed in the district court"); *see also In re Bowe,* 144 S.Ct. 1170 (acknowledging the circuit split on whether § 2244(b)(1) extends to § 2255, and Justice Sotomayor asking for a circuit court to certify the question to this Court); *Avery v. United States,* 140 S.Ct. 1080 (2020)(same, with Justice Kavanaugh stating he would grant certiorari to resolve this issue). Consistent with this Court's reasoning in *Felker,* §§ 2244(b)(1) and (2) are not applicable.

3. 28 U.S.C. § 2244(b)(3)(E) does not preclude this Court from hearing habeas applications filed as original matters pursuant to § 2241.

Felker holds that the AEDPA does not preclude this Court from entertaining an application for habeas relief. 518 U.S. at 654. Although the AEDPA imposed new conditions on the Court's authority to grant relief, it did not deprive the Court of jurisdiction. *Id.* at 658. Nor do these conditions amount to a "suspension" of the writ contrary to Article I, § 9 of the Constitution. *Id.* at 664.

4. 28 U.S.C. § 2244(d)(1) is not enforceable against petitioner.

The plain language of § 2244(d)(1) clearly demonstrates that the one-year time bar is not enforceable in this rare and unique situation. Specifically, § 2244(d)(1)(A) addresses State court judgments under direct review. Petitioner's Tenth Amendment claim does not address a State court judgment under direct review, but rather the federal court judgment from his first habeas proceeding, and therefore § 2244(d)(1)(A) is not applicable. Secondly, petitioner does not allege any impediment created by the State that would have prevented him from filing a Tenth Amendment claim because the claim did not exist until petitioner was out of state court and well into his federal habeas proceedings, making § 2244(d)(1)(B) inapplicable. Nor did the time bar start to run under § 2244(d)(1)(C) because this Court in 2011 did not make the right of private parties to raise a Tenth Amendment claim retroactive. *Bond,* 564 U.S. 211; *See also, Dodd v. United States*, 545 U.S. 353 (2005)(explaining that the one-year time bar does not begin to run until the Court actually recognizes a new right made retroactive).

Nevertheless, should this Court apply § 2244(d)(1) to petitioner, he is entitled to equitable tolling and can establish "cause" for any alleged procedural default. *See e.g., Moore v. United States,* 173 F.3d 1131 (8th Cir. 1999)(indicating § 2244(d)(1)'s one-year time bar is subject to equitable tolling). *See* Claim IV. *infra* p. 31.

5. The requirements of 28 U.S.C. §§ 2254(b) and (d) are satisfied.

Petitioner exhausted his Tenth Amendment claim in 2008 when he presented the claim to the Missouri Supreme Court in his Rule 91 application for habeas

relief. Pet. App. H1-H7. In those proceedings, respondent argued that the Missouri Supreme Court did not have "supervisory jurisdiction" to consider whether the federal court lacked authority to "expand" Missouri evidentiary law; only the United States Supreme Court did. Pet. App. I2. Thereafter, the Missouri Supreme Court denied petitioner's application. Pet. App. F1. Accordingly, § 2254(b)(1)(A)'s exhaustion requirement is satisfied.

Because the factual predicate for petitioner's Tenth Amendment claim did not exist until the district court issued its decision two years after his state appellate and post-conviction proceedings were completed, § 2254(b)(1)(B) is not applicable because the only corrective process Missouri makes available this late in the collateral review process is habeas corpus under Missouri Rule 91, which petitioner filed for. Pet. App. H1. This satisfies § 2254(b)(1)(B)(i).

Circumstances also exist that satisfy § 2254(b)(1)(B)(ii). First, as mentioned above, respondent posited that the Missouri Supreme Court did not have "supervisory jurisdiction" to consider whether the federal court lacked authority to "expand" Missouri evidentiary law. Pet. App. I2. If correct, then § 2254(b)(1)(B)(ii) is not applicable since state habeas review is ineffective to protect petitioner's rights. Nevertheless, Missouri restricts habeas relief to just four types of claims: state jurisdictional issues, which this Tenth Amendment claim is not; manifest injustice, which cannot apply because the Tenth Amendment violation did not occur in the trial court; "cause and prejudice" or actual innocence for a procedurally barred claim, which this claim is not; and free-standing claims of innocence for prisoners

sentenced to death, which petitioner is not sentenced to. *State ex. rel. Amrine v. Roper,* 102 S.W.3d 541, 546-547 (Mo. banc 2003)(outlining the four types of claims for state habeas relief). Therefore, neither sub-paragraph of § 2254(b)(1)(B) is applicable because the corrective process Missouri has in place is ineffective to protect the rights of petitioner when dealing with an eleventh-hour Tenth Amendment claim.

IV. Even if any portion of the AEDPA were to apply, petitioner is entitled to equitable tolling, and can establish cause and prejudice.

The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. *Trevino v. Thaler,* 569 U.S. 413 (2013); *Martinez v. Ryan,* 566 U.S. 1 (2012); *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). The rules for when a prisoner may establish cause are elaborated in the exercise of the Court's discretion. *McClesky,* 499 U.S. at 490; *Wainwright v. Sykes,* 433 U.S. 72, 83 (1977). As a last resort, a prisoner may assert a miscarriage of justice exception. *Dretke v. Haley,* 541 U.S. 386, 393-394 (2004); *Schlup v. Delo,* 513 U.S. at 327; *House v. Bell,* 547 U.S. 518, 536-537 (2006).

1. The novelty of a Tenth Amendment claim in habeas litigation establishes cause pursuant to *Reed v. Ross*, 468 U.S. 1 (1984).

At the time petitioner appealed to the Eighth Circuit from the denial of his first habeas application (1997-98), he had cause for not raising a Tenth Amendment claim based on the "novelty" of the issue. Specifically, there was no clear legal basis establishing private-party standing to raise such claims in habeas litigation, and

the Missouri courts had not yet objected to the district court's illegally provision. *Reed v. Ross*, 468 U.S. 1, 12-14 (describing how the "novelty" of an issue establishes cause for a procedural default).

Moreover, *Reed* would not have allowed petitioner's counsel on appeal to tactically forgo the clear-error claim to which the Eighth Circuit granted a COA in order to hedge the strategic risks of a Tenth Amendment claim. *Id.* at 14 (discussing the offense to the principles of comity, and the undermining of the judicial system to the detriment of all concerned if such actions by counsel were allowed). It is safe to say a Tenth Amendment claim in the context of habeas litigation would not have been appreciated by the Eighth Circuit at that time. *See e.g., Hacker,* 565 F.3d at 525-527 (barring criminal defendants from raising Tenth Amendment claims). Although the concept of private-party standing to raise Tenth Amendment claims in other areas of law was enjoying acceptance in some circuits, it was also being rejected in others, and had never been presented in the context of habeas litigation until now. In fact, no one had ever presented a Tenth Amendment habeas claim to the Missouri Supreme Court until petitioner in 2008. Even at that time, assuming the claim was cognizable in state court, *see e.g., Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 141 (Mo. banc 1990)(exercising jurisdiction to entertain a private-party Tenth Amendment claim), Missouri would not reject the illegal provision for another three years. *See Helmig*, 340 S.W.3d at 249-50 (2011), at which time this Court would also abrogate the Eighth Circuit's *Hacker* decision with its decision in

Bond. Regardless, the claim is not one that Missouri Rule 91 allows for obtaining state habeas relief. *See Amrine,* 102 S.W.3d at 546-547.

2. Petitioner asserts actually innocence as a gateway to have his Tenth Amendment claim reviewed on the merits.

Although a *Schlup* gateway claim requires new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial, 513 U.S. at 324, this Court's analysis is not limited to such evidence. *See House,* 547 U.S. at 537 (relying on *Schlup*). This Court must 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. *Id.* at 538; *see also Schlup,* 513 U.S. at 327-328 ("actual innocence" allows the Court to consider the probative force of relevant evidence that was either excluded or unavailable at trial). The *Schlup* standard does not require absolute certainty about petitioner's guilt or innocence. Petitioner's burden is to demonstrate that it is more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt. *House,* 547 U.S. at 538.

During his first habeas proceedings, petitioner presented the district court with an abundance of third-party-guilt evidence that revealed Howerton, Hertlien, and Jon Couzens actually murdered Trader. *Supra* pages 9-11. Four different witnesses (Snodgrass, Berryman, Nichols, and Kessler) described Hertlien's confessions to murdering Trader with two other people (Pet. App. J1-J2); several

more witnesses described Jon Couzens and Howerton violently assaulting Trader at Papa Leone's just an hour before Trader was killed; and still other witnesses described Trader hiding from Dave Couzens out of fear for his life. *Cf. House*, 547 U.S. at 551. As in *House,* it bears emphasis that the testimony of these witnesses is not comparable to the sort of eleventh-hour affidavit vouching for a defendant and incriminating a conveniently absent suspect. *Id.* at 552. Snodgrass, Berryman, Nichols, and Kessler were all interviewed by Detective Cavanah a few days after Hertlien made his confessions, and nowhere in his report does Cavanah try to downplay or rationalize Hertlien's statements as a ruse to get petitioner to confess. The other witnesses implicating the Couzens, Howerton, and Hertlien were interviewed and deposed at the onset of the investigation and discovery stage.

Furthermore, the eye-witness testimony of the cab driver, Blanz, stating he believed the man he saw with Trader at the crime scene was petitioner, was impugnable because his description was inaccurate as to petitioner, Pet. App. B12, but did describe Howerton in great detail, whose whereabouts at the time of the murder are unaccounted for. As this Court emphasizes, when identity is in question motive is key. *Id.* at 541. Here, the State conceded to the jury in closing argument that there was no plausible motive for why petitioner would want to have killed Trader. In contrast, the Couzens, Howerton, and Hertlien had a strong motive for killing Trader over a botched drug deal and $5,000 debt. In a case like this where the State's evidence was entirely circumstantial, a jury would have given petitioner's evidence great weight. It was only the testimony of Hertlien and Jon

Couzens that linked petitioner to the crime. No physical or forensic evidence corroborated their testimony, and now they and Howerton are directly connected to Trader's murder. *Cf. House* at 540-541.

At trial the jury did not get to hear any of this evidence, which would have effectively impeached Hertlien and Jon Couzens, and would have answered the all-important question: if petitioner didn't kill Trader than who did. This is not a case of conclusive exoneration, and petitioner admits some aspects of the State's circumstantial case still support an inference of guilt. Yet, that evidence connecting petitioner to the crime, the testimony of Hertlien and Jon Couzens, has been called into serious question now that petitioner has put forward substantial evidence pointing to Hertlien, Howerton, and Jon Couzens as the actual perpetrators of Trader's murder. *Cf. House* at 553-554. In addition, petitioner was the only person who could provide an alibi witness, whereas no one could account for the whereabouts of Howerton, Hertlien, and Jon Couzens at the time of the murder, with the exception of Hertlien admitting he was at the crime scene and at Cascone's residence destroying evidence. This Court should conclude that consistent with the findings in *Schlup* and *House,* this is a rare case where had the jury heard all the conflicting testimony and evidence directly connecting the State's star witnesses to the crime, it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

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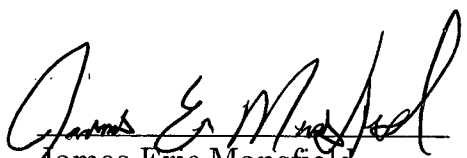
In the end, Congress did not extend the AEDPA's restrictions to habeas petitions filed as original matters pursuant to 28 U.S.C. § 2241, and therefore the AEDPA cannot be used to bar consideration of petitioner's Tenth Amendment claim. Nor can a federal court sidestep a Tenth Amendment violation by relabeling its unpermitted interference with state law as a misinterpretation, or by denying a habeas petitioner redress after his State refuses to follow the federal provision in question.

CONCLUSION

A writ of habeas corpus should issue.

Respectfully submitted.



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Petitioner, pro se