NO. 21-_____

In the Supreme Court of the United States

SCOTT CROW, DIRECTOR,

Petitioner,

v.

KARL FONTENOT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1988, an Oklahoma jury convicted Karl Fontenot in the abduction and killing of Denice Haraway. The chief evidence against Fontenot was his own confession—a confession the Oklahoma Court of Criminal Appeals found, in affirming Fontenot's convictions, was corroborated in nine critical respects.

In 2016, nearly *two decades* after his statute of limitations under the Antiterrorism and Effective Death Penalty Act had expired, Fontenot filed a federal habeas corpus petition. The State moved to dismiss as untimely, but the district court denied the State's motion, finding both that Fontenot could pass through the actual-innocence gateway and that *every* one of Fontenot's substantive claims entitled him to relief, without allowing a merits response by the State.

The Tenth Circuit affirmed. Over a dissent, the majority held Fontenot had made a credible showing of actual innocence based on "new," "reliable" evidence. While acknowledging a circuit split on the issue, the majority concluded that Fontenot's evidence of alleged innocence, despite the fact that it was largely available at the time of trial, was nevertheless "new" within the meaning of this Court's actual-innocence precedents.

The question presented is whether "new" evidence, as referred to in *Schlup v. Delo*, 513 U.S. 298 (1995), and *McQuiggin v. Perkins*, 569 U.S. 383 (2013), means evidence that was not available at the time of trial or, under the broad reading adopted below, encompasses any evidence, including evidence known by the defendant and/or available with due diligence, not presented at trial.

LIST OF PROCEEDINGS

Pontotoc County District Court
Case No. CRF-1984-143
State of Oklahoma v. Fontenot
Judgments and Sentences entered:
September 25, 1985

Oklahoma Court of Criminal Appeals
Case No. F-1985-769
Fontenot v. State of Oklahoma
Judgment entered: August 11, 1987

Hughes County District Court
Case No. CRF-1988-43
State of Oklahoma v. Fontenot
Judgments and Sentences entered: June 14, 1988

Oklahoma Court of Criminal Appeals
Case No. F-1988-571
Fontenot v. State of Oklahoma
Judgment entered: June 8, 1994

Oklahoma Court of Criminal Appeals
Case No. PC-2015-76
Fontenot v. State of Oklahoma
Judgment entered: October 29, 2015

United States District Court for the
Eastern District of Oklahoma
Case No. 16-069-JHP-KEW
Fontenot v. Allbaugh
Judgment entered: August 21, 2019

United States Court of Appeals for the Tenth Circuit
Case No. 19-7045
Fontenot v. Crow
Judgment entered: July 13, 2021

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OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals is published as *Fontenot v. Crow*, 4 F.4th 982 (10th Cir 2021), and is included in the Appendix at App.1a-214a. The order denying panel and en banc rehearing is unpublished and included below at App.500a-501a. The opinion of the federal district court is published as *Fontenot v. Allbaugh*, 402 F. Supp. 3d 1110 (E.D. Okla. 2019), and is included below at App.217a-493a. The State court's opinion on direct appeal following retrial is published as *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994), and is included below at App.512a-547a. The State court's opinion on direct appeal from the original conviction is published as *Fontenot v. State*, 742 P.2d 31 (Okla. Crim. App. 1987), and is included below at

App.548a-551a. The State court's opinion affirming the denial of post-conviction relief is unpublished, may be cited as *Fontenot v. State*, No. PC-2015-76 (Okla. Crim. App. Oct. 29, 2015) (unpublished), and is included below at App.502a-507a.

STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit was entered on July 13, 2021. App.1a. The court of appeals denied the State's petition for rehearing and rehearing en banc on October 6, 2021. App.500a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1)

> A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States is removed, if the applicant

was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2254(e)(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

I. The Abduction, Rape, and Murder of Denice Haraway

On April 28, 1984, Respondent Karl Fontenot and his co-defendant Tommy Ward kidnapped 24-year-old Denice Haraway from her workplace, McAnally's convenience store in Ada, Oklahoma, and thereafter raped and murdered her. The evening of the kidnapping, two men—one of whom was positively identified

as Ward—played pool at J.P.'s convenience store in Ada, just across the road and a quarter mile from McAnally's, from about 7:00 p.m. until about 8:30 p.m. App.549a. Although witnesses could not positively identify Fontenot as Ward's companion at J.P.'s, he "was said to resemble the man with Ward." App.550a. The two men left J.P.'s at around 8:30 p.m. "Shortly thereafter, Tommy Ward was seen leaving with Haraway from [the nearby McAnally's]." App.549a-550a.

By October of 1984, authorities had identified Ward as a suspect and, when questioned, Ward confessed, "inculpat[ing] Fontenot, an individual named Odell Titsworth, and to a slighter degree, himself." App.549a. As a result, both Ward and Fontenot were arrested. App.549a. On October 19, 1984, following his arrest, Fontenot confessed to the crimes in a videotaped statement. App.518a-519a. Fontenot's statement was "substantially in agreement with Ward's except that it more clearly inculpated Ward." App.549a. Thus, for purposes of examining Fontenot's actual-innocence claim, it is notable that his guilt of this crime has been shown by not one, but two confessions—confessions Oklahoma's highest criminal appellate court has found to be consistent.[1]

The men stated that Mrs. Haraway was robbed of approximately $150, abducted, and taken to the grounds behind a power plant in Ada where she was raped. App.549a. Fontenot said "she was then taken to an abandoned house behind the plant where Titsworth stabbed her to death. She was then burned

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[1] While Ward's confession inculpating Fontenot was excluded at Fontenot's second trial, assessment of an actual-innocence claim "is not bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327.

along with the house." App.549a. However, "[w]hen Haraway's remains were found[, subsequent to the confessions], there was no evidence of charring or of stab wounds, and there was a single bullet wound to the skull." App.549a. In any event, it is clear that both Fontenot and Ward, while admitting their involvement in the kidnapping and murder, manufactured details in an attempt to lessen their own culpability. Chiefly, "[i]n each [of] Ward's and Fontenot's statements, the instigator and ringleader in the criminal acts was said to be Titsworth. However, Titsworth was eliminated as a suspect within a few days of his arrest because of clear proof the police had that he had not been an accomplice." App.549a.

II. Trials and Direct Appeal Proceedings

In 1985, Fontenot and Ward were tried together in Pontotoc County District Court Case No. CRF-1984-183. Both co-defendants were convicted of first degree murder and sentenced to death. Thereafter, the Oklahoma Court of Criminal Appeals ("OCCA") reversed Fontenot's conviction, holding that the erroneous admission of co-defendant Ward's statement was not harmless. App.550a-551a.

In the meantime, in January 1986, almost twenty-one months after Mrs. Haraway disappeared, her remains were discovered in "hilly, rough brushland" in an area "30 miles east of Ada." App.23a.

In 1988, Fontenot was retried in Hughes County District Court Case No. CRF-1988-43, after a change of venue. He was again convicted of first degree murder and sentenced to death. He was also again convicted of robbery with a dangerous weapon, and kidnapping, and was sentenced to ten and twenty years on those counts, respectively. App.513a.

On June 8, 1994, the OCCA affirmed Fontenot's convictions and non-capital sentences, while remanding his death sentence for resentencing due to instructional error. App.513a, 545a. In that direct appeal, Fontenot challenged the voluntariness of his confession, the corroboration of his confession, the sufficiency of the evidence, and the effectiveness of his counsel. The OCCA found that Fontenot's confession to murder was voluntary and corroborated in nine separate ways.

First, the OCCA found it significant that Fontenot made two extrajudicial, post-crime statements in addition to confessing to the police.[2, 3] He told a friend, Gordon Calhoun, that he knew facts about the Haraway abduction—specifically the perpetrator's identity.

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[2] While the OCCA focused on admissions which Fontenot made to people other than the police, and the OCCA was specifically examining testimony from Fontenot's second trial, it is worth noting for purposes of his actual innocence claim that he made other very incriminating admissions in the presence of law enforcement after his confession (P/H Tr. V 1012-1015). At preliminary hearing, Detective Dennis Smith testified that sometime during a court appearance in November 1984, following his arrest, Fontenot made a statement, not in response to questioning, that he was guilty of "robbery, rape, kidnapping and abducting." (P/H Tr. V 1014). When Detective Smith was asked what he understood Fontenot to mean by the term "abducting," Detective Smith replied, "I took it to mean that abducting to him meant having sex with a dead person." (P/H Tr. V 1014). Thus, in addition to Fontenot's confession, the record is replete with instances where he made incriminating admissions both to law enforcement and lay witnesses which are inconsistent with his present claim of actual innocence.

[3] Citations to the designated record on appeal to the Tenth Circuit will be referred to as (ROA, Vol. ___). The trial transcript will be referred to as (Tr. [vol.] ___) and the preliminary hearing transcript will be referred to as (P/H Tr. [vol.] ___). These records are available below. *See* Sup. Ct. R. 12.7.

And while he was awaiting trial in the county jail, a fellow inmate, Leonard Martin, overheard him saying, "I knew we'd get caught." App.523a-524a.

Second, consistent with Fontenot's account of the abduction, the OCCA found that three witnesses, David Timmons, Linny Timmons, and Gene Whelchel, "saw Mrs. [Haraway] leaving the convenience store with a man on the day she disappeared. They saw this man take her to an old, gray primered Chevy pick-up, which Fontenot had described. They saw her enter from the passenger side, with the man following—just as Fontenot had described." App.524a.

Third, an insurance agent, Wayne Gridner, testified he insured a gray primered Chevy for its owner, Ward's brother (Joel Ward). A witness who knew both co-defendants, J.T. McConnell, testified they were friends and saw them riding around together in the Chevy pickup. App.524a-525a.

Fourth, one witness, Jim Moyer, who entered McAnally's just before the abduction testified that he saw two men generally matching Fontenot's and Ward's descriptions inside the store. The two men were driving an old, gray primered pickup. One of them acted as if he wanted the witness to leave. App.525a.

Fifth, another witness, Karen Wise, who worked just a quarter mile down the road at another convenience store testified about having seen two men matching Ward's and Fontenot's descriptions in her store earlier on the evening of the abduction. She described the truck they drove as red and gray primered. They were watching her and she felt uncomfortable. They left around 8:30 or 9:00 p.m. and headed towards McAnally's. App.525a.

Sixth, the manager of McAnally's, Monroe Atkinson, testified that $167 was taken from the store. Fontenot stated in his confession that they had taken about $150 during the robbery. App.525a.

Seventh, the blouse Mrs. Haraway wore on the evening of her abduction buttoned up the front and had lace around the collar and cuffs. Fontenot said in his confession that she had worn a blouse with ruffles around the sleeves and elastic in the sleeves. App.525a.

Eighth, the shoes found with Mrs. Haraway's remains were soft-soled, canvas shoes. Mrs. Haraway's husband characterized these shoes as "tennis" shoes. However, Fontenot gave a more accurate description of the shoes, specifically describing them as "soft-soled" shoes and stating they were not tennis shoes. The OCCA found it significant that "[d]uring oral argument . . . [Fontenot's] appellate counsel stated that information about Mrs. Haraway's shoes had not been made public prior to his confession." App.525a-526a.

Ninth, and most generally, there was considerable testimony describing Mrs. Haraway's life: her somewhat recent marriage to Steve Haraway; her eager anticipation of a teaching degree; her overall happiness and contentment; and her dedication to her job responsibilities. This corroborated Fontenot's statement that Mrs. Haraway did not willingly leave McAnally's but was abducted. App.526a.

The resentencing trial ordered by the appellate court never took place because, on September 18, 1995, Fontenot entered into a negotiated settlement in which he waived his right to jury re-sentencing in exchange for the prosecutor's recommendation of a sentence of life imprisonment without parole. App.47a.

III. State Post-Conviction Proceedings

Sixteen years later, on July 24, 2013, Fontenot filed an Application for Post-Conviction Relief in Pontotoc County, followed by an Amended Brief in Support of Application for Post-Conviction Relief. App.48a. The State answered Fontenot's post-conviction application on September 17, 2013. App.509a. On December 31, 2014, Fontenot's post-conviction application was denied by the state district court. App.508a-511a.

Fontenot appealed the denial of post-conviction relief to the OCCA, in OCCA Case No. PC-2015-76. App.502a. On October 29, 2015, the OCCA entered an Order Affirming Denial of Post-Conviction Relief, agreeing with the state district court that all of Fontenot's post-conviction claims were barred by laches, as he could have raised the claims years earlier. App. 502a-507a.

IV. Federal Habeas Corpus Proceedings

Because Fontenot's conviction became final prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), his statute of limitations to file a petition for writ of habeas corpus expired on the one-year anniversary of that statute, April 25, 1997. 28 U.S.C. § 2244(d)(1); *see Serrano v. Williams*, 383 F.3d 1181, 1183 (10th Cir. 2004).

On February 24, 2016, almost nineteen years after the expiration of the statute of limitations, Fontenot filed his petition for writ of habeas corpus in the District Court for the Eastern District of Oklahoma. App.53a. As a result of *ex parte* discovery orders, Fontenot was subsequently allowed to amend his habeas petition twice, ultimately filing his operative second amended habeas petition on March 15, 2019. App.56a. The State moved to dismiss on grounds that the habeas petition

was time-barred under the AEDPA and, alternatively, because a number of its claims were either unexhausted or procedurally barred based on the independent and adequate bar of laches applied by the OCCA. App.59a.

On August 21, 2019, the federal district court denied the State's motion to dismiss, finding Fontenot made a sufficient showing of actual innocence under *Schlup v. Delo*, and *McQuiggin v. Perkins*, to overcome his untimely filing. App.217a-493a. Notably, in so concluding, the federal district court did not mention, and certainly did not find to be rebutted, the OCCA's "nine points of corroboration" findings with regard to Fontenot's confession. This omission is significant given the statutorily mandated presumption of correctness that should have attended these findings, *see* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."), and the practical reality that a *confession* is powerful evidence against actual innocence. Compounding this error, the federal district court then—contrary to well-settled practice throughout Oklahoma's federal courts—proceeded to consideration of Fontenot's constitutional grounds for relief without calling for a merits response by the State. App.208a-209a (Eid, J., dissenting) ("The district court abused its discretion by failing to 'follow[] the traditional procedure of allowing Respondent to file a merits response after denying a procedural motion to dismiss.' Aplt. Br. at 46. Indeed, Oklahoma district courts routinely allow habeas respondents such as the State in this case to file answers after denying their pre-answer motions to dismiss."). Next, considering Fontenot's claims of error without the benefit of a response in opposition, the

federal district court unsurprisingly found merit with each and every one of Fontenot's claims. The court granted a conditional writ, noting that a writ of habeas corpus would issue "unless within one hundred twenty (120) days of the entry of this Order the State grants Respondent a new trial or, in the alternative, orders his permanent release from custody." App.493a.[4]

The State's appeal to the Tenth Circuit challenged the myriad ways in which the district court showed apparent favoritism to Fontenot and disregarded both AEDPA and common practice in its proceedings, as it would be expected to do when considering any other federal habeas corpus petition brought by any other state inmate. Despite this clear showing that habeas corpus relief was granted based upon a wholly deficient fact-finding process, the Tenth Circuit majority, over one well-reasoned dissent, affirmed the district court's finding that Fontenot presented a claim of actual innocence sufficient to overcome the untimeliness and procedural bars, in particular laches, that would have otherwise precluded review of his habeas claims. App.2a. Without reaching Fontenot's other claims, the majority agreed with the district court that

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[4] The federal district court resisted the State's timely and proper efforts to obtain a stay of its Opinion and Judgment, pending appellate review. It denied both a stay of Fontenot's release as well as a stay of the 120-day period for re-trial which it had imposed. By Order of November 4, 2019, however, the Tenth Circuit Court of Appeals stayed the Judgment to the extent it ordered that a re-trial must take place within 120 days. On December 19, 2019, Fontenot was released from the custody of the Department of Corrections, pending the outcome of appellate proceedings in this case. Following its affirmance of the grant of habeas relief, the Tenth Circuit Court of Appeals granted the State's unopposed motion for stay pending the filing of the instant Petition for Writ of *Certiorari*.

he was entitled to habeas relief based on a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). App.2a.

In relevant part, the majority rejected the State's threshold argument against Fontenot's actual-innocence claim. Specifically, the State asserted that much of Fontenot's proffered evidence of alleged innocence was not "new" within the meaning of *Schlup* because it had been available to the defense since the 1980s and, thus, at the time of Fontenot's trials. App.98a. The majority correctly recognized that, pursuant to *Schlup*, "[t]o be credible, a claim of actual innocence requires a petitioner to present 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" App.91a (quoting *Schlup*, 513 U.S. at 324). The majority noted that *Schlup* "did not precisely define what it meant by 'new reliable evidence that was not presented at trial,'" App.91a (quoting *Schlup*, 513 U.S. at 324) (alteration adopted), and "[a]s a result, 'there is a circuit split about whether the new evidence required under *Schlup* includes only newly discovered evidence that was *not available* at the time of trial, or broadly encompasses all evidence that was *not presented* to the fact-finder during the trial, *i.e.*, newly presented evidence.'" App.91a (quoting *Cleveland v. Bradshaw*, 693 F.3d at 633 (6th Cir. 2012)) (internal quotation marks omitted). Recognizing that "[t]his case require[d] [it] to pick a side," the majority "adopt[ed] the 'newly presented' view of *Schlup* evidence over the 'newly discovered through diligence' view," and therefore rejected the State's position that any evidence not presented at trial was not "new" if it was available at the time of trial. App.93a.

The majority then proceeded to consider the "six categories of new evidence in support of [Fontenot's] actual innocence gateway assertion," "contrasting the evidence put on at the 1988 new trial with that which is newly presented" and ultimately finding that four categories of evidence were particularly compelling and weighty. App.98a. The majority recognized that *Perkins* required consideration of Fontenot's lack of diligence and conceded that he "waited two decades. . . to first bring his claims in state court, which cuts against allowing the innocence gateway to open." App.142a. However, the majority determined that the eleventh-hour nature of Fontenot's evidence was not fatal in light of the alleged overall strength of his evidence and weakness of the State's case against him. App.143a. In sum, the majority held that the district court was correct to conclude that, in light of all of the evidence, it was more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt. App.143a.

Judge Eid dissented, disagreeing in pertinent part that Fontenot had presented a compelling case of actual innocence sufficient to overcome the AEDPA time-bar. She observed that, while the majority acknowledged this Court's principles limiting actual-innocence claims, it "fail[ed] to apply them in practice." App.203a. "Instead of viewing the relevant evidence as a reasonable juror would, the majority views it in the light most favorable to Fontenot." App.203a. The majority further overemphasized allegedly new evidence that was actually "cumulative" to that presented at trial, and "repeatedly dr[ew] inferences in support of Fontenot's innocence without considering whether a reasonable juror would draw the opposite inference." App.204a. Judge Eid also reasoned that, contrary to

Schlup's suggestion that "a petitioner must present new evidence that is consequential," Fontenot and the majority had, "[i]nstead of pointing to some paramount piece of consequential new evidence, . . . relie[d] on many small pieces—each with a problem of its own." App.205a-206a (citing *Schlup*, 513 U.S. at 324). While perhaps "the majority [found] the case against Fontenot to be so weak and insignificant that the slightest new piece of evidence—no matter how peripheral, cumulative, or remote in time—would have changed the outcome," the majority improperly "fail[ed] to give sufficient weight to the fact that Fontenot confessed." App.206a.

The Tenth Circuit denied panel and en banc rehearing. App.500a-501a. Judge Eid would have granted panel rehearing. App.500a.

REASONS FOR GRANTING THE PETITION

Although this case is factually intense, it presents a compelling and appropriate case for certiorari review because the majority's error in considering Fontenot's evidence of alleged innocence is, at bottom, actually quite simple and apparent. In short, the majority improperly found Fontenot had opened the actual-innocence gateway based on evidence that was not actually "new" within the meaning of *Schlup v. Delo*, and *McQuiggin v. Perkins*. Certiorari review is warranted for three reasons.

First, the majority's definition of what constitutes "new," and for that matter "reliable," evidence pursuant to *Schlup* and *Perkins* both misunderstands those decisions and conflicts with decisions of other federal appellate courts, thereby deepening a circuit split. *Second*, the majority's definition dramatically expands the extraordinarily narrow gateway envisioned by this Court in *Schlup* and *Perkins*, as exemplified by its determination that Fontenot's presentation of old, cumulative, and tangential evidence—including evidence either known by the defense or available to it with due diligence at the time of trial—was sufficient to show actual innocence. *Third*, this expanded definition will further strain the taxed and limited resources of federal district courts, which are already frequently faced with adjudicating claims of actual innocence when dismissing time-barred habeas petitions.

Respectfully, this Court should grant certiorari review.

I. THE DECISION BELOW CONFLICTS WITH CASES OF THIS COURT AND OTHER COURTS AND EXACERBATES A CIRCUIT SPLIT.

The Court should grant review because the majority's dramatic expansion of the definition of "new" evidence under the meaning of *Schlup* and *Perkins* conflicts both with those decisions and with cases from other circuits, exacerbating a split on this issue.

In *Perkins*, 569 U.S. at 390-94, a sharply divided 5-4 decision, this Court held that a credible showing of "actual innocence" may open a gateway for review of a habeas petition that is time-barred under AEDPA. To understand the confusion generated among lower courts by *Perkins*, and the flood of litigation it has produced for lower federal courts considering the dismissal of time-barred habeas petitions, it is necessary to review this Court's path to that decision.

Perkins's predecessor was *Schlup*, itself also a 5-4 decision. In *Schlup*, this Court held that a habeas petitioner seeking to overcome a procedural bar through a showing of actual innocence need only meet the *Carrier*[5] standard, in contrast to the "more stringent" *Sawyer*[6] standard. *Schlup*, 513 U.S. at 326-27. Thus, a petitioner "must show that it is more likely than not" as per *Carrier*, as opposed to "by clear and convincing evidence" as articulated in *Sawyer*, "that no reasonable juror would have convicted him in the light of. . . new evidence." *Id.* at 323, 329.

Schlup did not define what constitutes "new" evidence. But this Court did state—in response to

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[5] *Murray v. Carrier*, 477 U.S. 478 (1986).

[6] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

concerns raised by the dissenters that its standard was overly generous—that, "[t]o be credible, . . . [a] petitioner [must] support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. This Court observed that "such evidence is obviously unavailable in the vast majority of cases," so such claims of actual innocence would be "rarely successful," with most capable of "summar[y] reject[ion]." *Id.*

In dissent, then-Chief Justice Rehnquist lamented "the watered down and confusing version of *Carrier* which [was] served up by the Court," accurately predicting that it would "create confusion in the lower courts." *Schlup*, 513 U.S. at 334, 339 (Rehnquist, C.J., dissenting). "[I]n light of the dissenting opinions," which included a second dissenting opinion authored by Justice Scalia, Justice O'Connor wrote separately to explain her understanding of what the majority had, and had not, decided. *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). Importantly, the very first thing Justice O'Connor clarified is that the Court "[held] that . . . a petitioner who cannot demonstrate cause and prejudice 'must show that it is more likely than not that no reasonable juror would have convicted him' in light of *newly discovered* evidence of innocence." *Id.* (emphasis added).

In *Perkins*, as indicated above, this Court expanded *Schlup* to time-barred habeas petitions. This Court "caution[ed], however, that 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.'" *Perkins*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). Furthermore, while due diligence is not a threshold requirement, "the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence." *Id.* at 386-87, 399 (quotation marks omitted).

The dissenting opinion, authored by Justice Scalia, pointed out that *Perkins* made the unprecedented move of applying the judicially created actual-innocence exception, beyond simply to "judge-made, prudential barriers to habeas relief," to "a categorical *statutory* bar to relief." *Perkins*, 569 U.S. at 402 (Scalia, J., dissenting). In any event, be that as it may, the dissenters again predicted the floodgates that would open: "From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim." *Id.* at 411. At least in Oklahoma's experience, this has proved to be true, as shown *infra*, Part III.

Thus, given the relatively light standard applied by *Schlup*/*Perkins*, if the standard is to have any teeth at all, and vindicate this Court's promise that it applies only in rare cases, then such limiting effect must come through that which this Court left largely undefined—what constitutes "new," "reliable" evidence. Given the lack of clarity from this Court, confusion has abounded in the lower courts on this matter, as the dissenters feared, resulting in a circuit split. As the court below recognized, this split has centered on whether "new" evidence means "newly discovered" or "newly presented." App.91a-92a.

More specifically, does *Schlup* require "newly discovered evidence that was not available at the time of trial, or [does it] broadly encompass[] all evidence that was not presented to the fact-finder during trial, *i.e.*, newly presented evidence"? *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012). The Second, Sixth, Seventh, and Ninth Circuits, joined by the Tenth Circuit in the present case, have interpreted *Schlup* to mean evidence is "new" so long as the evidence was not presented at trial. App.92a-93a; *Gomez v. Jaimet*, 350 F.3d 673, 679-680 (7th Cir. 2003); *Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012); *Souter v. Jones*, 395 F.3d 577, 595 n. 9 (6th Cir. 2005); *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003). The Third and Eighth Circuits, on the other hand, have held "that evidence is 'new' only if it was not available at the time of trial through the exercise of due diligence." *Kidd v. Norman*, 651 F.3d 947, 952 (8th Cir. 2011); *see Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004) (evidence is not "new" if "it was available at trial"); *see also Wright v. Quarterman*, 470 F.3d 581, 590-91 (5th Cir. 2006) (noting the circuit split but finding it unnecessary to weigh in).

In this instance, the minority side of the split actually has the better view. This Court should grant certiorari review to hold that "new" evidence, for purposes of *Perkins*, means newly discovered or newly available, as opposed to newly presented, evidence.

To begin with, this Court has arguably already said as much. As quoted above, this Court said that a petitioner must present "new reliable evidence . . . that was not presented at trial." *Schlup*, 513 U.S. at 324. Either this sentence is redundant, or "new" must mean something beyond "not presented at trial," contrary to the view taken by the majority below. Indeed, as the

Ninth Circuit previously recognized, Justice O'Connor's concurring opinion expressly employed the term "newly discovered" evidence. *Griffin*, 350 F.3d at 962 (citing *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring)). Given that Justice O'Connor wrote to explain what she "underst[oo]d the Court to decide," *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring), her concurring opinion offers powerful evidence of what the majority's undefined use of the term "new" evidence meant, *see Griffin*, 350 F.3d at 962 (recognizing the significance of Justice O'Connor's view that "new" evidence means "newly discovered" evidence but finding the court was bound by prior panels' holdings that "actual innocence claims require only 'newly presented' evidence").

Furthermore, the reasoning of the contrary view adopted below collapses under scrutiny. The majority primarily reasoned that, under *Perkins*, "a petitioner who establishes actual innocence need not make a showing of diligence in order to get his otherwise time-barred substantive claims heard," and thus "[t]hose courts that categorically reject actual-innocence claims unless the petitioner shows he could not have discovered the new evidence through the exercise of diligence prior to trial seem to be in conflict with *Perkins*." App.93a (citing *Perkins*, 569 U.S. at 399). Respectfully, the majority misread *Perkins*'s discussion of delay and diligence.

The referenced discussion in *Perkins* occurred in the context of rejecting the State's argument that a habeas petitioner might "lie in wait and use stale evidence to collaterally attack his conviction," delaying, for instance, until an elderly witness has passed away to bring forth new evidence. *Perkins*, 569 U.S. at 399-400. This Court dismissed that concern, reasoning that "[u]nexplained delay in *presenting* new evidence

bears on the determination whether the petitioner has made the requisite showing." *Id.* at 399 (emphasis added). This Court reiterated its position from *Schlup* that "'a court may consider how the timing of the *submission* and the likely credibility of a petitioner's affiants bear on the probable reliability of evidence of actual innocence.'" *Id.* (quoting *Schlup*, 513 U.S. at 332) (alterations adopted, emphasis added). Accordingly, "[c]onsidering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in *proffering* new evidence." *Id.* (emphasis added).

Thus, as these quotations make clear, *Perkins* was referring to diligence and delay in the *presentation* of evidence, not defining what makes evidence *new* or suggesting that diligence may not be considered in that definition. Indeed, the State's reading of *Perkins* makes sense when one considers the newly proffered evidence this Court was considering—Perkins was convicted in 1993, filed his federal habeas petition in 2008, and claimed actual innocence based on affidavits prepared in 1997, 1998, and 2002, respectively. *Perkins*, 569 U.S. at 387-90. Thus, these affidavits were plainly new since trial but were not new as of the time they were presented in federal court. As such, the controversy about diligence in that case centered on Perkins's diligence, or lack thereof, in bringing his evidence to federal court, not on whether the evidence was available at the time of trial. In sum, what *Perkins* said was that courts may not consider as dispositive lack of diligence or undue delay in bringing new evidence of innocence to federal court, but the majority below gleaned from that the quite distinct proposition that

evidence is new even if it could have been discovered at the time of trial with diligence.

In sum, the position of the majority below, and its sister circuits on that side of the split, is contrary to this Court's precedents. Certiorari review is warranted.

II. THE DECISION BELOW DRAMATICALLY EXPANDS THE "NARROW" ACTUAL-INNOCENCE GATEWAY ENVISIONED BY THIS COURT.

Although this Court has attempted to limit the actual-innocence gateway to a narrow class of extraordinary cases in *Schlup* and *Perkins*, the "newly presented" definition of new evidence adopted by the court below and some of its sister circuits threatens to open the floodgates on such claims. For instance, any habeas petitioner who decided against testifying at trial could newly proffer proposed testimony to support a gateway claim of actual innocence in federal court, and such testimony would be considered "new" under the majority's rule. Such an absurd result is avoided by the contrary rule adopted by a minority of circuits. *See Hubbard*, 378 F.3d at 340 ("A defendant's own late-proffered testimony is not 'new' because it was available at trial. Hubbard merely chose not to present it to the jury. That choice does not open the gateway.").

Downplaying such concern, the majority here reasoned that "the fact that new reliable evidence of innocence 'is obviously unavailable in the vast majority of cases,' such that 'claims of actual innocence are rarely successful,' mitigates any concern that the 'newly presented' view will lead to a multiplication of unmeritorious claims." App.94a (quoting *Schlup*, 513 U.S. at 324). But this is no answer. For starters, this assurance in *Schlup* was predicated on its cabining actual-innocence claims to instances where habeas petitioners present

new evidence; as shown above, the majority below has effectively read the word "new" out of the *Schlup*/*Perkins* rule, which dramatically expands the class of actual-innocence claims that will require review. In addition, screening evidence for whether it is "reliable" and/or whether it could reasonably have changed the outcome of the trial is a far more onerous task than asking simply whether evidence is "new." Thus, even if a federal court employing an expansive definition of "new" nevertheless ultimately concludes that a petitioner's evidence is not reliable and/or does not show it is more likely than not that any reasonable juror would not have voted to convict him, the federal court—as well as the State—will have expended considerable time and energy examining the proffered evidence as well as all of the trial evidence in determining whether the petitioner has made the requisite showing. This is clearly contrary to this Court's premise in creating the actual-innocence gateway that, whatever is meant by "new reliable evidence," "such evidence is obviously unavailable in the vast majority of cases," so these claims will be, "in virtually every case," "*summarily rejected*." *Schlup*, 513 U.S. at 324 (quotation marks omitted, emphasis added).

The evisceration of the "narrow" gateway occasioned by the expansive definition of "new" evidence adopted by the court below and some of its sister circuits is nowhere better illustrated than in this very case. The Tenth Circuit majority's generous view of what constitutes "new"—and, indeed, even what constitutes "reliable"—evidence appears to have few limits. At bottom, the majority's overly expansive interpretation of *Schlup* improperly allows an "actual innocence" claim to do "nothing more than . . . repackag[e]. . . the record as presented at trial," *Hubbard*, 378 F.3d

at 341, which should, under a proper reading of this Court's precedents, be viewed as simply a rehashing of old evidence and insufficient to open the actual-innocence gateway.

The majority opinion found that Fontenot made a credible showing of actual innocence based on essentially four categories of "new," "reliable" evidence that were entitled to substantial weight. App.98a-132a. The first category was evidence "tending to establish Mr. Fontenot's alibi of being at [a] keg party at Gordon Calhoun's apartment on the night of [the kidnapping]." App.50a. In particular, the majority found to be persuasive affidavits of witnesses who allegedly saw Fontenot at the party, Ward's statement to police that he and Fontenot were in attendance, and a letter Fontenot wrote to his attorney in 1985 detailing his alibi and listing various individuals who were at the keg party. App.55a, 99a-104a. But this evidence cannot possibly be considered "new" within the meaning of *Schlup*. Information regarding Fontenot's own "alibi" was clearly something within his knowledge, and indeed the party factored into his confession (P/H Tr. III 664, Tr. V 969). In fact, Fontenot would have had better access to the witnesses who might have been present at that party than the State would have had. Nor is the alibi evidence "reliable" or convincing evidence of innocence. As Judge Eid reasoned, "a reasonable juror could conclude that Fontenot could have attended the party *and* committed the crimes. In fact, in his confession, he discusses being at a party before leaving to kidnap the victim. . . . And his co-defendant [Ward] was found to have been at both" the party and McAnally's. App.205a (Eid, J., dissenting).

As to the second category, the majority credited as "new" and "reliable" evidence that, prior to her

abduction, Mrs. Haraway had been receiving anonymous, obscene phone calls at McAnally's. App.104a-108a. But while these phone calls were not mentioned at trial, such evidence is again not new within the meaning of *Schlup* because trial counsel knew about these phone calls at the time of Fontenot's second trial. (ROA, Vol. II, 260). Yet, the majority placed great emphasis on the calls, going so far as to find that prank calls with "heavy breathing" somehow pointed to a different perpetrator *with a different motive* than Fontenot. App.14a, 106a. Given that Fontenot admitted to kidnapping and raping the victim, it is difficult to imagine how an obscene phone call points to any different motive than Fontenot had, contrary to the majority's finding that a motive "was entirely lacking with respect to the potential involvement of Mr. Fontenot." App.106a.[7] Further, as Judge Eid reasoned, "a reasonable juror presented with information about suspicious calls . . . would most likely [have] deem[ed] the calls irrelevant to the case" or would "view the calls in light of the other evidence against Fontenot and infer that he was the caller." App.205a (Eid, J., dissenting).

As to the third category, the majority then devoted a lengthy discussion to, and placed great weight on, two affidavits by eyewitnesses, James Moyer and Karen Wise, that were written *nearly three decades* after their original testimony. App.109a-127a. Mr. Moyer, who entered McAnally's just before the abduction, originally

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[7] Indeed, the majority repeatedly suggested that Fontenot lacked motive, emphasizing that there was "no evidence . . . that he had ever been in McAnally's or had ever even seen Ms. Haraway before the evening of the crime." App.106a. By this logic, however, no man would ever rape and murder a woman he does not know, and yet stranger sexual violence is very real.

testified that he saw two men generally matching Fontenot's and Ward's descriptions inside the store. App.525a. In a 2012 affidavit, however, "Mr. Moyer assert[ed] he is 'confid[e]nt that Karl Fontenot was not the man I saw at McAnally's.'" App.111a. As the State argued below, and Judge Eid found, this evidence was not truly new: "[t]he jury already had serious cause to deemphasize Moyer's identification of Fontenot at trial because it was riddled with hedging and admissions of uncertainty." App.204a (Eid, J., dissenting). Indeed, in touting the alleged reliability of Mr. Moyer's affidavit, the majority stated that the affidavit "align[ed] with candid statements he made prior to both trials." App.114a-115a. But this of course proves the State's point—this evidence is not actually "new" within the meaning of *Schlup*.

And Ms. Wise—who had testified at trial that Ward and a man matching Fontenot's description came into the convenience store where she worked down the road from McAnally's—provided an affidavit that did not "directly recant anything about Fontenot." App. 204a (Eid, J., dissenting). Rather, she essentially *added* to her testimony, claiming there were two additional men in her store that night who made her nervous. App.125a. Even if this evidence is "new," it is not remotely helpful, as it does absolutely nothing to advance Fontenot's claim of innocence. Moreover, Mr. Moyer's and Ms. Wise's affidavits, prepared some thirty years after the events in question, are extraordinarily unreliable. As Judge Eid noted, in light of this timing, "a reasonable juror would tend to discount the two affidavits." App.204a (Eid, J., dissenting). *See Herrera v. Collins*, 506 U.S. 390, 403, 406 (1993) ("[T]he passage of time only diminishes the reliability of criminal adjudications. . . . [T]he question of guilt or innocence

. . . becomes more uncertain with time for evidentiary reasons.").

Fourth and lastly, as to the category containing the medical examiner's file, the majority found to be significant and persuasive a 1986 letter from a forensic anthropologist consultant stating the consultant's opinion that Mrs. Haraway's remains showed signs, by virtue of marks on her pelvis, that she had given birth to at least one child. App.283a. The majority reasoned that this letter showed that, because there is no indication Mrs. Haraway was pregnant at the time of her abduction, "she must have been killed some months after April 28[, 1984]. . . . Due to his incarceration from late October 1984 onward, this would make Mr. Fontenot's involvement in the crime highly improbable." App.132a. Again, however, anything within the medical examiner's file was available to Fontenot at the time of his retrial and therefore not "new."

In sum, had the majority not adopted its overly expansive reading of *Schlup*, which considered as "new" evidence that frequently is, and indeed in this case was, *available* at the time of trial (*i.e.*, evidence that the defense either could have discovered or was aware of and considered, but chose against, presenting), the majority would never have been able to find the actual-innocence gateway satisfied.[8] Compounding

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[8] The majority's overly expansive definition also tainted its *Brady* analysis and exacerbated a *second* circuit split, leading it ultimately to affirm the grant of habeas relief to Fontenot. Specifically, the majority held that *Brady* can be violated even where the evidence in question was otherwise available to the defense, while acknowledging a circuit split on the issue: "It is true that *many* of our sister circuits deem evidence 'suppressed' under *Brady* only if 'the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.' In these circuits, '[e]vidence is not "suppressed" if the defendant either

this error, as Judge Eid recognized, the majority's evaluation of the evidence as a whole gave short shrift to the fact that Fontenot *confessed*. App.206a. While the majority focused on claimed weaknesses in the confession—inconsistencies with the physical evidence and Fontenot's later recantation—the majority all but ignored the OCCA's presumptively correct findings that Fontenot's confession was corroborated in nine separate ways. *See* 28 U.S.C. § 2254(e)(1).[9] From there,

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knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.'" App.163a (quoting *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (emphasis added, citation omitted)). Contrary to these circuits, the majority concluded that the fact that defense counsel knew about or should have known about the information at issue "is irrelevant to whether the prosecution had an obligation to disclose the information." App.164a (quotation marks omitted). In any event, the majority should never have even reached this issue and should instead have concluded that the actual-innocence gateway was not available to Fontenot.

[9] The majority found that Fontenot met his burden to overcome only one of these nine presumptively correct points of corroboration under § 2254(e)(1): Mr. Moyer's belief that he saw a man who matched Fontenot's description at McAnally's the night of the abduction. App.50a, 112a, 117a, 525a. Beyond the eight points left unrebutted, this application of § 2254(e)(1) by the majority was again error. Due to the passage of time alone—*thirty years*—Mr. Moyer's eleventh-hour statement that he is now certain it was not Fontenot does not clearly and convincingly overcome his original, already-equivocal identification of Fontenot at trial. *See* 28 U.S.C. § 2254(e)(1); *see also, e.g.*, *Thompkins v. Pfister*, 698 F.3d 976, 985 (7th Cir. 2012) (identifying *conflicting* evidence is insufficient to overcome § 2254(e)(1)'s presumption of correctness by *clear* and *convincing* evidence); *Rountree v. Balicki*, 640 F.3d 530, 543 (3d Cir. 2011) (same); *cf. Herrera*, 506 U.S. at 418-19 (finding to be unpersuasive affidavits containing statements that contradicted trial testimony offered just ten years after trial).

"[t]he majority's under-appreciation of the impact that Fontenot's confession would have on a reasonable juror then lead[] it to over-appreciate the value of the new evidence he presents." App.206a. At bottom, the proffered evidence given the greatest weight by the majority was not actually "new" within the meaning of *Schlup*, and it certainly was not sufficient to overcome Fontenot's graphic confession to the murder of Mrs. Haraway, made over a year before her body was found —a confession which two juries reviewed and found credible in spite of the fact that Fontenot put on a zealous defense at both trials. App.516a-530a.

For all these reasons, the majority's application of *Schlup* in this case both led to an erroneous result and threatens to eviscerate the "narrow" actual-innocence gateway this Court has attempted to erect.

III. THE DECISION BELOW, IF ALLOWED TO STAND, WILL ONLY CONTRIBUTE TO THE PROLIFERATION OF ACTUAL-INNOCENCE GATEWAY CLAIMS.

As indicated above, and predicted by the dissenting justices in *Schlup* and *Perkins*, the extraordinarily "narrow" actual-innocence gateway this Court attempted to craft has turned out to be anything but. In particular, the State of Oklahoma, and the federal district courts in which it routinely litigates habeas cases, is frequently confronted with innocence gateway claims in an attempt to overcome time-barred § 2254 petitions. The expansive definition of "new" and "reliable" evidence adopted by the majority here will only exacerbate that problem.

Even prior to the majority's opinion, the State and Oklahoma's federal district courts were forced to routinely address claims of actual innocence, meaning already limited State and judicial resources must be

spent in *merits* review of evidence in old cases despite a clear statutory time-bar. *See, e.g.*, *Macklin v. Dowling*, 822 F. App'x 720, 721-22 (10th Cir. 2020) (unpublished); *Moody v. Dowling*, No. CIV-20-00696-JD, 2021 WL 2446738, at *5 (W.D. Okla. June 15, 2021); *Proctor v. Whitten*, No. CIV-19-837-PRW, 2021 WL 597881, at *2 (W.D. Okla. Feb. 16, 2021); *Malone v. Crow*, No. 20-CV-0227-GKF-JFJ, 2021 WL 957264, at *3 & n. 4 (N.D. Okla. Feb. 5, 2021); *Birch v. Crow*, No. 19-CV-0276-TCK-FHM, 2020 WL 437553, at *8-9 (N.D. Okla. Jan. 28, 2020); *Colbert v. Crow*, No. 19-CV-0108-CVE-JFJ, 2019 WL 4740236, at *3 (N.D. Okla. Sept. 27, 2019); *McCurley v. Crow*, No. 18-CV-0429-JHP-JFJ, 2019 WL 3237992, at *5-6 (N.D. Okla. July 18, 2019); *Cardwell v. Allbaugh*, No. 18-CV-0199-CVE-FHM, 2018 WL 6075480, at *6-8 (N.D. Okla. Nov. 20, 2018); *Decker v. Braggs*, No. CIV-18-443-C, 2018 WL 4346707, at *4-5 (W.D. Okla. Aug. 21, 2018), *report and recommendation adopted*, No. CIV-18-443-C, 2018 WL 4344467 (W.D. Okla. Sept. 11, 2018); *Turnbough v. Bryant*, No. 17-CV-172-GKF-FHM, 2017 WL 5491005, at *3-7 (N.D. Okla. Nov. 15, 2017); *Simpson v. Bear*, No. 16-CV-0153-CVE-FHM, 2017 WL 78506, at *4 (N.D. Okla. Jan. 9, 2017).

As Justice Scalia accurately predicted, time-barred habeas petitioners very often claim actual innocence, meaning that, even if few of them ultimately pass through the *Schlup*/*Perkins* gateway, the district court is nevertheless "obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim." *Perkins*, 569 U.S. at 411 (Scalia, J., dissenting). This situation clearly belies this Court's promise that *Schlup*-satisfying evidence "is obviously unavailable in the vast majority of cases," so these claims may be, "in virtually every case,"

"*summarily rejected*." *Schlup*, 513 U.S. at 324 (quotation marks omitted, emphasis added). This further frustrates Congress's purpose in enacting the statute of limitations in AEDPA to, *inter alia*, promote finality and reduce collateral review. *See Duncan v. Walker*, 533 U.S. 167, 178 (2001). The majority's expansive interpretation of *Schlup*'s "new" evidence requirement (and, indeed, the low bar the majority set for what constitutes "reliable" and "compelling" evidence of innocence) will only exacerbate this problem.

Nor is the Tenth Circuit's frustration of AEDPA's goals limited to this case. Indeed, the State of Oklahoma has argued, and is arguing, that the Tenth Circuit has not faithfully applied AEDPA in other cases. *See, e.g.*, *Martin v. Cortez Johnson*, Petition for Writ of *Certiorari*, No. 21-896 (U.S.) (pending) (arguing the Tenth Circuit improperly stripped the OCCA's opinion of deference based on an argument never made in state court); *Sharp v. Harris*, Petition for Writ of *Certiorari*, No. 19-1105 (U.S.), *cert. denied*, 141 S.Ct. 124 (2020) (arguing that the Tenth Circuit found the OCCA's entire decision unreasonable in light of an isolated factual finding, resulting in a remand for an evidentiary hearing); *Sharp v. Smith*, Petition for Writ of *Certiorari*, No. 19-1106 (U.S.), *cert. denied*, 141 S.Ct. 186 (2020) (arguing that the Tenth Circuit improperly granted habeas relief after, among other things, *sua sponte* finding that the OCCA failed to make a merits adjudication because its analysis was allegedly too cursory and applying certain Supreme Court law retroactively despite a clear *Teague*[10] bar). This Court's intervention, to ensure fidelity to the limitations of AEDPA and this Court's precedents, is warranted.

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10 *Teague v. Lane*, 489 U.S. 288 (1989).

CONCLUSION

The petition for writ of certiorari should be granted.

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