No. 21-970

IN THE

Supreme Court of the United States

SCOTT CROW, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

KARL FONTENOT

Respondent.

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

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that a habeas petitioner's claim of actual innocence was based on "new" evidence, *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995), where his petition relied almost exclusively on police reports and interviews that the State had unconstitutionally withheld until after trial; on affidavits from trial witnesses explaining that their testimony had been influenced by police and prosecutorial pressure; and on information contained in letters the petitioner wrote to his trial attorney that the attorney never received because the State intercepted them and never turned them over until decades later.

PARTIES TO THE PROCEEDINGS

Petitioner Scott Crow, Director of the Oklahoma Department of Corrections, was respondent in the district court and appellant in the court of appeals.

Respondent Karl Fontenot was petitioner in the district court and appellee in the court of appeals.

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INTRODUCTION

Respondent Karl Fontenot was convicted of abducting and murdering Donna Denice Haraway in 1988, after a trial marred by "egregious" police misconduct and systematic suppression of material exculpatory evidence. Pet. App. 312a, 393a. The evidence of Fontenot's guilt was, as the court of appeals explained, "extremely weak": without any physical or forensic evidence tying Fontenot to the crime, the prosecution's evidence consisted almost entirely of the 19-year-old Fontenot's confession—which he quickly recanted, and which was inaccurate as to the manner of death and the location of the body—and two equivocal witness identifications placing someone who resembled Fontenot near the scene of Haraway's abduction. Pet. App. 135a-136a. At the same time, the State withheld information that would have decisively undermined the tenuous evidence of Fontenot's guilt. And the prosecutorial misconduct did not end with the trial: over the next thirty years, the State continued to withhold evidence, releasing it piecemeal only when compelled to do so by multiple court orders. The most recent exculpatory disclosure came in 2019, 31 years after Fontenot's conviction.

After reviewing all of the evidence—the vast majority of which was not available to Fontenot at trial because the State had suppressed it—both the district court and the court of appeals concluded that Fontenot had presented "new" evidence demonstrating his actual innocence, *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995), and that the State's "[s]hocking[]" "pattern" of suppressing exculpatory evidence violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Pet. App. 227a, 310a. The suppressed evidence would have completely changed the course of the trial. Most notably, Fontenot had an alibi—he was at a party at the time of the

abduction—but when he attempted to assist in his defense from jail by informing trial counsel of witnesses who could corroborate the alibi, the State intercepted his letters and never delivered them. Instead, the State investigated on its own behalf—and suppressed the corroborating witnesses' accounts as well as other evidence supporting the alibi. Other eventually-disclosed evidence included significant inconsistencies in the accounts of the two primary witnesses who placed Fontenot near the scene of the abduction, as well as evidence that the prosecution pressured those witnesses to testify as the prosecution wanted.

Remarkably, the State's certiorari petition *does not even mention* the egregious, decades-long pattern of prosecutorial misconduct aimed at ensuring that the facts establishing Fontenot's innocence would never come to light.[1] Instead, the State misleadingly treats this as a case in which the evidence of actual innocence was available, but simply not presented, at trial. The State thus urges this Court to grant certiorari to decide whether "new" evidence of actual innocence must be, as the State argues, "newly discovered" (that is, not available at trial), or whether the evidence need only be, as the court of appeals held, "newly presented" (that is, available but not presented at trial). But the evidence of Fontenot's innocence overwhelmingly was *not* available to Fontenot at trial because the State

[1] The two lead investigators and district attorney in Fontenot's case also investigated and prosecuted Ron Williamson and Dennis Fritz for the 1982 murder of another woman, Debbie Sue Carter. Both men were convicted and spent over a decade in jail until DNA evidence exonerated them—with Williamson once coming within five days of being executed. The very similar police and prosecutorial misconduct that plagued the investigations and trials in the Carter and Haraway cases are the subject of, among other things, John Grisham's *The Innocent Man*.

worked tirelessly to suppress that evidence. The vast bulk of the evidence was thus "new" under either standard, and resolving the question presented in the State's favor would not affect the outcome. This case therefore is not a suitable vehicle to resolve the lopsided, stale circuit conflict on the definition of "new" evidence that the State identifies. And in all events, the court of appeals was correct to adopt the "newly presented" standard that represents the near-consensus among the circuits to consider the question.

Finally, while the State suggests (Pet. 31) that the courts below applied a "low bar" in finding actual innocence, nothing could be further from the truth. The courts exhaustively reviewed voluminous amounts of withheld exculpatory evidence and correctly concluded that this is the rare case in which a habeas petitioner has credibly demonstrated actual innocence. It should not be surprising that the State's extraordinary efforts to frustrate the adversarial process by withholding exculpatory evidence undermined the reliability of Fontenot's conviction. Certiorari should be denied.

STATEMENT OF THE CASE

1. On April 28, 1984, Denice Haraway was abducted from McAnally's, a gas station and convenience store in Ada, Oklahoma where she worked the night shift. Pet. App. 3a. Three eyewitnesses saw a man and a woman, whom one identified as Haraway, walk out of the store and get into a pickup truck at around 8:45 p.m. Pet. App. 3a-5a.

Karen Wise was working at J.P.'s, a convenience store about a quarter mile from McAnally's, at the time of the abduction and gave police the description of two men who had been in J.P.'s that evening and "who made her nervous." Pet. App. 7a. The police created composite sketches of the men and solicited the

public's assistance in identifying them. Pet. App. 9a, 14a. A number of callers identified one of the men as resembling Tommy Ward. Pet. App. 14a. Police spoke with Ward on May 1, who said he had been with his friend Karl Fontenot the day and evening of the abduction. Pet. App. 15a. That same day, police also briefly spoke with Fontenot. Pet. App. 16a.

Five months later, "the police turned their focus back to Mr. Ward," questioning him again on October 12 and 18. Pet. App. 17a. Ward initially said he had dreamed he was involved with Fontenot and Odell Titsworth, and police told him his dream matched details of the offense. Pet. App. 18a. Eight and a half hours into the October 18 questioning, police started recording Ward, who confessed that, together with Fontenot and Titsworth, he kidnapped, raped, and murdered Haraway. Pet. App. 18a.

The following day, police interrogated Fontenot. Pet. App. 18a. Initially, he "repeatedly denied knowing anything about Ms. Haraway's abduction." Pet. App. 19a. Police then informed Fontenot that Ward had confessed, implicating Fontenot. Pet. App. 19a. Over the course of an hour and forty-five minutes, police provided Fontenot with a "story" of how he had committed the crime. Pet. App. 19a-20a, 331a. Eventually, Fontenot, 19 at the time and "described as having diminished cognitive and emotional skills," gave a videotaped confession that he, along with Ward and Titsworth, had abducted Haraway, raped her, stabbed her to death, left her body in an abandoned house near the Ada power plant, and burned down the house. Pet. App. 15a, 19a.

Within two days, Fontenot had recanted the confession and, just as quickly, both men's confessions fell apart. Pet. App. 20a-21a. Ada police had broken

Titsworth's arm two days before the abduction, "putting him in a cast for weeks and thus making him unable to participate" as Ward and Fontenot had confessed. Pet. App. 22a. Police searching for Haraway's body found a burned-down house near the power plant—but it had burned in 1983, the year before Haraway's abduction. Pet. App. 23a. Her body was not found there, nor at any of the other locations Ward and Fontenot directed police to look. Pet. App. 23a.

Instead, in January 1986, a hunter discovered Haraway's remains about 30 miles east of Ada. Pet. App. 23a. Based on a bullet hole in her skull, the medical examiner's office pronounced the probable cause of death to be a single gunshot wound to the head, Pet. App. 24a—that is, Haraway was not stabbed to death, as Ward and Fontenot had asserted. There was also no evidence her body had been burned. Pet. App. 224a-225a. Overall, as the Tenth Circuit explained, "Fontenot's confession was shot through with clear falsehoods and inconsistencies, produced no independently verifiable information, and provided the police no new facts about the crime." Pet. App. 136a.

2. The State tried Ward and Fontenot together in September 1985—four months before Haraway's body was discovered. Pet. App. 23a. Both videotaped confessions were played for the jury. Pet. App. 35a. The jury found both men guilty of kidnapping and first-degree murder, and sentenced both to death.[2] Pet. App. 35a.

On appeal, the Oklahoma Court of Criminal Appeals (OCCA) reversed Fontenot's conviction and remanded for a new trial. Pet. App. 551a. The OCCA

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[2] The petition incorrectly states that Fontenot "raped and murdered" Haraway. Pet. 3.

emphasized that "[o]ther than the statements given by Ward and Fontenot, there was no other evidence linking [Fontenot] to the crimes." Pet. App. 550a. The OCCA held that admitting Ward's confession violated Fontenot's Sixth Amendment rights where Ward did not testify and where that confession "lacked sufficient indicia of reliability to allow for its direct admission against Mr. Fontenot." Pet. App. 37a, 550a-551a. Ward's conviction was overturned on the same ground. Pet. App. 38a.

3. The State tried Fontenot again in June 1988, this time without Ward. Pet. App. 38a. Before trial, Fontenot's counsel "filed numerous discovery motions and made requests on the record for discovery of police and interview reports." Pet. App. 324a; Pet. App. 35a, 36a, 38a. In response, the State "made scant disclosures and stonewalled against providing any evidence." Pet. App. 326a; *e.g.*, Pet App. 36a (noting 1986 disclosure of five pages of evidence).

As in the first trial, the State played Fontenot's videotaped confession. Pet. App. 40a. Key prosecution witnesses included James Moyer, the only witness to testify that he might have seen Fontenot at McAnally's on April 28; and Karen Wise, the clerk from the nearby convenience store, who testified that two men resembling Fontenot and Ward were in her store earlier that evening. Pet. App. 39a. The jury found Fontenot guilty, again sentencing him to death. Pet. App. 40a.[3]

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[3] The following year, Ward was convicted of first-degree murder and sentenced to life imprisonment. Pet. App. 40a n.13. In 2020, a state court granted Ward postconviction relief on a state actual-innocence claim. Post Conviction Findings and Conclusions, *Ward* v. *Oklahoma*, Pontotoc County Case Nos. CRF-1984-183, CRF-1988-208 (Dec. 18, 2020), *appeal filed* No. PC 2021-8.

Fontenot appealed. In 1992, in response to a motion from Fontenot's counsel, the OCCA ordered the State to disclose all files related to the case, leading to a disclosure of 860 pages of new documents, Pet. App. 40a[4]—even though Fontenot's counsel had repeatedly filed similar motions during pretrial proceedings and in the first appeal, Pet. App. 35a, 36a, 38a, 324a. The OCCA's rules prevented Fontenot from using those materials on appeal. Pet. App. 41a.

The OCCA affirmed Fontenot's convictions. Pet. App. 513a. As relevant here, the court rejected Fontenot's argument that no evidence corroborated his confession, rendering it too unreliable to support his conviction. Pet. App. 526a. While acknowledging the "by no means inconsequential" inconsistencies between the confession and the actual facts of Haraway's death, the OCCA identified nine points of corroboration, including several that were later undermined by belatedly disclosed evidence. Pet. App. 523a-526a.[5]

Although it affirmed the convictions, the OCCA vacated Fontenot's death sentence on the basis of an erroneous jury instruction. Pet. App. 513a. Fontenot

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[4] The Tenth Circuit concluded it was "unclear" whether these documents were disclosed in 1992 or later, but used "1992 as a shorthand" because "the exact timing does not affect our analysis." Pet. App. 40a-41a n.14. This opposition does the same.

[5] The petition repeatedly emphasizes those "nine points of corroboration," Pet. 10, but ignores the ways in which later-discovered evidence undermined those points. Compare, *e.g.*, Pet. App. 525a (stating Fontenot's confession was corroborated by his identification of blouse Haraway was wearing), with Pet. App. 192a-195a (explaining how State suppressed documents regarding blouse that were "highly favorable" to Fontenot suggesting "Fontenot was fed details about the blouse").

and the State subsequently reached an agreement under which Fontenot received life without parole. Pet. App. 47a.

4. In 2013, Fontenot filed an application for postconviction relief in state court. Pet. App. 48a. In connection with that application, he filed a motion for discovery, which the state court granted, ordering the State to "provide a complete inventory of the records and evidence, relating to their investigations." Pet. App. 48a (citation omitted). In response, the State, again, produced significant material that it previously failed to disclose. Pet. App. 49a. In a two-page order, the court denied the application on laches grounds. Pet. App. 510a-511a. In 2015, the OCCA affirmed in a brief order. Pet. App. 505a-506a.

5. a. In 2016, Fontenot filed a federal habeas petition under 28 U.S.C. 2254. Pet. App. 53a. During discovery on the petition, Fontenot, again, "receiv[ed] an additional cache of law enforcement reports," prompting him to file an amended petition. Pet. App. 53a.

In January 2019, before the district court decided the amended petition, Fontenot's counsel learned that the Ada Police Department (APD) had sent previously undisclosed police reports to Ward's counsel in response to subpoenas Ward served in his state postconviction proceedings. Pet. App. 54a. When Fontenot had served subpoenas in his federal proceedings in 2017, he had been told that APD "no longer has any of the documents requested." Pet. App. 54a (citation omitted). In conduct the district court described as "[s]hocking[]" but consistent with the State's "repeated pattern of failing to comply with court orders and subpoenas," the State did not provide the responsive documents to Fontenot until his counsel requested them from the State. Pet. App. 227a, 294a-295a.

The 300 pages of new documents included, among other things, letters Fontenot had written to his trial counsel in 1985 detailing his alibi defense and providing his trial counsel with a list of witnesses who could verify it. Pet. App. 55a. The letters were never delivered to Fontenot's trial counsel, who had never seen them before the 2019 disclosure. Pet. App. 55a.

In response, the district court allowed Fontenot to amend his petition again. Pet. App. 56a. The second amended petition presented nine constitutional claims, and argued that "[n]ewly discovered evidence establishe[d]" Fontenot's innocence, thereby overcoming procedural barriers to review. Pet. App. 220a-221a.

b. In August 2019, the district court granted the petition. In a 190-page opinion, the court examined six categories of "newly discovered evidence" of Fontenot's actual innocence. Pet. App. 244a-286a. As to each category, the court explained how the State had prevented the defense from discovering evidence at the time of trial—either because the State improperly withheld evidence or pressured witnesses to stay silent on inconvenient facts (or both). Pet. App. 258a, 262a-263a, 265a, 268a-269a, 271a-272a, 274a, 276a, 278a, 280a. The court held that Fontenot had made a credible showing of actual innocence, allowing the court to reach his constitutional claims. Pet. App. 245a.

The district court found those claims meritorious. Pet. App. 61a, 305a-491a. The court accordingly granted Fontenot's petition. Pet. App. 493a. Fontenot was released on bond on December 19, 2019, after over thirty-five years in jail. Pet. App. 61a-62a, 495a, 498a.

c. The court of appeals affirmed. The court noted that Fontenot's claims were subject to a state procedural default and that his petition was time barred under the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year statute of limitations. Pet. App. 83a-84a.[6] Fontenot could overcome those barriers to review, the court explained, through "'[a] credible showing of actual innocence'"—*i.e.*, by showing that in light of new reliable evidence, "'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" Pet. App. 87a-88a (quoting *McQuiggin* v. *Perkins*, 569 U.S. 383, 392 (2013); *House* v. *Bell*, 547 U.S. 518, 537-538 (2006)). The court acknowledged a division in the circuits as to whether "new" evidence included any evidence that was not presented at trial or, instead, included only evidence that "was not available at the time of trial through the exercise of due diligence." Pet. App. 91a-92a (citation omitted). Stating that it had to "pick a side," the court of appeals adopted the former approach. Pet. App. 93a. The court did not explain, however, whether its selection of that test would have affected the outcome of the case.

The court then turned to a detailed analysis of the six categories of new evidence Fontenot had presented. Pet. App. 98a.

i. Alibi evidence. Fontenot's habeas petition laid out significant evidence that he was at a party when Haraway was abducted. Pet. App. 99a-104a. First, the court of appeals explained that Fontenot had pre-

[6] The court also found Fontenot had failed to exhaust two claims in state court but that the state court would find those claims barred by laches, such that they were "procedurally defaulted and effectively exhausted." Pet. App. 82a; Pet. App. 63a-82a.

sented evidence of his own prior statements supporting his alibi. Pet. App. 99a. During an October 21, 1984 interview, Fontenot told police that he was at the party and identified people who were also there and who could corroborate his whereabouts. Pet. App. 99a. He also wrote letters to his trial attorney in 1985 stating he was at the party and providing the names of corroborating witnesses. Pet. App. 55a, 99a. The State withheld the notes of his October interview and his letters to trial counsel until 1992 and 2019 respectively. Pet. App. 43a, 55a.

As the court of appeals detailed, Fontenot's habeas petition included notes from an October 1984 police interview with one of the alibi witnesses whom Fontenot had identified, corroborating his account (not turned over to Fontenot until 1992), and 2009 and 2013 affidavits from three other people stating that Fontenot was at the party (one of whom had told the police in 1985 that Ward was at the party and was told "I don't want to hear it"). Pet. App. 43a, 99a-101a, 253a. The court of appeals also noted the "[c]ontemporaneous police documents" that "corroborate[d] key details of Mr. Fontenot's alibi." Pet. App. 102a. These documents were also not provided to defense counsel. Pet. App. 248a, 333a.

The court of appeals further explained that Ward's prior statements supported Fontenot's alibi. When police first questioned Ward in May 1984, he told them he was at a party the evening of Haraway's disappearance. Pet. App. 101a-102a. The State did not provide the summary of that interview to Fontenot until 1992. Pet. App. 42a. Ward provided a similar account during an interview with police in October 1984. Pet. App. 102a. That October 1984 interview was the only piece of alibi evidence the court of appeals identified that was available to Fontenot at the time of his trial.

Fontenot did not present an alibi defense at trial. The court of appeals concluded that Fontenot's defense "would have been viewed in a different light" had this evidence been presented. Pet. App. 103a (citation omitted).

ii. Obscene phone calls. Fontenot's petition also presented evidence of "obscene phone calls" Haraway had received that made her feel "uneasy" working alone at night. Pet. App. 104a-108a. The Tenth Circuit took particular note of Haraway's sister's summary of conversations she had with Haraway immediately before her disappearance, in which Haraway said that the caller told her "'he was going to come out to the store some night and wait outside while she was working.'" Pet. App. 104a, 107a. The summary of those conversations was not turned over to defense counsel until 1992. Pet. App. 42a. Had such evidence been presented at trial, the court of appeals concluded, the jury would have had "an alternate suspect who was targeting Ms. Haraway * * * most likely * * * plant[ing] seeds of reasonable doubt in the mind of a reasonable juror." Pet. App. 108a.

iii. James Moyer evidence. James Moyer testified at Fontenot's second trial to seeing a dark-haired man and a blond-haired man enter McAnally's at around 7:30 p.m. on April 28. Pet. App. 109a. He identified Ward as the blond-haired man. Pet. App. 109a. Moyer offered "far more equivocal" testimony that Fontenot was the dark-haired man, including testifying on cross-examination that he had contacted the prosecutor's office in 1985 because he thought he had seen someone else in the courtroom during a preliminary hearing "who looked more like the dark-haired man." Pet. App. 109a-110a.

In support of his habeas petition, Fontenot offered two pieces of new evidence regarding that identification. First, he presented summaries of police interviews from April and November 1984 with Moyer, which were not turned over to Fontenot until 2019. Pet. App. 56a, 110a-111a. Moyer's account of the men he saw in McAnally's was materially inconsistent in the two interviews, and, in the November interview, he was asked to identify men from photo lineups of Ward and Titsworth—not Fontenot. Pet. App. 264a-265a. He also told police in that interview "that he did not get a very good look at the dark-haired man." Pet. App. 111a. Second, the petition included a 2012 affidavit from Moyer "assert[ing that] he is 'confident that Karl Fontenot was not the man I saw at McAnally's,' who 'was definitely taller than Karl Fontenot and had a much more intimidating look about him.'" Pet. App. 111a (alteration adopted). The affidavit explained that he was "'about 95% sure'" that the dark-haired man was, instead, another man named Steve Bevel, and that when he had called the prosecutor's office in 1985 to convey this concern, "he was told that '[i]t was not [Mr. Bevel],' which made him afraid to change his story." Pet. App. 111a, 115a.

The court of appeals explained that "Moyer was the only witness who placed Mr. Fontenot in McAnally's the night of Ms. Haraway's disappearance." Pet. App. 116a. The new evidence "would undermine" his identification "and serve to cast additional doubt in the mind of a reasonable juror regarding whether Mr. Fontenot was ever at McAnally's" that evening. Pet. App. 116a.

iv. Karen Wise affidavit. Fontenot's habeas petition included a 2009 affidavit from Wise, the J.P.'s clerk whose descriptions were used for the police's composite sketches. Pet. App. 7a-9a, 118a-120a. In

that affidavit, she explained that she had told the police on the evening of April 28 that there were actually four men in J.P.'s that night "but that the police insisted there were only two." Pet. App. 120a. The affidavit explained that "the two men who ended up in the composite drawings, later identified" as Fontenot and Ward "'were not aggressive in any way,' and that she 'was particularly nervous because of two *other* men in the store that evening.'" Pet. App. 120a. Wise knew the two other men and identified one as Jim Bob Howard. Pet. App. 120a. Wise told the prosecutor prior to the initial trial about the existence of the other men "and that they made her afraid," but the prosecutor "responded that he already had the 'ones who did it,'" that Howard "'couldn't have committed the murder'" because he was not smart enough, and that "she couldn't mention" the other two men in court. Pet. App. 120a. The court of appeals concluded that the affidavit "would lead a reasonable juror to question both Mr. Fontenot's involvement in the crime and the State's motivation for ignoring the other two men in J.P.'s that night." Pet. App. 121a.

Wise's identification of Howard, the court of appeals explained, was particularly significant. Police records showed that shortly before Haraway's disappearance Howard had been riding in a pickup truck matching the description of the one outside McAnally's on the evening of April 28 and police learned during 1984 interviews (summaries of which were withheld from the defense until 1992) that the pickup's owner had painted his truck red shortly after April 28. Pet. App. 43a, 121a-122a. Howard also testified at the preliminary hearing that he did not know Fontenot. Pet. App. 123a.

The court of appeals viewed this evidence as "strong new evidence of Mr. Fontenot's innocence."

Pet. App. 123a. It "place[d] a man in J.P.'s on the night of the abduction who had previously been seen in a pickup * * * similar to the pickup seen at McAnally's," which "would lead a reasonable juror to question whether a different man than Mr. Fontenot was in" that truck. Pet. App. 123a-124a. Even more significant, the fact that Howard was "unfamiliar[] with Mr. Fontenot," considered with Wise's affidavit that the four men in J.P.'s knew each other, "leads to the conclusion that Mr. Fontenot was not one of the remaining three." Pet. App. 124a. And, the court added, Wise's statements about the pressure she received from police and the prosecutor's office to ignore the other two men had "evidentiary value" because it "would lead a reasonable juror to question whether police and prosecutorial misconduct led to the conviction of an innocent man." Pet. App. 125a-126a.

v. Pickup truck descriptions. Fontenot's habeas petition "argue[d] that undisclosed police interviews" would have helped probe whether there were two pickups on the evening of April 28—one at J.P.'s and a different one at McAnally's. Pet. App. 127a. The court viewed this category of evidence to have "minimal weight." Pet. App. 129a.

vi. Medical examiner's report. Finally, the habeas petition identified two portions of the medical examiner's report that constituted new evidence: a report "express[ing] frustration with law enforcement's handling of Ms. Haraway's remains" and a statement concluding that "[m]arks on the pelvis indicated she had given birth to at least one child." Pet. App. 130a-132a (citation omitted). While the court of appeals viewed the value of the former evidence as "minimal," it explained that the latter evidence would "raise the level of reasonable doubt in the mind of a reasonable juror" as it would mean Haraway had to "have been

killed some months after April 28"—*i.e.*, likely at a time when Fontenot was already in jail. Pet. App. 131a-132a.

* * *

Considering all six categories of evidence, the court concluded Fontenot had presented a credible actual-innocence claim. Pet. App. 143a-144a. The court noted that, even without the new evidence, "the total record * * * reveals an extremely weak case against Mr. Fontenot." Pet. App. 135a. The new evidence, "combined with the plethora of inconsistencies and inaccuracies strewn throughout Mr. Fontenot's confession * * * would erode the credibility of that confession beyond repair." Pet. App. 142a.

The court then addressed Fontenot's *Brady* claim. It first rejected the State's argument that the district court had improperly denied the State the opportunity to address Fontenot's claims on the merits, adding that any error would have been harmless because the State conceded that it had addressed the *Brady* claim "thoroughly" in responding to Fontenot's first amended petition. Pet. App. 145a-151a, 151a n.49. Analyzing the significant evidence the State had withheld, the court concluded that "the absence of this evidence ensured that Mr. Fontenot did not receive a fair trial." Pet. App. 200a.

Judge Eid dissented. The dissent disagreed that Fontenot had presented sufficient evidence of actual innocence, noting that the majority had "fail[ed] to give sufficient weight to the fact that Fontenot confessed." Pet. App. 202a-207a. Judge Eid did not address the fact that Fontenot's confession was inaccurate as to the manner of death and where the body was found.

ARGUMENT

I. This case is an unsuitable vehicle to consider the question presented because the State would not benefit from a ruling in its favor.

The Court should deny certiorari because the evidence in this case qualifies as "new" evidence of actual innocence under any definition of new evidence. The State therefore would not benefit from a favorable ruling on the question presented. See R. Stern & E. Gressman, Supreme Court Practice 231 (8th ed. 2002) (fact that "resolution of a clear conflict is irrelevant to the ultimate outcome of the case" is basis for denying certiorari).

The State argues that the courts of appeals are divided as to what constitutes "new" evidence, and that the Eighth Circuit—the lone circuit on the more restrictive side of the split—correctly holds that evidence is "new" for purposes of the actual-innocence gateway only if that evidence is "newly discovered," that is, it "was not available at the time of trial through the exercise of due diligence." Pet. 19 (quoting *Kidd* v. *Norman*, 651 F.3d 947, 952 (8th Cir. 2011)). While that narrow understanding is irreconcilable with this Court's precedent, see pp. 26-30, *infra*, this case is not an appropriate vehicle to resolve that question because Fontenot's evidence meets even the Eighth Circuit's standard. Indeed, the district court expressly applied a "newly discovered" requirement—and found Fontenot had demonstrated his actual innocence under that standard. Pet. App. 240a; see also Pet. App. 241a, 243a-245a, 262a, 285a (noting evidence was "newly discovered").

As both lower courts found, almost all of the actual-innocence evidence here was unavailable to Fontenot

at his trial because of the State's "egregious" and often "[s]hocking[]" conduct. Pet. App. 227a, 312a. The State withheld critical exculpatory evidence; pressured witnesses to testify as to the existence of certain facts and to remain silent on other, exculpatory facts; and "unconscionabl[y]" interfered with Fontenot's ability to assist in his defense by intercepting his communications with his attorney. Pet. App. 116a, 227a, 312a, 396a. Those acts of serious and unconstitutional misconduct prevented Fontenot from discovering the evidence at issue until years after his trial had concluded.

As a result, that Fontenot failed to present this evidence at trial cannot possibly be ascribed to any lack of due diligence. As the Eighth Circuit—the court whose approach the State advocates—has explained, "[d]ue diligence does not require defense counsel to possess psychic abilities and discover potentially favorable evidence during trial that the State chose to conceal, particularly when defense counsel specifically requested disclosure of the evidence now at issue." *Jimerson* v. *Payne*, 957 F.3d 916, 927 (8th Cir. 2020) (addressing whether evidence was new under 28 U.S.C. 2244(d)(1)(D)); see also *Reeves* v. *Fayette SCI*, 897 F.3d 154, 164 (3d Cir. 2018), *as amended* July 25, 2018 (explaining that a videotape withheld by a prosecutor until after trial would constitute "newly discovered" evidence). Under any definition of "new," therefore, Fontenot's evidence in support of his actual-innocence claim would be appropriately considered.

Alibi evidence. The Tenth Circuit analyzed records of police interviews with Fontenot and other witnesses confirming Fontenot was at a party when Haraway was abducted, police reports corroborating details of Fontenot's alibi, letters Fontenot wrote to his trial attorney detailing his alibi, and 2009 and 2013

affidavits from individuals confirming Fontenot was at the party. See Pet. App. 99a-104a; pp. 10-12, *supra*. Of that evidence, only Ward's statement to police in October 1984 confirming Fontenot's alibi was available to Fontenot at trial.[7]

As the lower courts found, the remaining evidence was not available to Fontenot because of the State's repeated constitutional violations. The State withheld the interview notes and police reports confirming the alibi—despite Fontenot's motions and court orders seeking such documents and the obviously material and exculpatory nature of that evidence. Pet. App. 35a, 36a, 38a, 166a-168a, 324a. Even more egregiously, the State intercepted and never delivered Fontenot's letters to his trial attorney that detailed his alibi defense and potential corroborating witnesses, in violation of not only Fontenot's Sixth Amendment rights but also at least one court's order. Pet. App. 55a, 296a, 390a-394a. And Fontenot was unable to investigate and present the witness accounts contained in the 2009 and 2013 affidavits because the alibi witnesses' identities were "willfully kept from the defense" through that nondisclosure and interception. Pet. App. 335a.

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[7] Although Ward's statement that Fontenot was at the party was available at trial, that statement—coming from the other person accused of the crime—would not have been persuasive on its own. Moreover, although the State emphasizes (Pet. 24) that Fontenot could have attended the party *and* committed the crime, credible evidence that Fontenot was elsewhere, combined with the weakness of the evidence placing him near McAnally's and the lack of any physical evidence tying him to the crime, would have created reasonable doubt. Moreover, the newly discovered evidence includes people who put Fontenot at the party the entire night.

The State's response is remarkable. Without even acknowledging that it withheld all of this evidence from the defense, the State asserts that "this evidence cannot possibly be considered 'new'" because "[i]nformation regarding Fontenot's own 'alibi' was clearly something within his knowledge" and he "would have had better access to the witnesses" than the State. Pet. 24. But as the courts below explained, the police "denied [Fontenot] even the ability to ensure his attorney knew of this evidence"—thereby effectively denying Fontenot the assistance of counsel on this topic. Pet App. 393a; see *Weatherford* v. *Bursey*, 429 U.S. 545, 554, 557 (1977). Indeed, the police investigated for themselves "several of the witnesses Mr. Fontenot had tried to tell his attorney about as a means to undercut his alibi defense." Pet. App. 393a. And the State withheld its interviews and police reports corroborating the alibi defense despite repeated defense discovery motions. Pet. App. 161a-162a. In other words, the defense did not "cho[o]se against[] presenting" this evidence, Pet. 27—the defense never even had this evidence until decades after Fontenot's trial.

Obscene phone calls. As the Tenth Circuit concluded, the fact there was "no mention" during Fontenot's trial of the obscene phone calls Haraway received leading up to her disappearance could "be primarily attributed to the State's failure to disclose the police reports documenting such calls." Pet. App. 104a. Specifically, the Tenth Circuit catalogued the accounts of five people, taking particular note of details provided by Haraway's sister. Pet. App. 104a-108a. The State withheld police reports documenting three of those accounts—including the most detailed account, from Haraway's sister, who stated that the caller threatened Haraway that he would come to the store and wait for her outside one night—until 1992

and the report regarding a fourth until 2013. Pet. App. 42a, 49a, 107a. The fifth account was from a McAnally's customer who Ward's defense investigator had discovered and to whom Haraway had mentioned the calls shortly before her disappearance. Pet. App. 105a. Only that customer's account would be excluded from the actual-innocence analysis under the State's preferred approach. But the courts below would have reached the same result even if they were considering only the other four reports—given the number and consistency of withheld reports, and the fact that the withheld reports contained key details not in the available report.

James Moyer evidence. The Tenth Circuit relied on summaries of police interviews with Moyer and a 2012 affidavit from Moyer expressing "confiden[ce]" that, contrary to his testimony at trial, he had not seen Fontenot in McAnally's on the evening of Haraway's disappearance. Pet. App. 116a. The former were not available to Fontenot because the State withheld those reports until 2019. Pet. App. 56a, 111a. The latter was not available because "inappropriate prosecutorial influence" "made [Moyer] afraid to change his story," Pet. App. 115a-116a; Pet. App. 268a—*i.e.*, it was only in 2012, long after trial, that Moyer was willing to modify his trial testimony.

Entirely ignoring the withheld police reports, the State insists Moyer's affidavit is not new because he had already expressed uncertainty about his identification at trial. Pet. 26. But Moyer's "allegation of inappropriate prosecutorial influence" in the 2012 affidavit was not part of his trial testimony, Pet. App. 116a—and was not available to Fontenot until 2012. Moreover, the court of appeals concluded that Moyer's "uncertainty and confusion" at trial were meaningfully different from his "confidence" in 2012. Pet. App.

111a. The Moyer evidence therefore would be new even under the State's preferred "newly discovered" test.

Karen Wise affidavit. The information on which the court of appeals relied in Wise's 2009 affidavit about the four, not two, men in J.P.'s was not available to Fontenot because both the police and the prosecutor actively suppressed it. They pressured Wise to change her testimony, telling her "there were only two," gathering composite sketches not of the two men who made her "particularly nervous" but of the other two, and directing her that "she couldn't mention" the existence of the additional two men at trial. Pet. App. 120a. The State does not argue otherwise, instead asserting that this evidence "is not remotely helpful" and is "extraordinarily unreliable" given the passage of time. Pet. 26. But that is simply an argument that the Tenth Circuit erred in weighing this evidence in favor of actual innocence—a factbound issue not within the question presented—not an argument that this evidence would have been excluded under the State's preferred "newly discovered" standard.

Pickup truck descriptions. The new evidence regarding the truck or trucks seen on April 28 consisted of "undisclosed police interviews," Pet. App. 127a—*i.e.*, material withheld from Fontenot until after trial.

Medical examiner's report. The two portions of the medical examiner's report that the court of appeals identified as new evidence were withheld from Fontenot "despite the fact the trial court ordered full disclosure of the [Medical Examiner's] Report." Pet. App. 280a. The State disagrees, asserting without support that "anything within the medical examiner's file was available to Fontenot at the time of his retrial." Pet. 27. But the district court expressly found otherwise.

Pet. App. 245a, 280a, 282a. Even if this Court were to remand for application of the "newly discovered" standard, the State would be unable to show clear error in that factual finding. Pet. App. 156a-157a.[8]

* * *

In sum, nearly all of the evidence the court of appeals examined—everything except one statement from Ward supporting Fontenot's alibi and one account regarding obscene phone calls—is new even under the more restrictive standard the State asks this Court to adopt. There is no reason to think the court of appeals would have reached a different result if it had analyzed this case without that evidence. See pp. 30-32, *infra*; see also Pet. App. 240a (district court decision applying newly discovered standard). This Court should not expend its resources resolving a question that will not affect the outcome of this case.

II. The division among the courts of appeals does not warrant review.

The State argues that the courts of appeals are divided five-to-two as to whether evidence is new for the purposes of an actual-innocence claim when it is newly presented or, instead, only when it is newly discovered. In fact, the split is even more lopsided. It is also

[8] Although the state court found, without explanation, that Fontenot "had access to Medical Examiner report since 1986," Pet. App. 510, it did not address the critical dispute between the parties: whether Fontenot's access was to the *entire* report or to a version omitting certain critical documents containing exculpatory material. See Record on Appeal, vol. 2, pp. 51-54 (affidavit from appellate counsel stating she "was unaware that the medical examiner's report in this matter was some 43 pages long" until postconviction counsel provided it to her in 2013).

rarely outcome determinative, despite persisting for some time. This Court's review is not warranted.

To begin, almost every court to have addressed the question presented agrees with the decision below. At least six circuits have adopted the view that evidence is "new" if it is newly *presented*. See *Riva* v. *Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *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, 961-963 (9th Cir. 2003); *Gomez* v. *Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003); Pet. App. 93a. And the Third Circuit, one of the two circuits that the State identifies as adopting the minority, "newly discovered" approach, has in fact declined to take a side. See *Reeves*, 897 F.3d at 163 (explaining that "[o]ur Court has not yet resolved the meaning of new evidence in the actual innocence context" and that statements in prior opinions regarding standard were "dicta"); compare Pet. 19 (citing *Hubbard* v. *Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004)), with *Reeves*, 897 F.3d at 165 n.11 (explaining why *Hubbard* did not support a newly discovered view).[9] The State thus identifies only one circuit, the Eighth, as staking out a "newly discovered" test.[10]

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[9] *Reeves* held only that in the particular circumstance "when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence." 897 F.3d at 164.

[10] Although the State does not mention it, the Fifth Circuit also has stated that it "has yet to weigh in on the circuit split concerning what constitutes 'new' evidence." *Hancock* v. *Davis*, 906 F.3d 387, 389 (5th Cir. 2018) (citation omitted). In *Hancock*, the court held that certain affidavits were not "new" evidence because they were available to counsel at the time of trial.

But the division between the Eighth Circuit and other courts will rarely make a difference. As this Court has made clear, "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup,* 513 U.S. at 324. The "standard is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (citation omitted); see also *Perkins*, 569 U.S. at 395 (actual innocence "applies to a severely confined category"). Most petitioners will simply be unable to "show that it is more likely than not that no reasonable juror would have convicted," *Schlup*, 513 U.S. at 327, regardless of how new evidence is defined—as the numerous decisions that have rejected actual-innocence claims after applying the more permissive "newly presented" standard make clear. See, *e.g.*, *Riva*, 803 F.3d at 84-85; *Lee* v. *Lampert*, 653 F.3d 929, 938, 945 (9th Cir. 2011); *Gomez*, 350 F.3d at 680; *Griffin*, 350 F.3d at 965; see also, *e.g.*, *Green* v. *Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1151 n.132 (11th Cir. 2022) (explaining that court need not adopt a newly presented or newly discovered approach because petitioner could not prevail under either approach); *Rozzelle* v. *Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1018 n.21 (11th Cir. 2012) (same).

Perhaps for that reason, the conflict has persisted for many years without this Court granting review. The Eighth Circuit announced its approach almost 25 years ago and most of the decisions taking the opposite view are at least a decade old. See *Amrine* v. *Bowersox*, 128 F.3d 1222, 1227, 1230 (8th Cir. 1997) (en banc); p. 24, *supra*. Indeed, this Court has denied review in previous cases. See No. 18-543 (denied June 17, 2019); No. 18-940 (denied June 17, 2019). The only thing that has changed since those denials is that the Tenth Circuit has joined the numerous other courts

that reject the approach the State advocates. There is no reason for the Court to grant certiorari now—particularly where the State could not benefit from the Court's review.

III. The court of appeals' decision is correct.

Although the "new" evidence standard was not outcome determinative in this case, the court of appeals correctly held that evidence of actual innocence is new when it is newly presented. *Schlup*'s actual-innocence rule is an equitable principle that permits a habeas petitioner to present certain procedurally barred constitutional claims where doing so is necessary to avoid a "fundamental miscarriage of justice." *Perkins*, 569 U.S. at 391, 397 (actual-innocence gateway applies to claims that would otherwise be time-barred under AEDPA); *Schlup*, 513 U.S. at 327. The State's argument that a petitioner should be able to invoke this exception only where his evidence of actual innocence was not available at the time of trial is incompatible with the rationale for that exception and with this Court's explanation of its contours.

1. The actual-innocence gateway recognizes that "in appropriate cases, the principles of comity and finality * * * must yield to the imperative of correcting a fundamentally unjust incarceration." *Schlup*, 513 U.S. at 320-321 (citation and alteration omitted). Specifically, evidence of actual innocence may be "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error," permitting a court to hear otherwise barred claims. *Id.* at 316.

The actual-innocence inquiry thus focuses on whether the reviewing court has concerns that the

trial may have resulted in the conviction of an innocent person. Requiring that evidence of innocence be "newly presented" furthers that rationale by ensuring that the claim of innocence "is not based solely on evidence a jury has already found sufficient to convict the petitioner." Pet. App. 94a (citing *Schlup*, 513 U.S. at 324). The fact that a jury *did not* hear evidence demonstrating the petitioner's innocence helps support a petitioner's argument that he has been "unjust[ly] incarcerat[ed]." *Schlup*, 513 U.S. at 321. By contrast, the fact that a jury *could not* have heard evidence does nothing to help show that a court should lack "confidence in the outcome of the trial." *Id.* at 316. The risk of unjustly incarcerating an innocent person is present regardless of whether the evidence of innocence was available at the time of trial.

2. *Schlup* also supports the "newly presented" standard. There, the Court explained that a petitioner must come forward with "new reliable evidence * * * that was not *presented* at trial," and it used that formulation throughout in discussing the necessary evidence. *Schlup*, 513 U.S. at 324 (emphasis added); *id.* at 330, 332. Had the Court meant to require that the evidence have been previously *unavailable*, it would have said so. The State gets it backwards in arguing that "new" must mean something more than "not presented" to avoid "redundan[cy]," Pet. 19—unavailable evidence can never be presented at trial, so the Court need not have spelled out the "not presented" requirement if it understood the only "new" evidence to be unavailable evidence.

What is more, the actual-innocence petition in *Schlup* turned on evidence that, while not presented, was available at the time of trial. The Court focused on several affidavits it deemed "particularly relevant," but each of those affidavits was from someone who

could have testified at trial as to the same information contained in his affidavit. *Schlup*, 513 U.S. at 316-317. For example, one affidavit was from John Green, explaining a timeline of events that showed the petitioner could not have committed the murder for which he was convicted. See *id.* at 310. But Green had given the same information to the police and—critically and unlike here—the petitioner's counsel had been provided with a transcript of that interview before trial. See *id.* at 307, 312-313. The other affidavits the Court deemed significant came from an officer who testified at trial but "had not been asked about the significant details * * * recited in his affidavit" and from other individuals incarcerated at the facility who witnessed the incident. *Id.* at 308 n.18, 312 n.25, 316. Nothing in the Court's opinion suggests that diligent trial counsel could not have obtained and presented that evidence. Nonetheless, these affidavits, like the Green affidavit, were new because they were "not presented" at trial. *Schlup*, 513 U.S. at 324.

3. The State defends a "newly discovered" requirement on the grounds that it is necessary to promote finality and that only such a requirement will keep the actual-innocence gateway "narrow." Pet. 22, 31. It is, of course, true that narrowing the category of evidence that can be used to support an actual-innocence claim will decrease the number of successful petitions. But the whole point of a gateway claim is that finality must in rare cases "yield" to prevent a miscarriage of justice. *Schlup*, 513 U.S. at 320. And, as explained, only a newly presented requirement reflects appropriate "[s]ensitivity to the injustice of incarcerating an innocent individual." *Perkins*, 569 U.S. at 393.

As for the State's concern about "open[ing] the floodgates" for actual-innocence claims, Pet. 22, there

is no basis to think that a "newly presented" requirement will overwhelm courts with unfounded actual-innocence petitions. To begin, the State is in no position to argue—given its systematic effort to suppress exculpatory evidence in this case—that the standard applied by the court below would permit claims based on mere repackaging of the trial record (Pet. 23). Even more to the point, as this Court explained in *Schlup*, evidence of actual innocence "is obviously unavailable in the vast majority of cases." *Schlup*, 513 U.S. at 324. That is true under either a newly presented or a newly available test: where defendants possess "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," *ibid.*, at the time of trial, they will almost always present it. And the Court's imposition of a relatively high burden in this context means that very few habeas petitioners can demonstrate actual innocence. *Id.* at 327 ("The [more-likely-than-not] standard thus ensures that petitioner's case is truly 'extraordinary,' * * * ." (citation omitted)).

The overwhelming majority of circuit courts employ the more permissive "newly presented" standard—and the State conspicuously does not argue (much less demonstrate) that those courts have been inundated with actual-innocence petitions. The closest the State comes to supporting its empirical claim is a string cite of actual-innocence cases arising from Oklahoma district courts. Pet. 30. But in every one of those cases, the court *rejected* the actual-innocence claim—generally with very little effort. See, *e.g.*, *Proctor* v. *Whitten*, 2021 WL 597881, at *2 & n.4 (W.D. Okla. Feb. 16, 2021) (two sentences of analysis on actual-innocence claim). If anything, the State's failure to identify even a few cases finding actual innocence—much less a flood—only confirms that "substantial

claim[s] of actual innocence are extremely rare." *Schlup*, 513 U.S. at 321.

IV. The court of appeals' determination of actual innocence is correct and does not weigh in favor of certiorari.

The State's petition reveals that its true complaint is not that the Tenth Circuit improperly considered evidence that was available to Fontenot at the time of his trial—since the vast majority of the evidence had been suppressed by the State—but instead that the Tenth Circuit erred in concluding that the evidence established that Fontenot was actually innocent. Indeed, the State expends far more effort arguing that Fontenot's evidence was unpersuasive than it does attempting to demonstrate that the evidence was not "new." Pet. 24-29. The factbound, case-specific question whether the court of appeals' actual-innocence finding was correct under any definition of "new" evidence is not, however, before this Court, because the State has not sought review of that question. Pet. i; Sup. Ct. R. 14.1.

To the extent that the State suggests (Pet. 31) that the lower courts' actual-innocence determination provides an additional reason to review the question presented, the opposite is true. Far from applying a "low bar" (*ibid.*) for actual innocence, the court of appeals recognized that a finding of actual innocence is reserved for "extraordinary" and "rare" cases. Pet. App. 89a. The lower courts simply found that this was such a case. Their application of the rigorous *Schlup* standard to the facts of this case is clearly correct, even when the small amount of evidence that actually was available at trial is excluded from the analysis. See *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987) ("deference

to the shared conclusion of two reviewing courts" is appropriate where courts have reviewed the record and reached the same legal conclusion).

As the court of appeals explained, "[a]lmost no evidence connected [Fontenot] to the crime other than his own videotaped confession, a confession that rang false in almost every particular." Pet. App. 1a-2a. With the evidence withheld by the State, Fontenot would have been able to mount an alibi defense corroborated by several witnesses and by contemporaneous police reports documenting the party. Pet. App. 99a-102a; see also note 7, *supra*. The new evidence would also have allowed Fontenot to impeach the testimony of Moyer and Wise—the only two witnesses to suggest that someone resembling Fontenot was near McAnally's on April 28, Pet. App. 135a-136a—by pointing to Moyer's contemporaneous identification of someone else to investigators, Wise's identification of someone else who had a matching pickup and did not know Fontenot, and prosecutors' pressure on both to testify inaccurately.[11] Fontenot also could have offered a credible account of an alternate suspect based on the multiple contemporaneous accounts of obscene phone calls, including the important fact that the caller promised to wait outside the store for her one night. Pet. App. 107a. That evidence "fit[] with the observation of several witnesses that the gray-primered pickup was parked outside McAnally's for an hour or so before" Haraway disappeared. *Ibid*. Fi-

[11] Contrary to the State's argument (Pet. 25-26), Moyer's and Wise's affidavits are credible because both described their contemporaneous inconsistent statements to prosecutors, and how they were instructed as to how to testify. Belatedly-disclosed contemporaneous evidence corroborated those accounts. See pp. 13-15, *supra*.

nally, the medical examiner's report concluding Haraway gave birth prior to her death would have added further support to Fontenot's claim that someone else committed the crime, given Fontenot's incarceration starting in October. Taken together, this evidence—all of it unavailable at trial—easily demonstrated that no reasonable juror would have voted to find Fontenot guilty beyond a reasonable doubt.

The lower courts exhaustively reviewed hundreds of pages of newly disclosed evidence, together with the voluminous trial record, that showed that the State had an "extremely weak case." Pet. App. 135a. The weakness of the State's case and the sheer volume of exculpatory evidence—not to mention the fact that the reliability of Fontenot's conviction was vitiated by the State's own actions in withholding that evidence—decisively refute the State's purported concern about a flood of actual-innocence determinations. That this case, with its extraordinary, decades-long history of withheld exculpatory evidence, is one of the rare cases finding actual innocence hardly suggests that the courts below applied too permissive a standard.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 2, 2022