No.

In the Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Paul House's compelling new evidence of innocence sharply split the full *en banc* Sixth Circuit Court of Appeal. A bare majority of eight judges determined that he presented a colorable claim of innocence, but not a sufficiently strong one that allowed either for review of his underlying constitutional claims pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995) or his free-standing innocence claim pursuant to *Herrera v. Collins*, 503 U.S. 390 (1993). Six dissenters determined that House's new evidence of innocence was so persuasive and compelling that it easily satisfied *Schlup*, met Justice White's demanding innocence standard in *Herrera*, and warranted his immediate release from prison. The seventh dissenter argued that the new evidence was sufficient to warrant habeas relief and a new trial where a jury could consider all the evidence. Two questions arise from this outcome that warrant this Court's review:

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES:

COURT OF APPEALS CASES:

STATE COURT CASES:

RULES AND STATUTES:

OTHER:

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1) that is the subject of this petition is published at 386 F.3d 668. The earlier *en banc* opinion (App. 47) is reported at 311 F.3d 767. The panel opinion (App. 66) is reported at 283 F.3d 737. The memorandum opinion of the district court (App. 86) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2004. No further rehearing was sought. Mr. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article I, Section 9, clause [2] states, in relevant part: "The privilege of the Writ of Habeas Corpus shall not be suspended.."

The Fourteenth Amendment to the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

Introduction

Powerful new evidence of innocence, including DNA evidence, proves that petitioner Paul House was wrongly convicted of the murder of his former neighbor, Carolyn Muncey. Yet he remains on death row, having been denied review of his underlying meritorious constitutional claims by the barest possible majority of an *en banc* Court of Appeals, which did so only by misapplication of this Court's decisions in *Schlup v. Delo* and *Herrera v. Collins*.

In 1986, the district attorney general of rural Union County, Tennessee, successfully argued to twelve of that county's residents that Paul Gregory House brutally beat Carolyn Muncey to death after luring her to a remote area near her home and attempting to sexually assault her. The prosecution argued that Mr. House's semen was found on the underwear and nightgown of the murder victim, Carolyn Muncey; that blood shed from Mrs. Muncey's body during the murder was found on Mr. House's blue jeans; that Mr. House was seen a day later surveying the location where Ms. Muncey's body was found; that Mr. House did not tell law enforcement about a one hour and fifteen minute absence from his girlfriend's trailer that night; and that Mr. House shared a "low voice" with a person who had spoken to Carolyn Muncey sometime on the evening she was killed. That evidence, the prosecution argued, proved beyond a reasonable doubt that on the night of July 13, 1985, Paul Gregory House murdered his neighbor, a young housewife and mother of two, in the course of sexually assaulting her.

When those twelve men and women returned from deliberations convinced of Mr.

House's guilt, however, not one of them knew that the frailty – and more often than not, outright falsity – of virtually every significant piece of evidence presented to them. Not one juror knew that modern DNA testing would positively *exclude* Mr. House as the source of the damning semen stains on Ms. Muncey's clothing. None of them heard the Assistant Chief Medical Examiner of the State of Tennessee, Dr. Cleland Blake – a man who himself had put more than his share of men on Tennessee's death row and in its prisons – testify unequivocally and without hesitation that the blood stains on Mr. House's jeans came from blood originally contained in the four sample tubes collected during Ms. Muncey's autopsy, and <u>not</u> from the blows which caused her death. The jurors did not hear the un-controverted testimony or see the indisputable photographic evidence showing that at least three-fourths of the contents of one of these samples tubes was missing and could not be accounted for – providing powerful support for Dr. Blake's scientific opinion that the blood on the jeans was actually spilled from those tubes long after her death. They did not see the aerial photographs proving conclusively that the only place Mr. House was seen the day after the murder was walking toward the Muncey home trying to assist the victim's husband in the search for his missing wife.

Nor did a single person emerging from that jury room hear about the powerful evidence now uncovered which points convincingly to the victim's abusive husband, Herbert Muncey Jr., as the true perpetrator. The jurors did not hear about Mr. Muncey's long history of beating his wife or his recent threats to "get rid of her one way or another;" how he had lied to law enforcement about never seeing his wife after he left home on the morning she was murdered, and tried to fabricate an alibi for himself the night she was killed; or how an eyewitness saw him hit his wife again only hours before her death. Nor did the jurors know about his tearful

confessions to two of his friends – witnesses with no motive whatsoever to falsely implicate him -- that he had, in fact, later that same night committed the murder for which Paul Gregory House remains on death row. In short, the jury did not hear the truth.

Now, almost two decades later, Paul Gregrory House, an innocent man, cleared by DNA evidence, other exculpatory scientific evidence, indisputable physical evidence, and multiple eyewitness accounts, waits in a prison just outside of Nashville, Tennessee for a jury to hear the evidence in its entirety. He remains there despite the fact that eight Judges of the United States Court of Appeals for the Sixth Circuit, all of whom agree that Mr. House has established a "colorable claim of actual innocence," misinterpreted this Court's precedents to demand that he "do more" before they will even consider the patent constitutional violations which led to this manifest injustice. He remains on death row despite the fact that the six remaining Judges of that same court -- having themselves been wholly convinced of Mr. House's actual innocence -- logically concluded that no rational juror could ever vote to convict him of capital murder beyond a reasonable doubt, and called for his immediate release. And he remains on death row despite the fact that a seventh Circuit Judge concluded that, at the very least, the case poses a genuine "mystery" requiring a new trial by jury. Because this Court's precedents clearly provide an avenue of relief to a habeas Petitioner who offers such a compelling showing of actual innocence, yet the Circuits are both split and confused as to the standards they must apply in such cases, this Court should grant the Writ.

State Court Proceedings: The crime and its investigation

This case arises from Union County, a small rural community in east Tennessee, and concerns the beating death of Carolyn Muncey, the mother of two children, and wife of Hubert

Muncey, Jr. While suspicion might normally have been cast toward Mr. Muncey because of his reputation in the community for beating his wife, the police investigation focused solely and almost immediately on Petitioner Paul Gregory House, a convicted sex offender who had recently moved to Union County, after a witness claimed to have seen Mr. House on the day following the murder coming up from an embankment near the Muncey home where Ms. Muncey's body was later found. No other suspect, including Mr. Muncey, was ever investigated. Law enforcement collected blood and saliva samples from Mr. House, as well as a pair of muddy blue jeans which were recovered from a laundry hamper in the trailer home of House's girlfriend. These items, together with a sealed Styrofoam box containing four sample tubes of Carolyn Muncey's blood and a vaginal swab taken during her autopsy, and various articles of Ms. Muncey's clothing were placed in a large cardboard box and turned over to Joe Ed Munsey and William Breeding, two local law enforcement agents, who were charged with transporting it by car to the FBI Crime Laboratory near Washington, D.C. After learning that there were blood stains on Mr. House's blue jeans which were consistent with the blood of Carolyn Muncey, the State of Tennessee charged Paul Gregory House with first degree murder.

State Court Proceedings: The trial

The State's case against Mr. House was purely circumstantial. The prosecution had no confession; indeed, Mr. House steadfastly denied killing Ms. Muncey. It had no eyewitnesses. And it had no obvious motive: Mr. House had only recently moved to Union County, and while he had met Ms. Muncey, there was no evidence that he either disliked her or wanted more than a friendship with her.

The prosecution built its case for capital murder around several circumstances, each of

which tended either to place House with the victim on the evening of the crime or impeach his alibi. First, it asked the jury to believe that Billy Ray Hensley's testimony – that he saw House climbing up the embankment very near to where Ms. Muncey's body was found – showed the House was guilty because he, and no one else, knew where her body was located. Further, it asked the jury to conclude that the black rag that Hensley testified he saw House clutching when he first saw him was in fact the blue shirt that he was wearing at the time of the crime, and that House had returned to Ms. Muncey's body to retrieve it so he could not be linked to the crime.

Second, the prosecution asked the jury to find that the stains that appeared on House's pants that were recovered from Donna Turner's clothes bin were Ms. Muncey's blood, *and* that the pants became stained *during* House's struggle to bludgeon and strangle Ms. Muncey. It presented expert testimony from an FBI special agent that informed the jury that lab testing showed that the blood on the pants very likely was Ms. Muncey's blood.

Third, the prosecution presented evidence that the semen stains found on Ms. Muncey's clothing was left by a secretor with House's blood type, and that House was a secretor. This biological evidence also provided a damning, and indeed the only plausible, motive for the crime, *i.e.*, House murdered the victim either to conceal a sexual assault, or in an attempt to force the victim's acquiescence. Moreover, it was the <u>only</u> evidence of sexual assault or even attempted sexual assault which did not require the jury to first assume Mr. House's guilt.

Finally, the prosecution presented evidence that showed that House had lied to law enforcement officials and urged his girlfriend, Donna Turner, to lie about whether House had left the trailer on Saturday evening. It asked the jury to conclude that House had misled the police so they would not find the incriminating pants or place him where he had no alibi.

The defense countered that Mr. House did not commit the crime and that the evidence pointed more truly toward Hubert Muncey. Donna Turner testified that House did not leave the trailer until 10:30 or 10:45. This would have left House insufficient time to travel on foot the nearly two miles to the Muncey home and abduct Ms. Muncey before the Muncey children awoke and walked to their neighbor's home by 11:00. The State's forensic evidence placed the time of death between 9:00 and 11:00 pm. Further the defense attempted to show that Billy Ray Hensley did not see House climbing up the embankment where Ms. Muncey's body was later found and that he actually saw Mr. House on the roadway where Mr. House had admitted to being and where another witness also saw Mr. House.. It was unable to address the State's blood on pants or semen stain evidence, except to argue that the prosecution was negligent not to have tested to see if the semen could be linked to Mr. Muncey. It further argued that because the prosecution failed to satisfy its special burden in a circumstantial evidence case under Tennessee law , *i.e.* it must establish beyond a reasonable doubt that the evidence is consistent with only a hypothesis of guilt, the jury was required to acquit Mr. House.

After deliberations, the jury found Mr. House guilty of capital murder. At the conclusion of the sentencing phase of trial, the jury determined that Mr. House had committed the murder during the course of a rape, attempted rape, or kidnapping, and found two additional statutory aggravating circumstances. The jury sentenced Mr. House to death. The Tennessee Supreme Court affirmed Mr. House's conviction and sentence. *House v. State*, 743 S.W.2d 141 (Tenn. 1987), *House I.*

State Post-Conviction Proceedings

On February 25, 1988, Mr House filed a *pro se* state post-conviction motion asserting,

inter alia, his trial counsel's failure to properly investigate and prepare for the guilt phase of his capital trial and that the State had failed to reveal exculpatory evidence. Counsel was appointed for Mr. House. On August 25, 1988, the day set for hearing on Mr. House's motion, counsel filed an amended petition containing only two jury instruction claims and deleting Mr. House's *pro se* claims. At the hearing, counsel presented no evidence whatsoever and argued only the jury instruction claims. Mr. House made no on-the-record statement that he agreed to waive his guilt phase ineffective assistance of counsel claim. The court dismissed that claim, and also summarily dismissed the jury instruction claims on the grounds that they should have been presented on direct appeal. The decision was affirmed by the Tennessee appellate courts. Certiorari review was denied by this Court. 498 U.S. 912 (1990).

On December 14, 1990, Mr. House, who was by then represented by undersigned's co-counsel in the district court below, filed a second petition for post-conviction relief, challenging not only trial counsel's ineffectiveness, but prior post-conviction counsel ineffectiveness for withdrawing that claim. In response, the State asserted the claims were procedurally defaulted. The State submitted that, because of counsel's prior withdrawal of Mr. House's claim of ineffective assistance of counsel, the petition should be dismissed. The court agreed as did the Tennessee Court of Criminal Appeals. The Tennessee Supreme Court vacated the lower appellate court's decision and remanded it for consideration in light of a new decision. The Court of Criminal Appeals then reversed its prior holding and ordered that Mr. House's case be returned to the trial court to determine whether Mr. House had deliberately and personally waived his ineffective assistance of trial counsel claim during his first post-conviction proceeding. *House v. State*, 1993 WL 97546 (Tenn. Crim.App.) The State then sought review in the Tennessee

Supreme Court. In a decision specifically overruling prior authority which required a personal waiver, the Supreme Court reversed the decision of the Court of Criminal Appeals and affirmed the trial court's dismissal of Mr. House's second petition for post-conviction relief. *House v. State*, 911 S.W.2d 705 (Tenn. 1995), *House II*. This Court denied certiorari review. 517 U.S. 1193 (1996)

Federal Habeas Corpus Proceedings

Mr. House filed a timely petition pursuant 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, asserting claims of, *inter alia*, ineffective assistance of counsel and suppression of material exculpatory evidence. Respondent Bell asserted that consideration of these claims was procedurally barred. Mr. House responded that any such bar was inadequate and that based upon the facts alleged, he was entitled to an evidentiary hearing to demonstrate that he was actually innocent and that his claims could nonetheless be considered under the substantial miscarriage of justice exception. The district court determined that the *House II* court's default holding was an independent and adequate state ground for dismissal of the ineffective assistance of counsel and *Brady/Giglio* claims and ordered an evidentiary hearing to determine whether Mr. House could meet the "miscarriage of justice" exception by demonstrating his "actual innocence" as set forth in *Schlup v. Delo*, 513 U.S. 298 (1995).

The District Court Hearing Evidence

Petitioner House presented substantial credible evidence that showed that *each* of the principal pieces of circumstantial evidence relied upon by the jury to convict was either entirely unreliable or strongly suggested that Carolyn Muncey's killer was her husband, Hubert Muncey. The evidence also showed that the State of Tennessee knew, yet failed to reveal, and sometimes

overtly misrepresented, many of these facts.

First, he presented DNA evidence that conclusively established that the semen stains found on Ms. Muncey's clothing were not, as the prosecution urged the jury to conclude, Mr. House's. Apx 800. In fact, the semen stains (upon which the prosecution relied totally to provide an even remotely believable explanation what would motivate Mr. House to walk or run almost two miles, at a rapid rate of speed, up and down the hills of East Tennessee, in the middle of a moonless night) were those of her husband, Hubert Muncey Jr.[1] This new evidence itself raises a colorable showing of innocence. At trial, the defense claimed innocence, asserted that Mr. House had no motive to harm Ms. Muncey, and argued that Mr. Muncey was the likely assailant. This new evidence strongly bolsters Mr. House's trial defense and shows the prosecution's urging the jury to conclude that House was driven by lust to commit the crime was entirely misleading and highly prejudicial.

Second, he presented evidence that Hensley could not have seen House coming up the embankment from the area where Ms. Muncey's body was found as Mr. Hensley had originally claimed. Photographs taken near the time of trial as well as aerial photographs taken during federal proceedings showed that it was physically impossible for Mr. Hensley to have seen Mr. House from his claimed vantage point, much less to have seen him coming up from the embankment, leaving the only credible evidence that of the witness who testified that he had seen a man fitting House's description walking from his car toward the Muncey home.[2]

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[1] Also introduced at the hearing was a TBI report which showed that Muncey had told law enforcement that he and his wife had had sexual relations on the morning of the crime. This report was not disclosed to the defense prior to or during the trial.

[2]At trial, the prosecutor tried to obfuscate this fact by telling the jury, "[p]hotographs, which we all now, only go so far in showing you the truth - photographs distort distance, and they distort angles, we all know that."

Third, House presented considerable lay and expert evidence to establish that the blood on his pants that the jury was urged to conclude was transferred from Ms. Muncey at the time of the crime was in fact transferred *after* the pants were in the possession of law enforcement. This evidence came from several sources. The most notable of these was the testimony of Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, a man who had not only previously testified almost exclusively for the prosecution in criminal cases, but had also trained Tennessee law enforcement agents regarding the proper handling of biological evidence. Dr. Blake testified unequivocally that he had determined that because of the similarity of the degradation of the blood stains on Mr. House's blue jeans and that of the blood taken from the sample tubes, the blood stains on Mr. House's blue jeans did not come from the transfer of blood during the crime but from the transfer of blood from the sample tubes taken during Carolyn Muncey's body. Dr. Blake's testimony was partially corroborated by the State's own serology expert, who conceded the soundness of the basic scientific principles upon which Dr. Blake relied.[3] It was further corroborated by, *inter alia*, indisputable photographic and documentary evidence that blood was inexplicably missing from the sample tubes and that this blood had escaped prior to their receipt by the FBI Crime Laboratory and that the Styrofoam box containing the sample tubes was opened during transit to the FBI.

Fourth, House presented evidence from local law enforcement personnel and long time friends of Hubert Muncey, Jr., the victim's violent and abusive husband, that showed that he, not Mr. House, murdered Carolyn Muncey on the night of Saturday, July 13, 1985. Evidence that

[3]The State's expert disagreed with Dr. Blake's ultimate conclusion because, while he admitted that these similarities might be significant, he opined that they might also have been the result of simple coincidence.

Hubert Muncey Jr., unlike Mr. House, had the motive and opportunity to kill his wife, and that he actually confessed to having done so.

This evidence showed that Hubert Muncey was known in the community to be a severe alcoholic and wife abuser. Not only had a number of people seen Mr. Muncey strike the victim, she had also been seen a number of times with bruises from a beating to her face and head. A few months before her murder, Mr. Muncey told his friend, Hazel Miller, that he had been in an argument with his wife and was going to get rid of her "one way or the other."

On the evening of the crime, Ms. Muncey was seen with Mr. Muncey outside of the C & C Recreation Center. They argued and a witness saw Mr. Muncey strike her. Ms. Muncey left, alone and on foot. The next morning, Mr. Muncey went to the home of Ms. Artie Lawson. He asked her to say that she had seen him at the dance the night before. This was untrue and Ms. Lawson refused to do what Mr. Muncey had requested. Mary Atkins, the same person who had seen Mr. Muncey hit his wife the night before, was staying nearby at her brother's house and saw Mr. Muncey at Ms. Lawson's house that morning.

Some time before Mr. House's trial, Muncey stopped by the home of a former girlfriend, Kathy Parker. Ms. Parker was there, along with some friends, having a few beers. Also present was her sister, Penny Letner, who was not drinking. Mr. Muncey had been drinking. He had been at the house for a few minutes when he sat down on the couch and started crying. Ms. Parker, who had been drinking herself, recalled that Mr. Muncey said that he had got into an argument with his wife, that he slapped her, that she fell and hit her head, and that he didn't mean to do it. Ms. Letner, who had not been drinking, remembered more of the details of his confession:

He said that he didn't mean to do it. That she was "bitching him out" because he didn't

> take her fishing that night, that he went to the dance instead. He said when he came home that she was still pretty heavily "bitching him out" again and that he smacked her and that she fell and hit her head. He said he didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Ms. Letner stated that she was upset by Mr. Muncey's confession and that she left immediately. Ms. Parker testified that she too was upset and "run [Mr. Muncey] off". Ms. Letner stated that she was a nineteen year old mother at this time and that she was too scared to come forward (Letner habeas hearing testimony). However, Ms. Parker testified that she soon thereafter attempted to tell law enforcement about what she and Ms. Letner had heard, but that they did not appear interested. (Parker habeas hearing testimony 2/1/99, p. 38-39)

In his testimony, Mr. Muncey denied that he was often abusive to his wife; he denied the physical encounter he had with his wife at the C & C Recreation Center; he denied that he killed her; he denied that he asked Ms. Lawson to lie (or that he was even at Ms. Lawson's home the morning following his wife's murder); and he denied that he confessed to Ms. Letner and Ms. Parker. He could not explain why so many people who considered themselves his friends would come into federal court and testify to the contrary.

The District Court ruling

The district court dismissed the petition. Conflating principles announced in *Herrera v. Collins*, 506 U.S. 390 (1993) and *Schlup v. Delo*, 513 U.S. 298 (1995), the court determined that the new evidence did not establish that Mr. House was actually innocent. While the court heard from numerous witnesses, it made few credibility determinations.

The Court of Appeals rulings

The United States Court of Appeals for the Sixth Circuit issued two published *en banc*

decisions in this matter.[4] In each, court members were sharply divided not only on the legal standards that govern this proceeding but on the significance of the new facts to those principles.

In *House v. Bell*, 311 F.3d 767 (6th Cir. 2002)(*en banc*), a six-judge majority concluded that the new evidence created "a serious question or doubt that the defendant is guilty of first degree murder," 311 F.3d at 777, and certified questions to the Supreme Court of Tennessee to facilitate review. *Id.* [5] Judge Gilman issued a dissenting opinion stating that he considered the certified questions unnecessary but would grant sentencing phase relief on the basis of the then-current record. Four other judges also dissented. While conceding that the evidence, "might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted." *House v. Bell*, 311 F.3d at 780 (Boggs, J., dissenting)(emphasis supplied), these judges believed that Mr. House had failed to meet the requirements of *Schlup* because, in their opinion, *Schlup* allowed them to reach the merits of Mr. House's claims only "if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit." *House v. Bell*, 311 F.3d at 783

(Boggs, J., dissenting)(emphasis supplied) Mr. Bell petitioned this Court for certiorari review, which was denied.

At the urging of the State, the Tennessee Supreme Court departed from years of prior practice and refused to answer the certified questions and the matter was returned to the Sixth Circuit Court of Appeals. Thereafter, on October 6, 2004, the Sixth Circuit issued a new opinion

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[4] An initial panel opinion denying relief, *House v. Bell*, 283 F.3d 737 (6th Cir. 2002), was vacated when the majority agreed to hear the case *en banc*.

[5] Those questions inquired whether state avenues were available to present guilt phase claims of constitutional error to a defendant who has demonstrated his actual innocence, under what combination of constitutional errors a defendant ceases to become death eligible under Tennessee law, and whether Tennessee law provided a state remedy for a person whose lack of eligibility for the death penalty was demonstrated through newly discovered evidence.

affirming the district court's denial of relief. *House v. Bell*, 386 F.3d. 668 (2004)(*en banc*). The eight-judge majority agreed that Mr. House had established a colorable claim of innocence, *House v. Bell*, 386 F.3d at 684, but nonetheless denied relief because it determined that *Schlup* required Mr. House to do more. *Id.* It found that sufficient evidence of guilt remained unaffected by the new evidence to adequately support his conviction. 386 F.3d at 685.

Six judges dissented. They concluded that House's new evidence not only was sufficient to satisfy the *Schlup* gateway standard and thus permit review of House's underlying constitutional claims, they found the evidence presented that rare and extraordinary case where petitioner has provided "a truly persuasive demonstration of 'actual innocence' " which met Justice White's concurring opinion in *Herrera* to establish his innocence of the crime. 386 F.3d at 708-09. Judge Gilman again dissented alone, and wrote that the new evidence "left him in grave doubt as to which of the . . . two suspects murdered Carolyn Muncey." 386 F.3d at 709. He believed that the evidence was sufficient to satisfy *Schlup* and determined that the proper resolution was to grant the writ so that "a new trial would allow a jury to assess House's guilt or innocence free from erroneous introduction of semen evidence, the full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey." 386 F.3d at 710.

REASONS FOR GRANTING THE WRIT

In the twelve years since this Court decided *Herrera v. Collins*, 506 U.S. 390 (and the decade since it decided *Schlup v. Delo*, 513 U.S. 298 (1995), we have learned a great deal about the fallibility of our system of justice. As a result of increasingly sophisticated forensic tests, exonerations of people charged with or convicted of serious crimes are no longer rare events.[6]

[6]*See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003* at 1 (2004)("The rate of exonerations increased sharply over the 15-year period of the study, from about 12 a

Staunch supporters of capital punishment have acknowledged that the alarming number of exonerated death row inmates has given them pause about the application of the ultimate penalty.[7] Late last year, in recognition of the need to prevent and expose wrongful convictions, a bill designed to facilitate access to DNA testing and improve defense representation enjoyed broad bi-partisan support and was enacted by Congress.[8] In his latest State of the Union Address, President Bush extolled the paramount importance of protecting against wrongful convictions. [9]

Paul House presents a compelling case of actual innocence. He has demonstrated that all the physical evidence linking him to the crime for which he has spent the last twenty years on death row was either non-existent or patently unreasonable. He has shown that the purely circumstantial case against him, consisting primarily of the statement of Billy Ray Hensley, is wholly implausible. And he has presented testimony that Mrs. Muncey's husband has confessed to killing her. Nine federal court of appeals judges believe that Mr. House has raised serious doubts about his guilt. *See House*, 386 F.3d at 684, 710. Six more believe that he has proven that he is innocent. *See House*, 386 F.3d at 708. House urges this Court to grant certiorari in his case. Doing so will permit the Court to clarify its holdings in *Schlup* and *Herrera* and elaborate on the standards by which lower courts

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year through the early 1990s to an average of 43 a year after 2000.").

[7] *See* George F. Will, *Innocent on Death Row*, Washington Post, April 4, 2000; Del. Vincent F. Callahan, Jr., "Virginia Needs A Moratorium On The Death Penalty" The Roanoke Times, Jan. 31, 2002 ("In the past, I have been a strong advocate of the death penalty. However, I have now become one of those who believe that we must take another look at the death penalty. New scientific evidence, such as DNA evidence, has revolutionized all areas of crime detection, criminal prosecution and criminal defense.").

[8] *See* Peter Baker, *Behind Bush's Bid To Save The Innocent*, Washington Post, A09 (Feb. 4, 2005); *see* Bill No. H.R. 3214/S 1700 (Advancing Justice Through DNA Act)(sponsored by Rep. F. James Sensenbrenner and Sen. Orrin Hatch).

[9] *See* Baker, *supra* (quoting Pres. Bush in his State of the Union Address of Feb. 2, 2005: "Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America, we must make doubly sure no person is held to account for a crime he or she did not commit.").

should consider claims of actual innocence. A survey of circuit decisions applying *Herrera* and *Schlup* reveals inconsistency and confusion among lower courts about how to use those cases to consider post-conviction claims of actual innocence. The need for this clarification cannot be overemphasized in this era since DNA and other exonerations have shined the light on a "catalog of appalling miscarriages of justice."[10]

I. THE CIRCUITS REQUIRE GUIDANCE ABOUT HOW TO APPLY *SCHLUP* IN CASES LIKE HOUSE'S IN WHICH POST-CONVICTION INVESTIGATION UNCOVERS CREDIBLE EVIDENCE OF ACTUAL INNOCENCE AND RADICALLY UNDERMINES THE CASE PRESENTED TO THE TRIAL JURY.

The sharply divergent approaches of the Sixth Circuit majority and dissenting opinions in House's case reveal a schism that cleaves *Schlup* analysis not only in that court but in other circuits as well. For a decade, the courts of appeals have applied *Schlup* inconsistently to cases with indistinguishable facts. This Court should grant the writ to clarify the *Schlup* standard and give the lower courts much-needed guidance to avoid arbitrariness in resolving claims of actual innocence, especially in capital cases. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

House has presented exactly the kind of evidence specifically cited in *Schlup* as necessary to establishing a "credible" gateway claim of actual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. Post-conviction DNA testing has established that the semen evidence excluded House as a donor and removed the motive the jury was asked to ascribe to him. Moreover, the DNA testing has pointed to the victim's husband, who has through other evidence presented, become a very plausible alternative suspect. Post-conviction testing of the blood evidence established that the victim's blood

[10]Will, *supra*.

ended up on House's clothing not because he bludgeoned her, but because either shoddy packaging allowed the blood to spill or two law enforcement agents deliberately placed the blood onto the clothing during transportation to labs. Further, several witnesses came forward, offering detailed first-hand accounts of the victim's husband both trying to establish a false alibi and confessing to the death of his wife.

The Sixth Circuit majority acknowledged that "[House] has presented a colorable claim of actual innocence" and yet it viewed House's post-conviction evidence in isolation without considering the effect it would have had on a reasonable juror viewing it in its entirety. *House*, 386 F.3d at 684-685. In fact, the majority examined each piece of testimonial and biological evidence singly and opined as to each one why it alone failed to dismantle the case against House. *Id.* (discussing and dismissing the Letner and Parker testimony, Hubert Muncey's attempt to concoct an alibi, the semen evidence, the blood on the jeans, and the absence of blood on House's shoes). As a result, the majority– without ever putting itself in the shoes of House's trial jury-- concluded that House's evidence failed to meet *Schlup*'s "no reasonable juror" standard and therefore fell short of warranting forgiveness of a procedural default. *House*, 386 F.3d at 685. This conclusion flies in the face of *Schlup*'s express requirement that courts evaluate claim of actual innocence in light of all the evidence presented, both old and new collectively. *See Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial.") (internal quotation marks omitted); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

Meanwhile, the Sixth Circuit dissent reached the polar opposite conclusion from the majority

and announced that House had not only proffered evidence sufficient to pass through the *Schlup* gateway, but that he had sufficiently undermined the case against him as to warrant his immediate release. *House*, 386 F.3d at 708 ("The new evidence so completely turns the case around that the proof is no longer constitutionally sufficient to warrant a conviction or imposition of the death penalty."). The dissent reached this conclusion by taking a detailed look at the impact House's post-conviction case had on each piece of trial evidence. Reasoning that the trial case against House had been built entirely on circumstantial evidence and that his post-conviction evidence had "disprov[ed] the motive for the crime" and the rape aggravator and "undermin[ed] the main circumstances that gave rise to his conviction," the dissent advocated for overturning House's conviction. *Id.* at 707. The dissent relied heavily on the fact that the prosecution had persuaded the jury that rape had been the motive for House's assault on the victim and that rape had been disproven by the DNA test results showing that the semen belonged to Hubert Muncey. The dissent reasoned that the prosecution's theory of the crime had been dismantled, and therefore House's conviction became invalid. The dissent went on to pointedly criticize the majority for turning a blind eye to this fact. *Id.* at 690-692 ("[T]he State now seems to deny that the semen evidence was introduced at the state trial in 1986 to show that House attempted to rape Carolyn or that rape was the motive offered to the jury for this kidnapping and murder and the basis of the jury's verdict. This argument is simply not consistent with the facts, and the majority opinion does not acknowledge or deal with this problem.").

That judges on the same court, viewing the same record, could reach such sharply divergent conclusions in a capital case highlights the need for this Court to clarify the "no reasonable juror" standard it announced in *Schlup* and to give lower courts guidance on how to apply post-conviction

evidence of actual innocence. In fact, a review of *Schlup* cases in the courts of appeals unearths inter-circuit and intra-circuit splits on several questions confronting courts considering claims of actual innocence : 1) What is the appropriate approach for analyzing old evidence in light of new evidence? Must new evidence of innocence completely neutralize or eliminate the validity of old evidence of guilt, or is it sufficient for new evidence to raise doubt in the minds of the hypothetical "reasonable juror"?; 2) How are courts to evaluate the credibility of old and new evidence? Should judges view the evidence from the perspective of the trial jurors and assess the impact of the new evidence on the evidence the jury heard, or should they substitute their own credibility assessments in considering the weight of both kinds of evidence, or should they take some other approach?; and 3) Is it enough for the petitioner to undermine central aspects of the trial case against him, or must the petitioner present affirmative evidence of innocence in order to pass through the *Schlup* gateway?

This case cries out for clarification of the law. This Court should grant certiorari to instruct the lower courts that when a post-conviction petitioner proffers evidence which discredits the tenets of the trial case against him such that no reasonable juror viewing the old evidence in light of the new would vote to convict, *Schlup* should apply. *See Schlup*, 513 U.S. at 320-321 (emphasizing the "equitable nature of habeas corpus" and stating, "tying the miscarriage of justice exception to innocence . . . accommodates both the systemic interests in finality, comity , and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'").

A. IMPACT OF NEW EVIDENCE ON OLD

This Court should grant certiorari to clarify that *Schlup* requires courts to evaluate the impact of the new evidence as a whole on the evidence presented to the jury which convicted the petitioner.

See Schlup, 513 U.S. at 327-328.[11]

The divergent approaches to evaluating new evidence evinces the urgent need for clarification. For example, the Fifth Circuit has held that affidavits from trial witnesses recanting their prior testimony suffice under *Schlup*. *See Wilkerson v. Cain*, 233 F.3d 886, 889, 892 (5th Cir. 2000)("William Riley executed an affidavit in which he recanted his [trial] testimony and stated that he did not witness the killing but, rather, merely related to prison officials what another inmate had told him. Similarly, inmate Charles Lawrence, who testified at the first trial but not the second, executed two affidavits in which he recanted his testimony."); *cf. id.* at 893 (Garza, J., concurring)("The district court must hold an evidentiary hearing to assess the newly introduced affidavits because there are reasons to doubt their reliability."); *see also Fairman v. Anderson*, 188 F.3d 635, 644-645 (5th Cir. 1999)(finding that during post-conviction, trial witness Prewitt signed an affidavit alleging that his trial testimony was the result of police coercion and recanting it and finding that Prewitt's post-conviction testimony established that the petitioner acted in self defense and was therefore innocent pursuant to *Schlup*); *cf. id.* at 647.

A panel of the Sixth Circuit considering a *Schlup* gateway claim recently adopted an approach very different from the *House* majority's piecemeal approach to the evidence in this case. *See Souter v. Jones*, 2005 WL 86477 (6th Cir. Jan. 18, 2005). In *Souter*, the panel held that the petitioner had through the affidavits of several trial witnesses, who recanted central portions of their trial testimony, re-analysis of old physical evidence, and proffered testimony undermining the plausibility of the use of a particular model of beer bottle as the murder weapon, the petitioner had

[11] ("In assessing the adequacy of the petitioner's showing. . . the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.").

met *Schlup*'s innocence standard. The *Souter* court detailed the testimonial, scientific and other physical evidence presented at trial and in post-conviction hearings and concluded that considered holistically, the old evidence viewed in light of the new evidence warranted the conclusion that Souter was actually innocent. *Id.* ("We conclude that this new evidence– the changed testimony of Drs. Bauserman and Cohle, the statements from the bottle manufacturer, the additional evidence of the forensic scientist and police laboratory technician, the photos of the bloody clothes– when taken together chips away at the rather slim circumstantial evidence upon which Souter was convicted.") (internal quotation marks omitted).[12]

In contrast, the Third Circuit has found *Brady* material not turned over at trial in the form of prior inconsistent statements from trial witnesses, eyewitnesses to the crime, insufficient under *Schlup*. *Mattis v. Vaughn*, 2003 WL 22070528 (3rd Cir. Sept. 25, 2003)("On the record, we cannot conclude that the impeachment of Watson's trial testimony with his identification of a different triggerman in the [*Brady* material] would satisfy the *Schlup* standard that no reasonable juror would have found Mattis guilty beyond a reasonable doubt. . . Moreover, Mattis has not established that no reasonable fact finder would have convicted him based on [another trial witness's] testimony alone. At most, Mattis has shown that it is possible that a reasonable juror could have acquitted him in light of the new evidence.").

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[12]The Ninth Circuit has adopted a similar approach to *Souter*. *See Cooper v. Woodford*, 358 F.3d 1117, 1120 (9th Cir. 2004) (*en banc*). The Court decided that Cooper had met the *Schlup* standard by introducing sworn declarations which "if believed, appear to indicate that a *Brady* violation has taken place and that crucial evidence introduced at trial was not reliable." *Id.* The Court reached this conclusion while acknowledging that evidence that implicated Cooper at trial still remained and was confirmed via post-conviction DNA testing. *Id.* at 1123; *cf. id.* at 1127 (Silverman, J., dissenting)("Viewed against the evidence as a whole, the information that Cooper now urges is not sufficient to establish by clear and convincing evidence that, but for the alleged constitutional errors, no reasonable jury could have concluded that he was guilty even if the [post-conviction evidence] had been available to the defense at trial.").

B. REVIEWING COURT AS REASONABLE JUROR?

Despite *Schlup*'s clear admonition that reviewing courts should not substitute their own "independent judgment as to whether reasonable doubt exists," 513 U.S. at 329, circuits have adopted different approaches to assessing the credibility of new evidence and its impact on trial evidence. The Court should grant certiorari to instruct lower courts that the perspective of the reasonable trial juror is the vantage point from which to evaluate new evidence of actual innocence.[13]

Rather than substituting their own judgment for that of the jury, some courts have put themselves in the jury's shoes and assessed the new evidence as the jury likely would have viewed it at trial. The Third Circuit substituted its own judgment for that of the trial jury in *Mattis* and concluded that at most Mattis had raised reasonable doubt, but that he fell short of showing that no reasonable juror would have convicted him in light of the new evidence. *Mattis*, 2003 WL 22070528 *45. This approach is similar to that of the Sixth Circuit majority in *House*, which viewed the evidence not from the perspective of the jury, but from its own perspective as a reviewing court. *See House*, 386 F.3d at 684-685 ("Moreover, in weighing the new evidence we review the factual findings of the district court for clear error"; "Despite his best efforts, the case against House remains strong. We therefore conclude that he has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."); *see also McKenzie v. Smith*, 326 F.3d 721, 728 (6th Cir. 2003).[14]

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[13]*See also Jackson v. Virginia*, 443 U.S. 307 (1979)(holding that when reviewing claims that trial evidence was insufficient, "this inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.")(internal quotation marks omitted).

[14](finding that the petitioner had met the *Schlup* standard by undermining the credibility of a child witness's hearsay statement, which was the ground for his conviction and stating, "While such

The Fifth Circuit in *Wilkerson* explicitly put itself in the shoes of the jury in assessing the new evidence– an affidavit from an eyewitness recanting his trial testimony-- and determined that in light of the affidavit, the prosecution's trial case would have been significantly weakened in the jury's eyes. *See Wilkerson v. Cain*, 233 F.3d at 890-891, 892 (assuming the validity of the statements in the proffered affidavits and recognizing that the jury was deprived of the opportunity to assess the recanting eyewitness's credibility in light of the affidavits; "Had the jury believed that [the witness] was testifying to curry favor with the state, or that he expected some real or perceived benefit in return, the state's case would have been seriously undermined. Accordingly, it is apparent that there is more than a reasonable possibility that the verdict may have been different."); *cf. Fairman v. Anderson*, 188 F.3d at 648-649 (Jones, J., dissenting)(analyzing new facts offered to prove that the petitioner acted in self-defense and concluding that "Under the majority's ruling, perhaps we will find out what all 'reasonable jurors' would do with this case. I cordially disagree that 'more likely than not,' they will accept Fairman's claim of self-defense.").

In at least one case, the Ninth Circuit has declined to assess the credibility of the new evidence itself and deferred the credibility determination to the district court while concluding that "[the petitioner] has presented sufficient evidence, if credible, to support a finding that he is actually innocent of first degree murder." *Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003). In so concluding, the Ninth Circuit considered the evidence in light of the other evidence presented to the jury and thereby determined that if the evidence turned out to be credible, the jury's verdict would

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evidence could certainly be used to add to the prosecution's case, a statement made under circumstances such as those in this case by an 'incompetent' declarant simply does not constitute proof beyond a reasonable doubt. . . [W]e hold– upon the record as a whole– that the petitioner's conviction is not supported by constitutionally sufficient evidence. Although we can understand why a jury would want to convict someone for the crime involved in this case, the proof is neither substantial nor competent enough to let stand the jury's verdict. . . .").

have been different. *Id.* ("The new evidence, if credible, and considered in light of all the evidence, demonstrates that it is more likely than not that no reasonable juror would have convicted Jaramillo of the charged offenses."); *see also Majoy v. Roe*, 296 F.3d 770, 778 (9th Cir. 2002)(quoting *Schlup*, 513 U.S. at 329)("We note also that 'it is not the district court's independent judgment as to whether reasonable doubt exists,' but whether 'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"); *Silva v. Wood*, 2001 WL 737591 (9th Cir. June 29, 2001)("The district court erroneously failed to evaluate properly all the evidence, both old and new, relied on by Silva, and in so doing abused its discretion in finding that the new evidence has no import on previous evaluations of the totality of the circumstances")(internal quotation marks omitted).

C. AFFIRMATIVE SHOWING OF INNOCENCE REQUIRED?

Finally, circuit courts have adopted radically different approaches to the question whether *Schlup* requires an affirmative showing of innocence, more than an effective undermining of the prosecution's trial case. The Court should grant certiorari to instruct the lower courts that once the petitioner has produced enough evidence to meet the "no reasonable juror" standard, he should pass through the *Schlup* gateway, regardless of whether the new evidence entirely dismantles the pillars of the prosecution case against him or whether the new evidence affirmatively demonstrates innocence. *See Schlup*, 513 U.S. at 329, 331.

In House's case, the Sixth Circuit majority determined that despite his strong proffer of evidence undermining the prosecution's trial case, because some evidence pointing to House's guilt remained unmolested by the new evidence, he failed under *Schlup*. *See House*, 386 F.3d at 684-685. The majority went out of its way to identify the remaining shred of credibility contained in each item

of evidence which House had undermined through his post-conviction case. *Id.* at 685.[15] The majority held that because House had not debunked every piece of evidence against him, and because there were hypothetically plausible alternative explanations for his new picture of the physical evidence, House had failed to meet *Schlup*'s requirement. This holding seems to suggest that without affirmative proof of innocence absolutely exonerating House of the crime, he could not pass through *Schlup*'s gateway.

The dissent, on the other hand, concluded that because the prosecution's theory of the crime as presented to the jury – that House attacked the victim in order to rape her– had been thoroughly discredited by the DNA evidence, House had succeeded under *Schlup*. *Id.* at 690. The dissent reasoned that *Schlup* is satisfied when the trial case is sufficiently undermined, and that House's evidence was sufficient. *Id.* at 708. The dissent went on to say that House had gone as far as establishing an affirmative case of innocence sufficient to satisfy *Herrera*. *Id.* The dissent's position suggests that a substantial showing short of an affirmative demonstration of innocence will satisfy *Schlup*. *See also McKenzie*, 326 F.3d at 728.

Again, on this question as well as on the preceding two questions, other circuits have reached conclusions different from each of the Sixth Circuit's opinions and different from each other. In *Lucas*, the Fifth Circuit held that six pieces of new evidence "support[ive and] probative of Lucas's claims of innocence" which corroborated the petitioner's alibi defense which had been presented at

[15]("House has a deep voice and Laura Muncey testified that the man who came to the trailer on the night of the murder had a deep voice;. . . Regarding House's attacks on the scientific evidence that incriminated him, he has succeeded in showing that the semen attributed to him during the trial was that of Mr. Muncey and that, at some point, the blood evidence appears to have been mishandled. . . However, the fact that the semen found on the victim's clothing came from her husband and not from House does not contradict the evidence that tends to demonstrate that he killed her after journeying to her home and luring her from her trailer, nor does the lack of any physical evidence of sexual contact contradict the notion that the murderer lured Mrs. Muncey from her home with a sexual motive.").

trial were insufficient to establish actual innocence. *Lucas v. Johnson*, 132 F.3d 1069, 1077-1078 (5th Cir. 1998). Yet, in *Fairman*, the Fifth Circuit concluded that an eyewitness who recanted his trial testimony that the petitioner had not acted in self-defense, whose credibility had been credited by the district court, sufficed to meet the "more likely than not, no reasonable juror would have voted to convict" standard. 188 F.3d at 645. There is no logical distinction between the two kinds of evidence presented in *Lucas* and *Fairman*. Both were attempts to present affirmative proof of innocence through the new eyewitness testimony. Nevertheless, the Fifth Circuit reached opposite conclusions in each case. In yet another case, the Fifth Circuit concluded that newly discovered evidence merely impeaching a central trial witness was enough to warrant consideration of the petitioner's underlying claims. *See Wilkerson v. Cain*, 233 F.3d at 891.[16]

The Ninth Circuit has similarly held that new evidence dismantling the prosecution's theory of the crime warranted allowing a petitioner to pass through *Schlup*, thereby not requiring, as the Sixth Circuit majority did in *House*, that the petitioner affirmatively establish his innocence. *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997)(discussing the impact of medical records which were *Brady* material never turned over to the defense which strongly suggested that the victim died in neither the time nor the place the prosecution had argued at trial and concluding that "[u]nder such an assessment of the medical evidence, the circumstantial evidence relied upon in Paradis' conviction would be conclusively contradicted by the medical evidence available from the record" and determining that "it may be more likely than not that no reasonable juror would have found

[16] (concluding that new affidavits from recanting eyewitnesses and from the petitioner's co-defendant claiming sole responsibility for the crime showed that "the jury was denied information essential to its assessment of [the central prosecution witness's] believability and, in turn, of the strength of the state's case against the defendant" and warranted an evidentiary hearing in district court).

Paradis guilty beyond reasonable doubt of having killed [the victim] in Idaho")[17]; *see also Jaramillo v. Stewart*, 340 F.3d at 883 (allowing petitioner to pass through *Schlup* gateway without biological evidence but based on new testimony of a previously undisclosed eyewitness).

It is impossible to reconcile these results with one another or with the result the Sixth Circuit majority reached in House's case. These wildly inconsistent results demonstrate the patchwork jurisprudence that has developed in the decade since *Schlup* was decided and the critical need for this Court to clarify that decision. That *Schlup* remains the only practical means by which a habeas petitioner with claims of actual innocence and otherwise procedurally defaulted claims of constitutional error might challenge his conviction makes this clarification all the more urgent.

II. IN A PURELY CIRCUMSTANTIAL CASE IN WHICH NEARLY EVERY INDICIA OF GUILT PRESENTED AT TRIAL HAS BEEN WHOLLY UNDERMINED BY POST-CONVICTION EVIDENCE, IS PASSAGE THROUGH THE *SCHLUP* GATEWAY WARRANTED?

Tennessee courts have long applied the well established rule that when a criminal case is based exclusively on circumstantial evidence, the defendant may not be convicted unless the facts and circumstances are "so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant, and that beyond a reasonable doubt." *State v. Crawford*, 470 S.W.2d 610, 612 (Tenn. 1971); *Collins v. State*, 445 S.W.2d 931, 932 (Tenn. Crim. App. 1969); *State v. Transou*,

[17] Similarly, in *Cooper*, the Ninth Circuit decided that even though unchallenged biological evidence still linked Cooper to the crime, he had presented sufficient evidence undermining the prosecution's trial evidence to warrant that he pass through the *Schlup* gateway. *Cooper v. Woodford*, 358 F.3d at 1123(allowing Cooper to file a successive petition to prove his *Brady* claim while recognizing that "There was. . . evidence pointing to Cooper's guilt at trial. Salient among that evidence was a spot of blood taken from the hallway in the [victims'] house, the bloody t-shirt, and a hand-rolled cigarette found in the [victims'] . . . car. . . Pursuant to an agreement between Cooper and the State, all three of these pieces of evidence have been subjected to DNA testing. All three resulted in a positive match with Cooper's DNA."). How should Cooper, whose DNA indisputably matched the crime scene evidence, be allowed to pass through *Schlup*, and House, who has presented credible evidence that the only physical evidence linking him to the crime is the result of botched handling of the evidence, not be allowed to so pass?

928 S.W.2d 949, 955 (Tenn. Crim. App. 1996)("[A] conviction for a criminal offense cannot be predicated solely upon conjecture, guess, speculation or a mere possibility that [the defendant] may be guilty."). The Sixth Circuit majority in *House* never acknowledged the "every reasonable hypothesis save guilt" standard, despite *Schlup*'s clear announcement that reviewing courts must consider the way the jury was instructed in assessing the impact of new evidence on the trial case against the petitioner. *See Schlup*, 513 U.S. at 331; *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992)(discussing what Louisiana law required the jury to find in order to sentence the defendant to death).

There is no question that the trial case against Paul House was entirely circumstantial. It consisted of his being seen in the vicinity where the body was found; his having misrepresented his whereabouts the night of the crime; blood on the clothes he was said to have worn the night of the crime; semen containing characteristics consistent with his found on the victim's nightgown; and his status as a stranger in the community with a sex-offense conviction. *See House*, 386 F.3d at 671-672 (quoting *State v. House*, 743 S.W.2d 141, 142-144(Tenn. 1987)("Appellant never confessed to any part in the homicide, and the testimony linking him to it was circumstantial.")); *see also State v. Davidson*, 121 S.W.3d 600, 606 (Tenn. 2003)("All of the evidence regarding Davidson's role in the killing is circumstantial. . . Davidson was a janitor in a hospital department where surgical instruments were cleaned [; the killing involved the use of surgical instruments.] [H]e did not return to work as scheduled after [the date of the crime.] . . In addition, he did not return to his residence . . . for almost three weeks after [the victim's] disappearance. . . There was also evidence that Davidson was in the area where the body was found in the days following [the victim's] disappearance."). However, because at trial he was unable to rebut much of the circumstantial case

against him, House was convicted. (This despite his trial counsel's repeated admonishment of the jury that the prosecution had not proved its case beyond a reasonable doubt.)

House's new evidence has dismantled nearly every piece of circumstantial evidence the jury heard. He has shown that the semen found on the victim was her husband's. He has shown that the blood found on his jeans more likely than not ended up there after it spilled during transportation to the crime lab. He has shown that there is no way Billy Ray Hensley could have seen House where he said he did from the vantage point that he would have had based on Hensley's own description of his whereabouts. The only part of the prosecution's case which remains unchallenged is that House lied to authorities about various details of his alibi and the source of injuries he had sustained around the time of the murder, and that he has a deep voice similar to that described by the victim's daughter as the one she heard on the night her mother disappeared. *House*, 386 F.3d at 685. This surely would not have been enough for the jury to conclude that "the finger of guilt is pointed unerringly at the defendant and the defendant alone[.]" *Crawford*, 470 S.W.2d at 613 (holding that in order to convict on circumstantial evidence alone the facts and circumstances must be so interconnected as to point exclusively at the defendant's guilt). Moreover, House has painted a plausible picture of Hubert Muncey, Jr. as the actual perpetrator of the crime.

The question, then, is when a petitioner's post-conviction case discredits much of the circumstantial evidence relied on by the jury, *and* presents a credible alternative hypothesis for the crime, does *Schlup* require that reviewing courts allow the petitioner to pass through its gateway? The Sixth Circuit dissent opined that it does. *House*, 386 F.3d at 708. *Schlup* strongly suggests that it does. *Schlup*, 513 U.S. at 331 ("Those new statements [exculpating *Schlup*] may, of course, be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the

judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. Under a proper application of either *Sawyer* or *Carrier*, petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."). In House's case, the record shows that there no longer remains sufficient evidence to support the jury's verdict, which was required to point to no hypothesis save guilt. Thus, *Schlup* requires that he pass through the gateway. *Id.* This Court should grant certiorari to clarify this requirement in cases like House's in which circumstantial evidence, later discredited, formed the only basis for the petitioner's conviction. *See also Cooper*, 358 F.3d at 1123; *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997); *Jaramillo*, 340 F.3d at 883; *Paradis*, 130 F.3d at 396; *Majoy*, 296 F.3d at 776; *McKenzie*, 326 F.3d at 726; *Souter*, 2005 WL 86477, at *13; *Wilkerson*, 233 F.3d at 892; *Fairman*, 188 F.3d at 645; *but see Lucas*, 132 F.3d at 1078.

III. THE COURTS OF APPEALS NEED CLARIFICATION OF THE STANDARD FOR FREE-STANDING CLAIMS OF ACTUAL INNOCENCE UNDER *HERRERA V. COLLINS*.

In the twelve years since *Herrera* was decided, the actually innocent have been freed from death row in ever increasing numbers. The Court should grant certiorari to announce a standard for *Herrera* claims in light of the growing body of actual innocence cases. As this Court recognized in *Herrera*, it did not announce there the standard that courts are to apply when reviewing free-standing claims of actual innocence. *Herrera*, 506 U.S. at 417; *id.* at 430 (Blackmun, J., dissenting)("Without articulating the standard it is applying, however, the Court . . . decides that this petitioner has not made a sufficiently persuasive case."). Thus, lower courts facing claims by petitioners who assert that they are actually innocent, but who are unable to point to any underlying constitutional violation infecting their trials, have lacked guidance for how to assess such claims or whether such claims

might even form a basis for habeas relief.[18] The confusion is apparent in House's case.

Six judges of the Sixth Circuit opined that House has affirmatively demonstrated his innocence and that he therefore deserves relief under *Herrera*. *See House*, 386 F.3d at 686, 690, 708. The dissenting judges suggested that the court adopt Justice White's proposal in his *Herrera* concurrence that a petitioner aiming to obtain relief upon a showing that he is actually innocent should mirror the standard in *Jackson v. Virginia*, 443 U.S. at 324. *House*, 386 F.3d at 688-89(quoting *Herrera*, 506 U.S. at 429 (White, J., concurring)). Even under this "extraordinarily high" standard, the dissenting judges concluded that House had demonstrated his innocence and deserved immediate relief. *House*, 386 F.3d at 688, 708.

As House and the other *Herrera* cases cited demonstrate, the Court's leaving the *Herrera* standard undefined has had the practical result of leaving even the Courts of Appeals who believe that preventing the execution of one who is actually innocent might be a basis for habeas relief without guidance on what a petitioner must show in order to obtain such relief. *See Whitfield*, 324 F.3d at 1020; *Wilson*, 155 F.3d at 404; *Conley*, 323 F.3d at 14; *cf. Lucas*, 132 F.3d at 1075. As a

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[18] *See Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir. 2003), *vacated in part for other reasons by Whitfield v. Bowersox*, 343 F.3d 950 (8th Cir. 2003), (holding that in order to prevail under *Herrera*, a petitioner must present evidence "unquestionably establishing his innocence"); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000)(holding that *Herrera* does not apply to claims that the petitioner lacked the mens rea for the crime for which he was convicted and that a *Herrera* petitioner must affirmatively show that he is innocent); *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998)(same); *Carriger v. Stewart*, 132 F.3d at 476 ("A habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent."); *Cooper v. Woodford*, 358 F.3d at 1124 (same); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994)(finding that *Herrera* does not apply to non-capital cases even where the petitioner had made a "credible" showing that newly discovered evidence would exonerate him); *Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003)(noting that "it is not clear whether a habeas claim could be based on evidence *proving* actual innocence" and finding that where the most the petitioner did was to undermine the sufficiency of the evidence on which he was convicted, he did not satisfy *Herrera*); *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999)(stating that *Herrera* held that a claim of actual innocence alone is not a basis for habeas relief); *Lucas v. Johnson*, 132 F.3d at 1075 ("*Herrera* does not overrule previous holdings (nor draw them into doubt) that a claim of actual innocence based on newly discovered evidence fails to state a claim in federal habeas corpus.").

result, no federal habeas petitioner has ever succeeded in convincing a court that he deserved relief for a freestanding claim of actual innocence under *Herrera*. *But see Ex Parte Tuley*, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002)(granting relief on freestanding actual innocence claim in an aggravated sexual assault case in which the complaining witness and another witness provided post-conviction affidavits contradicting the complainant's trial testimony); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 549 (Mo. 2003)(recognizing that state courts reviewing freestanding actual innocence claims may apply a lower standard than federal courts reviewing state convictions implicating such claims because state courts will not be "affected by the federalism concerns" facing federal courts; setting aside petitioner's conviction).

House's case presents a critical opportunity for this Court to revisit its decision in *Herrera* and to announce a standard which will guide courts presented with freestanding innocence claims in capital cases. Though concerns about the finality of convictions remain paramount, increasing numbers of exonerations in the twelve years since *Herrera* was decided strongly militate in favor of presenting courts with a workable framework for reviewing innocence claims, especially in death penalty cases.[19]

Paul House has successfully discredited every piece of physical evidence his trial jury was led to believe linked him to this crime. He has also seriously undermined the circumstantial case against him. He has gone even further and presented an affirmative case of innocence and identified a plausible actual perpetrator. Yet, without this Court's review, House will face death and the lower courts will continue to stumble blindly without guideposts to steer them in cases, like House's,

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[19] According to the Death Penalty Information Center, there have been 71 exonerations of death row inmates in the years including 1993 through 2004. *See http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-yr-rc*

presenting "colorable claim[s] of actual innocence." *House*, 386 F.3d at 684.

CONCLUSION

The petition for a writ of certiorari should issue as to both questions.

Respectfully submitted,

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