No. 13-5307

IN THE

Supreme Court of the United States

CARL CASE,

Petitioner,

—v.—

TIMOTHY HATCH, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

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The Innocence Network (the "Network") respectfully submits this brief as *amicus curiae* in support of Petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals for whom evidence discovered post-conviction can provide conclusive proof of innocence. Its sixty-two member organizations represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom and New Zealand.[2] The Network and its

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[1] Pursuant to Supreme Court Rule 37, counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amicus curiae*'s intention to file the brief. All parties have consented to the filing of the brief and the parties' consent letters are being filed herewith. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities other than the *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[2] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Arizona Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Network UK, Innocence Project,

members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on lessons from cases in which the system convicted innocent individuals, the Network promotes further study and advocates reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Irish Innocence Project at Griffith College (Ireland), Kentucky Innocence Project, Life After Innocence, Knoops' Innocence Project (Netherlands), Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Oklahoma Innocence Project, Pace Post-Conviction Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (United Kingdom), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic.

As an affiliation of the nation's leading advocates against wrongful convictions, the Network has a strong interest in ensuring that wrongfully convicted defendants are not prevented from proving their innocence by an incorrect and overly restrictive judicial interpretation of the already tightly circumscribed right to challenge one's wrongful detention in federal court based on newly discovered evidence. The Network is concerned that the decision of the court below, in excluding substantial swaths of newly discovered exculpatory evidence from federal habeas courts' consideration under 28 U.S.C. § 2244(b)(2), misinterprets the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and unduly increases the risk that innocent individuals may needlessly remain in prison or be put to death for crimes they can prove they did not commit.

SUMMARY OF THE ARGUMENT

AEDPA permits a new claim to be presented in a second or successive 28 U.S.C. § 2254 application for a writ of habeas corpus if, *inter alia*, "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). In the instant case, the Tenth Circuit concluded that, notwithstanding the statutory direction to view such a claim "in light of the evidence as whole," a habeas court is forbidden to consider "newly developed facts that only become available after trial and that are

not linked to constitutional errors occurring during trial." Pet. App. 30a.

This Court's review is urgently needed for two reasons. First, the Tenth Circuit's interpretation of "the evidence as a whole" to exclude evidence discovered after trial—including, for instance, exculpatory results of DNA testing using technology that did not become available until years after trial—is contrary to the plain meaning of Section 2244(b)(2)(B)(ii), and creates a circuit split between the Tenth Circuit and every other court of appeals to have considered the issue.

Second, the Tenth Circuit's conclusion fails to account for the particularly strong federal interest in providing a forum to review the detention or death sentences of individuals who both were unconstitutionally convicted *and* are actually innocent. Congress provided the narrow Section 2244(b)(2)(B) gateway for consideration of second or successive habeas petitions precisely to allow a federal forum for the exoneration of individuals with compelling claims of actual innocence, and the rare applicant who can pass through should not be denied a day in court based on a strained reading of AEDPA that turns a blind eye to new evidence of innocence.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IS AT ODDS WITH THE PLAIN MEANING OF 28 U.S.C. § 2244(b) AND CREATES A CIRCUIT SPLIT THAT SHOULD BE RESOLVED

When a statute's meaning is clear, it must be applied as written. *Conn. Nat'l Bank v. Germain*,

503 U.S. 249, 253-254 (1992). Here, the language of Section 2244(b)(2)(B)(ii) is clear: the determination whether to entertain a claim raised in a second or successive habeas petition is based upon the reasonableness of a guilty verdict in light of "the facts underlying the claim, if proven and viewed in light of the evidence as a whole." Rather than apply the statute as written, the Tenth Circuit concluded that the Section 2244(b)(2)(B)(ii) "inquiry is *only* concerned with the evidence presented at trial, properly adjusted for evidence that [a petitioner] alleges was erroneously excluded *due to trial-related constitutional error*." Pet. App. 30a-31a.

None of the Tenth Circuit's justifications for its assumption that Congress inadvertently used the phrase "evidence as a whole" where it meant to say "*trial* evidence as a whole" provides a basis to depart from the statutory plain meaning.

First, the panel asserted that Congress must have intended to limit the Section 2244(b)(2)(B)(ii) "evidence as a whole" inquiry only to evidence presented at trial or excluded from trial due to constitutional error because the statute uses language from this Court's pre-AEDPA decision in *Sawyer v. Whitley*, 505 U.S. 333 (1992). *See* Pet. App. 31a-34a. According to the panel, the *Sawyer* Court's inquiry whether "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty," 505 U.S. at 348, notably "focused on the probable effect" of unconstitutionally suppressed evidence only. Pet. App. 31a-32a. But the *Sawyer* Court could hardly have done otherwise: the evidence

allegedly suppressed due to constitutional error was the only new evidence that petitioner had.

Second, the panel inferred from "linguistic distinctions" between Section 2244(b)(2)(B)(ii) and a gateway requirement for *federal* prisoners, 28 U.S.C. § 2255(h)(1), that Congress meant for "evidence not rooted in constitutional error at trial" to be excluded from the Section 2244(b)(2)(B)(ii) inquiry. Pet. App. 34a-39a. In the panel's view, Section 2255(h)(1)'s omission of the phrase "but for constitutional error" reflects the intent to create a class of second or successive habeas applications that can be considered on the merits for federal but not state prisoners: claims of newly discovered constitutional error by prisoners who have also uncovered separate compelling new evidence of their innocence. This conclusion does not withstand analysis of the structure and language of the relevant provisions.

Section 2255(h) addresses the standard for *certification* by the court of appeals of a second or successive habeas motion, not the standard for avoiding dismissal by the district court prior to merits consideration. The analogue to Section 2255(h) for state prisoners, Section 2244(b)(3), arguably sets a *lower* bar for circuit court certification of petitions by state prisoners because it requires only a "prima facie showing that the application satisfies the requirements of this subsection"—rather than the "clear and convincing evidence" mandated by Section 2244(b)(2) and Section 2255(h)(1).

Even if Section 2244(b)(2) and Section 2255(h) were analogous, the statutory language actually at

issue—the direction to consider new facts "in light of the evidence as a whole"—is identical in both provisions. It is unlikely that Congress used the exact same phrase in two related provisions of AEDPA and intended them to have two completely different meanings. The panel's view that Congress meant "the evidence as a whole" to be taken literally in Section 2255(h)(1) but to be read as "the *trial* evidence as a whole" in Section 2244(b)(2)(B)(ii) therefore strains credulity.

Against potential arguments such as these, the correctness of the plain-meaning interpretation of "the evidence as a whole" was presumably clear enough to a different three-judge panel of the Tenth Circuit that it authorized the Clerk to enter an unpublished order recognizing that "asserted new evidence" unrelated to Petitioner's *Brady* claim was "relevant to an evaluation under § 2244(b)(2)(B)(ii) of the evidence 'as a whole.'" Pet. App. 66a. The same interpretation has subsequently been adopted by every other circuit to have confronted the issue.

In *Lott v. Bagley*, 569 F.3d 547 (6th Cir. 2008) the Sixth Circuit adopted the analysis of the Northern District of Ohio, which had noted that habeas courts are obliged to "consider all evidence, both inculpating and exculpating, when reviewing an actual innocence claim" pursuant to Section 2244(b)(2)(B)(ii). *Lott v. Bagley*, No. 1:04 CV 822, 2007 WL 2891272, at *18 (N.D. Ohio Sept. 28, 2007). Citing *House v. Bell*, 547 U.S. 518 (2006), the *Lott* court indicated that the meaning of "the evidence as a whole" in Section 2244(b)(2)(B)(ii) was coextensive with the meaning of "all the evidence" as used in *House*—including evidence whose exclusion from

trial was not only unconnected to a constitutional violation but in fact might not even be admissible at trial. *See Lott*, 2007 WL 2891272, at *14 (citing *House*, 547 U.S. at 537-38; *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

In *United States v. MacDonald*, 641 F.3d 596 (4th Cir. 2011), the Fourth Circuit reached the same conclusion, holding that a habeas court must consider new evidence of innocence even if unrelated to an alleged constitutional violation: "Simply put, the 'evidence as a whole' is exactly that: all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) or § 2255(h)(1) evaluation." 641 F.3d at 610.

Noting that AEDPA's "standards clearly incorporate features of the standards spelled out in the pre-AEDPA decisions" of this Court, the Fourth Circuit held:

> [W]e cannot ignore the pre-AEDPA precedent in interpreting what constitutes the "evidence as a whole." Indeed, by its plain language, "the evidence as a whole" means, in the equivalent language of *Schlup*, "all the evidence." *See* 513 U.S. at 328. Thus, a court must make its § 2244(b)(2)(B)(ii) or § 2255(h)(1) determination—unbounded "by the rules of admissibility that would govern at trial"—based on "all the evidence, including that alleged to have been illegally admitted [and that] tenably claimed to have been wrongly excluded or to have become

> available only after the trial." *Id.* at 327-28.

641 F.3d at 612.

Most recently, in *Nooner v. Hobbs*, 689 F.3d 921 (8th Cir. 2012), the Eighth Circuit likewise adopted the plain-meaning interpretation of Section 2244(b)(2)(B)(ii), holding that "evidence as a whole" "refers to the entirety of the trial evidence as well as new evidence offered in the collateral proceedings," and citing precedent applying the *Schlup* "all the evidence" standard. 689 F.3d at 933 (citing *Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011)). The court examined all the allegedly new evidence proffered by the petitioner, including evidence not directly linked to his putative constitutional claim. *Id.* at 935-37.

The court below, having abandoned the Tenth Circuit's own previous position, now stands alone in disagreement with the Fourth, Sixth and Eighth Circuits.[3] The Innocence Network respectfully submits that this Court should grant certiorari and resolve this circuit split before the confusion

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[3] The panel attributed this disagreement to *Nooner* and *MacDonald*'s supposed "fail[ure] to appreciate" that Section 2244 "is not a form of relief" but merely a gateway, and that after an applicant passes through the gateway the standards for a second or successive petition on the merits "are no different than hearing a first § 2254 petition on its merits." Pet. App. 42a n.12. No support exists for this characterization of what the Fourth and Eighth Circuits failed to "appreciate," or for any supposed link between such a failure and the plain-meaning interpretation of Section 2244(b)(2)(B)(ii).

introduced by the Tenth Circuit's ruling spreads to other courts.

II. THE TENTH CIRCUIT'S DECISION MAY FORECLOSE CONSIDERATION OF MERITORIOUS HABEAS PETITIONS BY ACTUALLY INNOCENT INDIVIDUALS

Section 2244(b) is calculated to relieve district courts of the burden of evaluating the merits of abusive second or successive Section 2254 habeas petitions. It is clear, however, that Congress intended Section 2244(b)(2)(B) to create a gateway to merits consideration of such petitions under rare circumstances of "actual innocence."

Congress meant for this gateway to be quite narrow, and it is so. A petitioner must demonstrate that his claim was not presented in a previous Section 2254 application; that the factual predicate for his claim could not have been discovered earlier; and that the facts underlying his claim, if proven, would clearly and convincingly establish that no reasonable juror could find him guilty. Such a demonstration, which does no more than enable the prisoner's petition to be heard on its merits, is satisfied in a vanishingly small number of cases, all of which by their very nature raise the troubling prospect that our state courts have convicted a person for a crime he did not commit and then refused to correct their mistake.

The public policy behind AEDPA does not suggest that the small pool of prisoners who can satisfy the literal requirements of Section 2244(b)(2) should be winnowed any further. Just the opposite.

Fundamental fairness and the need for confidence in our criminal justice system require special concern for those few prisoners who are able to uncover compelling new evidence that their criminal convictions were both constitutionally defective and factually incorrect. The fact that some newly discovered evidence may help establish that a conviction is wrongful, even though it is untethered to an explicit constitutional violation, is not a good reason to close the "actual innocence" gateway to a prisoner with a colorable Section 2254 claim.

Indeed, a review of several exoneration cases illustrates that the Tenth Circuit's reading of Section 2244(b)(2) is problematic in two key ways.

First, the Tenth Circuit's focus on evidence of constitutional error, to the exclusion of additional, new evidence of actual innocence, is pernicious in an era of advanced DNA testing. DNA evidence has the "unparalleled ability" to exonerate the wrongfully convicted and identify the guilty. *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 55 (2009). To date, 311 individuals in the United States convicted of crimes they did not commit have been exonerated using DNA testing. *See* DNA Exonerations Nationwide, Innocence Project, http://www.innocence project.org/Content/DNA_Exonerations_Nationwide. php. Since the first DNA exoneration in 1989, DNA technology has continued to advance, enhancing the ability to conduct accurate testing on smaller and less pristine DNA samples. *See* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1469-70 & nn.107-09 (2007). There is a direct correlation

between advances in DNA testing technology and the increase in the number of exonerations, and the testing of formerly inconclusive biological evidence has led to many exonerations. *See* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1658-59 (2008). The Tenth Circuit's decision has the potential, in many cases, to force reviewing courts to ignore such evidence. The experience of Michael Morton, whose wrongful conviction is discussed in greater detail below, illustrates that this concern is not academic. Mr. Morton discovered that his prosecution was rife with *Brady* violations only while pursuing the DNA evidence that ultimately exonerated him. *See* Innocence Project, Browse the Profiles: Michael Morton, http://www.innocence project.org/Content/Michael_Morton.php.

Second, the Tenth Circuit's decision ignores the complex reality of wrongful convictions. Such cases rarely result from an isolated instance of constitutional error. Instead, the causes of wrongful conviction are myriad and exonerations occur following the revelation of several kinds of newly discovered evidence. Such evidence often takes years to come to light. The average time spent in prison in DNA-based exoneration cases is 13.6 years. DNA Exonerations Nationwide, Innocence Project, http://www.innocenceproject.org/Content/DNA_Exon erations_Nationwide.php. This Court has itself recognized that developing new evidence takes time, stating in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), that ineffective-assistance-of-counsel claims "often require investigative work" that may be incompatible with "[a]bbreviated deadlines to expand the record on direct appeal." 129 S. Ct. at 1317-18. In other instances, the import of new evidence may not

immediately be clear. For example, in *People v. Bermudez*, 667 N.Y.S.2d 901 (1st Dep't 1997), a New York court rejected the defendant's motion to vacate judgment on the basis of affidavits from recanting eyewitnesses, stating that recantations suffer from "inherent unreliability." When the defendant's wrongful conviction was finally vacated—after he spent eighteen years in prison—the reviewing court credited the recantations in light of newly developed evidence, including evidence that the original identifications were the result of overly suggestive procedures and persuasive evidence of an alternate suspect. *See People v. Bermudez*, No. 8759/91, 2009 WL 3823270, at *13 (Sup. Ct. N.Y. Cnty. Nov. 9, 2009).[4]

Examples abound where exonerations followed the discovery of multiple new forms of exculpatory evidence. Indeed, in allowing the petitioner in *House v. Bell* to proceed on remand with procedurally defaulted constitutional claims, this Court cited several kinds of newly discovered evidence that cast doubt on the verdict, including exculpatory DNA evidence, "disarray" surrounding forensic evidence, evidence of an alternate suspect developed over ten years after the crime, and various other details that called into question the petitioner's conviction**.** *See* 547 U.S. at 540-53. The facts of *House* illustrate that

[4] In light of the *Bermudez* exoneration, it is worth underscoring the contrast between the Tenth Circuit's breezy dismissal that recantations like those in the instant case are "notoriously unreliable," Pet. App. 53a, with the district court's assessment—after 31 pages of analysis—that "Ms. Knight's and Mr. Dunlap's recantations are credible, and they gravely undermine the jury's finding of guilt." Pet. App. 173a.

any approach that requires a reviewing court to turn a blind eye to newly developed evidence of innocence is a recipe for injustice.

In short, in the rare case that a wrongfully convicted prisoner finds newly discovered evidence that his constitutional rights were violated at trial, he may well *also* uncover other new evidence that clearly and convincingly demonstrates his innocence. Congress could not have intended for the federal courts to refuse to consider such an individual's second or successive habeas petition on the merits simply because the most persuasive evidence of his actual innocence—including exculpatory DNA evidence—was distinct from the evidence that was illegally admitted or suppressed at trial.

Indeed, DNA exonerations reveal that there are often multiple causes of wrongful conviction. *See* The Causes of Wrongful Conviction, Innocence Project, http://www.innocenceproject.org/understand. While DNA testing may prove that errors occur, such errors are present in DNA and non-DNA cases alike. Traditional post-conviction litigation will therefore also expose complex factual and legal issues signifying a wrongful conviction. The examples below reveal the complexity in evaluating innocence claims and the need for holistic review when assessing constitutional error in the post-conviction setting.

Kirk Bloodsworth. In 1984, an eight-year-old girl was raped and murdered outside Baltimore. Kirk Bloodsworth was convicted and sent to Maryland's death row for the crime in 1985. Five separate eyewitnesses testified that Bloodsworth was

the man seen with the victim just prior to her death. The jury also heard that a shoeprint near the body was the same size as Bloodsworth's own, and that, while being interrogated, Bloodsworth had revealed knowledge of a "bloody rock" at the crime scene—a detail then known only to police. DNA testing undertaken in 1992 excluded Bloodsworth as the killer and he was released from prison in June 1993. With the passage of time, it became clear that Bloodsworth's wrongful conviction rested on multiple causes. The eyewitnesses, including heavily coached children, were all mistaken; the same-sized shoeprint near the body was a coincidence; and Bloodsworth's "knowledge" of the bloody rock was a fabrication by the police, who had in fact shown Bloodsworth a rock during the interrogation. *See* Innocence Project, Browse the Profiles: Kirk Bloodsworth, http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php; Dept. of Justice, Office of Justice Programs, Edward Connors et al., Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 36-37 (1996); James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7. Bloodsworth's experience illustrates that, in contrast to the Tenth Circuit's exclusive focus on evidence of constitutional error, wrongful convictions often result from the cumulative effect of multiple factors. Ignoring a subset of those factors makes little sense in light of how wrongful convictions actually occur.

Michael Morton. In August 1986, Michael Morton's wife was murdered while at home. Morton was convicted and sentenced to life in prison in February 1987. A bloody bandana was recovered

approximately 100 yards from the Morton home, but serology testing at the time was inconclusive. DNA testing in 2011 revealed that the bandana included hair and blood from Morton's wife, as well as a male whose DNA did not match Morton's. Instead, the male DNA from the bandana matched that of a convicted felon whose DNA was found at the scene of another Texas murder that occurred two years after Mrs. Morton's death. Morton was released from prison in October 2011. During the course of litigation over the DNA testing, Morton's attorneys obtained information indicating that prosecutors withheld exculpatory evidence at Morton's trial, including a statement from Morton's three-year-old son, an eyewitness, that his father was not the killer; evidence about a suspicious van parked behind the Morton house; and evidence indicating that Mrs. Morton's stolen credit card may have been recovered and that a police officer could identify the woman who attempted to use the card. *See* Innocence Project, Browse the Profiles: Michael Morton, http://www.innocenceproject.org/Content/Michael_Morton.php. Under the approach of the Tenth Circuit, a reviewing court could consider the suppressed evidence but *not* the exculpatory DNA testing.

Eddie James Lowery. In July 1981, a woman was raped in her home in Ogden, Kansas. The next morning, Eddie James Lowery, a twenty-two-year-old soldier stationed nearby, was injured in a car accident near the victim's house. Lowery was questioned all day without food and water, denied his request for an attorney, and fed details about the crime that were eventually incorporated into his false confession. Lowery was convicted of rape and sentenced to eleven years to life based in part on the

unconstitutionally obtained confession. In 2002, Lowery obtained DNA testing of the biological evidence collected during the investigation that exonerated him of the crime. *See* Innocence Project, Browse the Profiles: Eddie James Lowery, http://www.innocenceproject.org/Content/Eddie_James_Lowery.php. The decision below would bar a reviewing court from considering the very DNA evidence that underlay Lowery's exoneration.

Thomas Webb. In March 1982, a woman was sexually assaulted in her home in Oklahoma. After the victim was unable to identify her assailant from among six black-and-white photographs, she was shown a second array containing six color photographs and incorrectly identified her attacker as Thomas Webb. Webb was the only man included in both photo arrays who actually matched the victim's description of her attacker. Based in part on the victim's constitutionally suspect mistaken identification, Webb was convicted of rape and sentenced to sixty years to life. Webb gained access to biological evidence in 1996 and was eventually exonerated based on the exculpatory DNA results. *See* Innocence Project, Browse the Profiles: Thomas Webb, http://www.innocenceproject.org/Content/Thomas_Webb.php. Under the Tenth Circuit's decision, a reviewing court could consider only the suspect identification procedure and not the exonerating DNA evidence.

Roy Brown. In May 1991, a woman was found bitten, stabbed, and strangled to death outside of her home in Aurelius, New York. At the trial of Roy Brown, the prosecutor presented testimony from a local dentist that the bite marks matched Brown's

teeth. Unbeknownst to Brown's defense attorneys, the prosecutor also consulted a leading forensic dentist who excluded Brown. DNA testing was inconclusive. Brown was convicted of murder and sentenced to twenty-five years to life. While in prison, Brown uncovered significant *Brady* material that the prosecution had suppressed at trial, some of which implicated another person, Barry Bench, who subsequently committed suicide. DNA testing on Bench's body confirmed that he was the source of saliva stains on the victim's clothing. *See* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying Daubert Isn't the Only Problem*, 43 Tulsa L. Rev. 285, 297-98 (2007); Innocence Project, Browse the Profiles: Roy Brown, http://www.innocenceproject.org/Content/Roy_Brown.php. The Tenth Circuit's reading of Section 2244(b) would have the nonsensical result of severing consideration of the suppressed evidence from the DNA evidence, even though the suppressed evidence pointed to the very alternate suspect whom DNA testing later proved was the actual culprit.

Jerry Watkins. In 1986, Jerry Watkins was convicted of murdering his sister-in-law and sentenced to sixty years in prison. After trial, Watkins uncovered significant *Brady* evidence casting doubt on his guilt, and also obtained DNA testing conclusively showing that semen found in the victim's body could not have come from him. Watkins sought post-conviction relief in state court, but because of the court's misunderstanding of the DNA evidence, such relief was denied. Watkins was finally freed and exonerated in 2000 after the federal district court granted his (first) Section 2254 habeas

petition. *See Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000); Innocence Project, Browse the Profiles: Jerry Watkins, http://www.innocence project.org/Content/Jerry_Watkins.php. Watkins' case again illustrates the danger of placing different forms of newly developed evidence into segregated analytical silos.

These exonerees were all similarly situated to Petitioner here—in possession of newly discovered exculpatory evidence, some of which may have been unconstitutionally suppressed at trial and some of which was simply not available at the time of trial. Had any of them, like Petitioner, already litigated and lost a habeas petition prior to discovery of their exculpatory evidence, and then been denied relief in state court (as Jerry Watkins was), under the Tenth Circuit's reading of Section 2244(b)(2)(B)(ii), they would have had no way to present the full universe of exculpatory evidence to a federal court reviewing the constitutionality of their detention.

In recognition of this concern, the court below suggests that an innocent individual could still vindicate his constitutional rights in the federal courts with *a petition invoking the original jurisdiction of this Court*—a solution that the panel itself admits would be exceptionally unlikely to succeed. Pet. App. 39a-41a & n.10.

Far better would be to reaffirm the Fourth, Sixth and Eighth Circuit's common-sense interpretation of AEDPA according to its plain meaning, ensuring that the "actual innocence" gateway to consideration of a second or successive petition remains open to the few actually innocent

individuals for whose benefit Section 2244(b)(2)(B) was unquestionably intended.

CONCLUSION

For the reasons stated herein, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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AUGUST 2013