No. 04-8990

In The Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONER

STEPHEN MICHAEL KISSINGER
FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC.
530 South Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979
(865) 637-7999 fax

GEORGE H. KENDALL
HOLLAND & KNIGHT, LLP
195 Broadway, 25th Floor
New York, NY 10007
(212) 513-3200

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
NORMAN J. CHACHKIN
MIRIAM S. GOHARA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

I. 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?

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

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 386 F.3d 668 (6th Cir. 2004) (*en banc*). The unreported decision of the United States District Court for the Eastern District of Tennessee is reprinted at Pet. App. 87.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 2004. No further rehearing was sought. Justice Stevens extended the time for filing a petition for writ of certiorari to and including March 5, 2005. The petition was filed on March 3, 2005. Certiorari was granted on June 28, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution, which respectively provide that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"; "nor [shall] cruel or unusual punishments [be] inflicted"; and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves 28 U.S.C. § 2254d(1), which provides that "[a]n 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ."

STATEMENT OF THE CASE

A Tennessee jury convicted Paul House of first-degree murder after the prosecution urged jurors to conclude from circumstantial evidence that he had abducted, attempted to rape, and murdered the victim. In federal habeas corpus proceedings below, House presented new evidence, including objective scientific evidence, which proved that the key evidence adduced by the prosecution at trial to link him to the crime was either false or unreliable. He also presented credible new evidence demonstrating that the victim's husband was probably the killer. The significance of this new evidence sharply divided the lower federal courts on two questions: (1) whether the new evidence was sufficient under *Schlup v. Delo*, 513 U.S. 298 (1995), to permit adjudication of his defaulted ineffective-assistance-of-counsel claim, and (2) whether it established his actual innocence under *Herrera v. Collins*, 506 U.S. 390 (1993). The district court and a bare majority of the *en banc* court of appeals dismissed House's petition even though all the judges agreed that his new evidence presented a colorable showing of innocence. Seven dissenters in the court of appeals determined that he had clearly met the *Schlup* standard, and six of them found that he had shown his actual innocence of the crime. *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (*en banc*). The record shows the following:

A. State Trial Court Proceedings

1. The Crime

This case arises from Union County, Tennessee, a rural county north of Knoxville. In July 1985, Carolyn Muncey, the victim, resided on Ridgecrest Road with her husband Hubert Muncey, Jr., and their two minor

children.[1] It was well-known that Hubert Muncey, Jr., was an alcoholic, that the Munceys had marital difficulties, and that Hubert had been abusive toward Carolyn. J.A. 229; J.A. 234; J.A. 237. Paul House had recently moved to Union County to be near his mother. When Hubert Muncey, Jr., reported to authorities that he had come home from a dance in the early morning hours of July 14, 1985, to find that his wife was not home with the children, local law enforcement and the community came together to search for her. Almost immediately after Carolyn Muncey's badly beaten body was found the next afternoon at the base of an embankment near a roadway where Paul House had been seen earlier, House became the sole suspect in her murder. His motive, it was supposed, was rape.

2. Trial Proceedings

House was tried in Union County in February 1986, after a change of venue motion was denied. The evidence showed that Ms. Muncey left her home sometime prior to 11:00 p.m. on July 13 and was not seen again until her fully clothed body was found the next day. Both the coroner and the state pathologist determined she died between 9:00 and 11:00 on July 13. J.A. 76. Lacking either a confession or an eyewitness, the prosecutors sought to show, entirely by circumstantial evidence, that House tricked Carolyn Muncey out of her home and killed her when she resisted his sexual advances. The defense asserted that House was innocent, that he had no motive to harm Ms. Muncey, and that the evidence failed to show his guilt beyond a reasonable doubt.

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[1] Hubert Muncey, Jr., was widely known in the community as "Little Hube" and his family called him "Bubba" and "Bubbie."

3. The Circumstantial Case for House's Conviction

The evidence presented by both parties focused upon five issues: Did House have the opportunity to commit the crime when he walked away from his girlfriend's trailer late on the evening of July 13? Why was House, on the following day, near the location where the body was recovered? Why did House, when questioned, mislead law enforcement about his whereabouts and clothing on the night of the 13th? Did analysis of blood, semen, hair, and fiber evidence reliably link House to the crime? And, was Hubert Muncey, Jr., responsible for his wife's death?

a. The equivocal evidence concerning House's opportunity to commit the crime

The Munceys' ten year-old daughter, Laura, testified that sometime after she went to bed on July 13, she was awoken by a honking car horn. She heard a man with a low voice calling out to her mother. The voice asked if she knew where her husband could be found. Laura heard her mother respond that he was out digging a grave. J.A. 18, 21-22. Laura also told the jury that, "they said that daddy had a wreck down the road, and [her mother] started crying – next to the creek." J.A. 18.

Pam Luttrell, who lived across the road from the Munceys, testified that Carolyn Muncey had told her earlier that evening that her husband was digging a grave and had promised to take her fishing the following day. J.A. 12. She testified that later, in the early morning hours of July 14, Mr. Muncey appeared with his kids and said Carolyn was missing. He left Laura and Matthew, 8, with Ms. Luttrell. That morning, Laura told Ms. Luttrell that someone had come looking for "Bubbie" (a family nickname for Mr. Muncey). Laura also said that she heard her mother crying and going down the steps, but that Laura

was not sure whether this was at the same time or some time later. J.A. 14. Ms. Luttrell testified that Matthew had interrupted Laura while she was talking, saying, "sister – they said daddy had a wreck, they said daddy had a wreck." J.A. 13.

Laura Muncey testified that she did not immediately start looking for her mother. Instead, she waited for a while to see if her mother would return. Only then did she get up, wake Matthew, and go out to see if they could locate their mother. J.A. 18-19, 23-28. When they did go out, they first went to the Luttrells. When the Luttrells did not answer, they went to the Clintons. J.A. 27-30. According to Michael Clinton, their knock on the door came at 10:55 p.m. J.A. 83-85.

On the day of Carolyn Muncey's murder, Mr. House was living with his girlfriend Donna Turner. Her trailer was 1.9 miles from the Muncey home. J.A. 81. House did not have a car. Ms. Turner testified that late that evening, Mr. House announced that he was going for a walk. He left her trailer on foot no earlier than 10:45 p.m.[2] When he returned around midnight, he was out of breath, sweating, and disheveled. He also was missing his shoes and shirt (a blue tank top with yellow trim). Ms. Turner observed that when Mr. House returned, his finger was swollen. She had not noticed that injury earlier.[3] She testified that Mr. House attributed his condition to the fact that he had been accosted by a group of men in a pick-up and that he had fled through the woods to escape. J.A. 86-87, 88-91. In two statements he gave to police, which were read to the jury,

[2] The prosecution introduced evidence that Ms. Turner at one time told police that Mr. House could have left between 10:30 p.m. and 10:45 p.m. J.A. 82-83.

[3] These injuries were photographed by law enforcement when they first interviewed Mr. House on July 14. J.A. 77-80.

Mr. House maintained that his injuries were incurred innocently from tearing down a shed a few days earlier and from playing with Ms. Turner's cat. J.A. 74-75.

Donna Turner testified that she was certain House did not use her car while he was on his walk. J.A. 87-88. The evidence showed that investigators seized her car, examined it for four days (even keeping a towel she had placed on the front seat the day before Ms. Muncey disappeared for further examination) and discovered no evidence whatsoever linking the car to the crime. J.A. 44-45, 92-93. Mr. House's mother testified that her car, which Mr. House had used on occasion, was loaded with boxes and was not used by anyone on that night. J.A. 95-98.[4]

During closing, the prosecutor urged jurors to conclude, notwithstanding a complete lack of evidence, that Mr. House had used one of the vehicles on the night of the murder. J.A. 99-101. Alternatively, the prosecutor argued that if Mr. House had indeed left Donna Turner's trailer on foot at 10:30 p.m., he would have had plenty of time to perpetrate the crime. J.A. 105. The defense countered that Ms. Turner was certain that Mr. House left her trailer no earlier than 10:45 p.m. and that he did not use her car. J.A. 101-103. Even if he had left at 10:30 p.m., as the prosecution suggested, House still would have been unable to walk almost two miles over the hilly terrain and commit the crime within the time frame established by the evidence. J.A. 103-104.

b. House's presence on Ridgecrest Road the next day

The prosecution called two witnesses, Billy Ray Hensley and Jack Adkins, to establish its theory that House returned

[4] House lived roughly one mile from his mother's house. J.A. 82.

to the crime scene the following day to retrieve his missing blue tank top. This evidence was also equivocal because Hensley was impeached on critical portions of his account and no shirt or dark rag was ever recovered.

Hensley testified that on the afternoon of July 14, he was driving toward the Muncey home looking for Mr. Muncey. He stated that while driving on Bear Hollow Road near its intersection with Ridgecrest Road, he saw Mr. House coming up an embankment wiping his hands on a dark rag. J.A. 31-33. Mr. Hensley said after he saw Mr. House, he turned left on Ridgecrest Road, did not see Mr. House as he drove up Ridgecrest Road, but did see a white Plymouth parked on the side of the road. After determining that Mr. Muncey was not home, Mr. Hensley headed back toward Bear Hollow Road. He then met Mr. House driving the white Plymouth. He testified that Mr. House flagged him down. House stated that he was looking for Mr. Muncey because he had heard about Carolyn's disappearance and that Mr. Muncey was drunk. J.A. 32-34.

On cross-examination, Hensley admitted that he did not actually see Mr. House coming up the embankment but only that he appeared "out of nowhere." J.A. 38-39. Hensley also conceded that he saw House for only a second or two. J.A. 40. Hensley acknowledged that he had earlier told officers that he first saw House on the roadway *not* from Bear Hollow Road, but after he had turned onto Ridgecrest Road and traveled several hundred feet up the road – well past where the body was later found. J.A. 35-38. He was not able to say the car was on the same side of the roadway as Ms. Muncey's body. J.A. 40-41.

Another witness, Billy Hankins, testified that he saw a man fitting House's description on the roadway that day. Hankins said he saw this man on the opposite side of the road from where Ms. Muncey's body was found but on the same side of the road as the Muncey home. The man was

walking toward the Muncey home. Jurors also heard a statement House made to law enforcement officers in which he said that he had parked the Plymouth on Ridgecrest Road. He explained that he then walked from his car to the Muncey home.

Hensley further stated that after speaking to Mr. House he continued on his way. He found Muncey about a mile away at the home of Bill Silvey. Muncey was drunk. Thereafter, Hensley and Adkins returned to Ridgecrest Road and, near where Hensley said he saw House, Adkins found Carolyn Muncey's body. It was partly covered with brush, down off the road.

Soon thereafter, several law enforcement officials met Adkins at the scene. Other civilians soon appeared, including House and Muncey, who arrived together. Adkins told Sheriff Loy that House was the man Hensley claimed he had seen coming up the embankment to Ridgecrest Road near to where Adkins found the body.

The prosecutor argued during closing that Mr. Hensley had actually seen Mr. House coming up the embankment and that the black rag in his hands was actually the missing blue tank top which House had been wearing the night before. He asserted that Mr. Hensley located Ms. Muncey's body at the exact spot where he had seen Mr. House. Defense counsel reminded the jury of the sharp inconsistencies in Hensley's accounts and pointed out that of all the many photographs the prosecution had shown the jury, none showed the view from where Mr. Hensley claimed to have seen Mr. House.

c. House's custodial statements

The State presented evidence that House misled law enforcement officials.

During police questioning on July 14, hours after recovery of Carolyn Muncey's body, House willingly provided

a detailed account of his whereabouts on the previous night as well as earlier that day. He told officials that he had spent the entire Saturday evening with Ms. Turner and had not left her residence. He said the jeans he was wearing during questioning were the same pair he had worn the previous night. House also told police that injuries to his hands resulted from recent construction work and scratches to his arms from Ms. Turner's cats. He denied having been down the embankment where Jack Adkins discovered Carolyn Muncey's body. He told police he had been on the road only, and was searching for Mr. Muncey. He parked Donna Turner's car at a turnout because he had missed the Muncey driveway. He then walked back to the Muncey home. His full statement was read to the jury.

Other evidence showed that Mr. House, when questioned, was not wearing the same jeans he wore on Saturday evening. On July 15, Donna Turner told police that the jeans that House wore on Saturday evening were in the laundry hamper in her trailer. Law enforcement officers seized them and entrusted them to the care of William Breeding, a local law enforcement officer.

During closing, the prosecutor argued that Mr. House had lied to law enforcement officers about being at Ms. Turner's trailer the entire evening. He argued that Mr. Hensley's testimony proved that House had lied about not being down the embankment. He argued that House had also lied about the injuries observed by law enforcement: House gave Ms. Turner a different explanation about the injury to his finger than the one he gave the police. Defense counsel did not dispute that Mr. House had misled law enforcement about not leaving Ms. Turner's trailer and the clothes he was wearing. Counsel submitted that Mr. House was not trying to conceal his guilt. If he had, he surely would have washed his jeans in the thirty-six hours between the alleged crime and the time he was questioned. Counsel also argued that House's statements to Ms. Turner

about his whereabouts during his Saturday evening absence from her trailer was consistent with the length of his absence. In contrast, the prosecution's theory that he had walked to the Muncey house, committed the murder, and walked back during this period of time was impossible.

d. The forensic evidence

By far the prosecution's most damning evidence came from FBI special agents who gave largely unrebutted evidence that appeared to directly link House to Ms. Muncey's murder.

Agent Paul Bigbee, a serologist, testified that he received House's blue jeans and vials of Ms. Muncey's blood from state officials. He described the tubes of blood as badly degraded and rotted, J.A. 72, and the stains on the pants as minute. J.A. 71. He performed several tests upon House's blue jeans to determine whether there was blood, and if so, to identify its origin.[5] While he searched for sixteen genetic markers/enzymes, he was able to find only four because enzymes outside the body quickly become unstable and degrade. The combination of markers from these three tests led Bigbee to conclude that there were several small human blood stains on the pants, and that the blood did not come

[5] He described the tests and their results as follows: The first, ABO grouping, is grouping according to the four blood types, A, B, AB, and O. The blood found on the jeans was type A, which was consistent with both Carolyn Muncey and House. The second test groups an enzyme found in blood called phosphoglucomutase (PGM), which is grouped broadly into type 1, 2, and 2-1, and is further sub-typed into ten different groups, designated as 1-, 1±, 2- or 2±, or any combination thereof. The PGM type in the blood stains on the jeans was a 1-,1±, consistent with Carolyn Muncey's blood, but not House's. The third test groups a protein called haptoglobin, of which three types are found in Caucasian blood, designated as 1, 2, and 2-1. The haptoglobin type found in the blood stains was consistent with the type found in Carolyn Muncey's blood and inconsistent with that of Paul House.

from House, but was consistent with Ms. Muncey's blood. Bigbee calculated that the probability was roughly less than 7% of the population would have the same combination of characteristics as the blood found on the jeans. He acknowledged that no serologist could state unequivocally that an individual was the source of a stain to the exclusion of all others. J.A. 48-52, 66-70.

Bigbee also testified that he analyzed semen stains found on the nightgown and underwear. From the material supplied to him, he determined that House has type A blood and is a secretor. Bigbee testified that a person who is a secretor would also secrete the H blood group substance. A person who has type A blood and is a secretor would secrete both the A and H blood group substance. Bigbee found that the stain on the nightgown contained both A and H blood group substances, but the stain on the underwear yielded only the H blood group substance. He explained that the environment in which the stain was deposited could have led to the A blood group substance deteriorating into the H blood group substance, since the H blood group substance is the chemical precursor to the A blood group substance and lasts longer. While he could not say how long they had been there, he testified that both stains were consistent with House's blood type and secretor status. Because prosecutors did not provide him with the necessary biological evidence to determine Hubert Muncey's secretor status, he could not give an opinion whether Muncey could have been the source of that material. J.A. 57-59, 72-74.

Agent Chester Blythe, a micro-analyst, testified that he examined hair found on Ms. Muncey's body and hand. None of the collected hair was similar to House's. J.A. 46. Blythe also analyzed fiber material recovered from Ms. Muncey's clothing and body. He found blue jean fiber consistent with House's pants on each article of Ms. Muncey's clothing provided to him – the robe, nightgown, bra and panties – as well as in her nail clippings. He conceded that blue jean fiber

is very common and not unique. He found no fiber from Ms. Muncey's clothing on House's jeans.

The defense presented no rebuttal expert testimony.

The prosecutor argued forcefully in closing that the forensic evidence presented at trial showed that House had left his semen on Ms. Muncey's clothing during his vicious assault, J.A. 106, and that she marked his pants with her blood as she bravely, unsuccessfully fought his advances. He told the jury:

> [d]efense counsel does not start out discussing the fact his client had blood on his jeans the night Carolyn Muncey was killed. He doesn't start with this man's jeans. He doesn't start with the blood that was on the jeans. He doesn't start with the fact that nothing that the defense has introduced in this case explains what blood is doing on his jeans, that is scientifically, completely different from his blood

J.A. 104.

e. Evidence that Hubert Muncey, Jr. was the killer

The defense called Ricky Green, Carolyn Muncey's brother. He told jurors that two weeks before his sister's death, she called him and was upset. She had just argued with her husband, and she was waiting for him to leave. She was afraid of him, and wanted to take her children and live with Green. It was unusual for Green to receive a call like this. Green also testified about having witnessed a drunken Hubert Muncey smack his sister on an earlier occasion.[6]

[6] The prosecution did not call Hubert Muncey, Jr., as a witness, and Paul House did not testify in his own defense.

4. The Instructions and Verdict

During the court's instructions, the jury was charged, *inter alia*, on circumstantial evidence and reasonable doubt.[7] The jury returned a verdict of guilty of first degree murder.

5. The Sentencing Phase

The prosecution urged the jury to find three statutory aggravating circumstances: (1) the defendant was previously convicted of one or more felonies . . . "which involved the use or threat of violence to the person"; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, and (3) the murder was committed while the defendant was engaged in committing or attempting to commit rape or kidnapping. J.A. 109. *See* TENN. CODE ANN. § 39-2-203(i)(2), (5), and (7). The prosecution called only one witness, House's parole officer, who testified that House had previously been convicted in Utah for aggravated sexual assault. J.A. 111. The defense called House's father and mother. They provided brief testimony about House's childhood and asked the jury not to impose the death penalty. J.A. 111-121. After arguments and deliberations, the jury found all three aggravating circumstances and imposed the death penalty.[8]

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[7] The circumstantial evidence instruction charged jurors that "when the evidence is made up entirely of circumstantial evidence, then before you could be justified in finding the defendant guilty, you must find that all of the essential facts are consistent with the hypothesis of guilt, as that [sic] to be compared with all the facts proved. The facts must exclude every other reasonable theory or hypothesis, but that of guilt, and the facts must establish such a certainty of guilt of the defendant as to convince the mind beyond a reasonable doubt that the defendant is the one who committed the offense." J.A. 108.

[8] On direct appeal, the Tennessee Supreme Court affirmed House's conviction and death sentence, and characterized the evidence against House as "circumstantial" but "quite strong." *State v. House*, 743 S.W.2d

(Continued on following page)

B. State Postconviction Proceedings

On September 25, 1988, House, *pro se*, filed a petition for postconviction relief in the state trial court. He alleged that trial counsel provided ineffective assistance of counsel, in part because he failed to adequately investigate and present a defense at the guilt phase of the trial. Counsel was appointed. Relief was denied on all claims. Through counsel, House appealed, but raised only one sentencing instruction claim. The Tennessee Court of Criminal Appeals affirmed the denial of relief. *House v. State*, 1989 WL 152742 (Tenn.Crim.App. 1989), and the Tennessee Supreme Court denied review. *Id*.

Thereafter, House filed a second state postconviction application, this time with new counsel, and again asserted his ineffective assistance of counsel claim. The State argued that this and other pleaded claims were barred because they either had been previously adjudicated or had been waived. The Tennessee Supreme Court ruled that House's ineffective assistance of counsel claim had been previously determined and could not again be brought. *House v. State*, 911 S.W.2d 705 (Tenn. 1995). This Court denied review. *House v. Tennessee*, 517 U.S. 1193 (1996).

C. Federal Habeas Corpus Proceedings in the District Court

In September 1996, House filed a habeas corpus petition in the United States District Court. He claimed that he was innocent of the underlying crime and pleaded his ineffective assistance of counsel claim, together with a claim that the prosecution had suppressed exculpatory, material evidence at trial. He requested a hearing. The

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141 (Tenn. 1987). Certiorari was denied. *House v. Tennessee*, 498 U.S. 912 (1990).

Warden responded that these claims were not properly before the court because they had not been properly raised in the state court. The district court granted the Warden's motion for summary judgment on most of the pleaded claims and set a hearing on "Mr. House's claims of actual innocence of the offense, actual innocence of the death penalty, and ineffective assistance of counsel. . . ." Cert. App. 88.

1. The New Evidence Supporting House's Innocence

At the hearing below, House presented both expert and lay testimony to establish two points. First, new scientific evidence demonstrated that the forensic evidence which had been crucial in establishing at trial the prosecution's theory that House killed Ms. Muncey during a sexual assault – the prosecution's only theory that gave House any motive to kill Ms. Muncey – was indisputably false or completely untrustworthy. Second, persuasive testimony from several long-time friends of Hubert Muncey, Jr., showed that Muncey was unhappy with his marriage, wanted to get rid of his wife, confessed to them that he had killed her, and asked them to provide him with an alibi.

The Warden submitted rebuttal evidence. The habeas record shows:

a. There is new evidence establishing beyond peradventure that much of the State's circumstantial case rested upon inaccurate and misleading evidence

i. DNA evidence proves that the source of the prosecution's semen evidence was Hubert Muncey, not Paul House

During the proceedings below, both House and the Warden subjected the clothing evidence to DNA testing.

Lisa Calandro, a forensic scientist at a private forensic laboratory, testified that analysis of DNA material removed from the semen stains on the nightgown and panties showed that House was *not* the source of the semen. J.A. 238-239. The Warden concurred in this finding. State forensic experts also confirmed that Hubert Muncey, Jr., the victim's husband, was the donor of the semen found on these articles of Ms. Muncey's clothing. This new evidence destroyed all factual support for the prosecution claim that House raped or attempted to rape Ms. Muncey. It left no intelligible motive for House's supposed commission of her murder.

ii. New analysis of blood on House's jeans strongly points to its transfer there during the investigation, not during the crime

Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, testified that the bloodstains on Mr. House's blue jeans came from blood contained in the sample tubes taken during Carolyn Muncey's autopsy, *not* from transmission during the crime. J.A. 250-251. He explained the basis for his finding as follows: He observed that when Agent Bigbee tested Ms. Muncey's autopsy samples in 1985, Bigbee detected measurable enzymatic activity for only a small number of sixteen factors. Again when Agent Bigbee tested the bloodstains on Mr. House's blue jeans, he was able to detect measurable activity for only the same small number. J.A. 252. Consistent with Agent Bigbee's trial testimony, Dr. Blake opined that certain factors/enzymes in human blood varied in stability, and noted that one, the glyoxylase enzyme, should have been present in the bloodstains on Mr. House's blue jeans. J.A. 253-255. Dr. Blake also agreed with Bigbee that many factors contributed to a finding of no measurable activity, including whether the blood sample was liquid or a dried stain, the environmental

factors to which the blood had been exposed, and the amount of bacterial activity. J.A. 243-244, 248, 250, 251. Finally, Dr. Blake considered evidence that blood appeared to have escaped the autopsy blood samples prior to their arrival at the FBI crime laboratory. J.A. 248-250.

Because the Carolyn Muncey autopsy sample was "rotted" liquid blood, removed from a body that had lain out in ninety-degree weather for the better part of a day, while the stains on House's blue jeans had been subjected to much different environmental factors, it could be expected that the enzyme factors on each would differ significantly. Because both showed measurable activity for virtually the same enzymes, Dr. Blake concluded that the source of the bloodstains on Mr. House's jeans was the highly degraded liquid blood samples taken during her autopsy. J.A. 250-252.

Agent Bigbee was called to rebut Dr. Blake's opinion, but agreed with Blake that liquid blood would degrade faster than dried blood. J.A. 283. He also agreed that the blood in Ms. Muncey's sample tubes had been badly degraded, *id*., and that one of the missing enzymes, glyoxylase, would normally exhibit detectable activity a week after death. J.A. 282-283. He even agreed that it was "curious" that the bloodstains on the jeans and the autopsy samples showed such similarity in the enzymes that displayed similar identifiable activity. Agent Bigbee opined, however, that because there were many different factors that could cause a particular enzyme to not demonstrate identifiable activity, the bloodstains on Mr. House's jeans could have been exposed to a different set of factors than the liquid autopsy samples and still have yielded such similar results when tested.

iii. New evidence shows that blood escaped from the autopsy blood samples prior to, not after, FBI testing

The record evidence shows that four sample tubes of blood from Carolyn Muncey's autopsy were sent to the FBI. J.A. 311. Agent Bigbee used no more than one-quarter of a tube of blood for testing purposes. Agent Bigbee testified that the FBI did not spill any blood from the sample tubes while they were in the FBI's possession. J.A. 279. Howard Bragdon, an employee of the defense serological expert, photographed the autopsy samples when they were received from TBI Agent Scott in October, 1985, following FBI testing. That photograph showed that one sample tube was completely empty while another was only one-half full. J.A. 307. Bragdon, who personally received the samples from Agent Scott, confirmed that the blood was missing. J.A. 240. The photograph reveals that blood had leaked from the autopsy sample tube that remained one-half full during transport from the FBI to House's serological expert. It also shows that only a negligible amount of blood leaked from the empty autopsy sample tube. J.A. 307. There is no contradictory evidence. At least three-fourths of the blood in the empty autopsy sample was neither used by the FBI in testing nor spilled after FBI testing. It is undisputed that prior to FBI testing, the blood samples were in the exclusive control of the State of Tennessee.

Abundant evidence pinpoints when the missing blood was removed from the autopsy samples. Officer Breeding took Carolyn Muncey's unsealed autopsy blood samples directly from the pathologist. J.A. 8; J.A. 42-43. He also took possession of Mr. House's blue jeans when they were seized from Donna Turner's trailer. J.A. 8; J.A. 43. Breeding and Officer Jo Ed Munsey packaged the blue jeans and the autopsy samples and personally transported them by automobile to the FBI Crime Laboratory. J.A. 8-9. Breeding and

Munsey sealed the blood samples in a Styrofoam container. The label on the container stated that it held two items, Ms. Muncey's blood samples and vaginal secretions. J.A. 287. Agent Bigbee testified that when the Styrofoam container was received by the FBI, the vaginal secretions were no longer in that container. They had been removed and placed in a manila envelope. J.A. 289; J.A. 309.

In addition, Respondent's blood spatter analyst, Paulette Sutton, testified that she found blood mixed with dried mud on Mr. House's blue jeans. The blood had to have come in contact with the mud when the mud was wet. J.A. 294-296. There was no mud at the crime scene. J.A. 308. A creek near the Muncey home was neither adjacent to the body, nor was it between the body and the Muncey residence. J.A. 304. The ground was covered with grass, twigs, and pine needles. National Weather Service records for July, 1985, showed that it had not rained in that area for three full days and that the temperature had been around ninety degrees. J.A. 310. There was no mud on Ms. Muncey's housecoat and nightgown. (Plaintiff's Hearing Exhibits 14a and 15) (physical exhibits returned to custody of state court). The only evidence of wet mud on Mr. House's blue jeans was TBI Agent Scott's testimony that the jeans were soiled with wet mud when they were seized. J.A. 274.

Moreover, Mr. House's missing tennis shoes were discovered after his arrest on different days and at separate locations in the woods across the road near Donna Turner's trailer. They were not in Breeding's and Munsey's possession when they took the autopsy samples and the blue jeans to the FBI Crime laboratory. J.A. 94-95. Agent Bigbee testified that there were bloodstains on the cuff of Mr. House's blue jeans. Ms. Sutton also noted that the bloodstains on the cuff of Mr. House's blue jeans were on both the inside and outside surfaces. J.A. 291-292, 296. The Tennessee Bureau of Investigation tested the shoes for the presence of human blood. The test failed to show the

slightest indication of blood. J.A. 305. Ms. Sutton also tested the shoes for the presence of blood and found none.

The Warden presented no evidence to explain the blood missing from the sample tube, the unsealing and resealing of the Styrofoam box containing the samples of Ms. Muncey's blood, the absence of blood on the tennis shoes Mr. House was wearing on the night of the murder, or the fact that the blood on Mr. House's blue jeans showed similar enzyme activity with Ms. Muncey's badly degraded blood samples obtained during the autopsy. Instead, Respondent's rebuttal was presented by Ms. Sutton and TBI Agent Charles Scott.

Scott testified that he had an independent recollection of seeing reddish-brown stains on some portion of the upper part and the cuff of the right leg of Mr. House's blue jeans when he took them out of the laundry hamper at Donna Turner's trailer. J.A. 274. Scott could point only to the general area where he saw stains. Respondent's Exhibit's 18-f and 18-g, show the front and back of Mr. House's right pants leg. In both photographs, the transfer stains (which adjoin the cuttings in 18-f) are virtually impossible to see unaided, while next to them are other non-blood stains, which are quite similar but much more apparent. J.A. 302, 303. The same holds true for the blood and non-blood stains on the front of Mr. House's jeans.

The record also confirms the faintness of those blood-stains on the outside of Mr. House's jeans. Ms. Sutton testified that there were stains on the jeans that could not easily be seen as blood to the naked eye. She testified that she was unable to determine which stains merited her review until she had examined the stains with a stereomicroscope. J.A. 297-300; J.A. 302, 303. This was consistent with Agent Bigbee's testimony that the stains on the outside of the jeans were so small that he did not expect to detect any enzymatic activity. J.A. 71. The prosecutor even

told the jury during opening argument at trial that the stains were of a type that, "you [the jurors] or I [Phillips] might not detect. Might not see, but which the FBI was able to find on his blue jeans." J.A. 11.

iv. Expert evidence indicates that injuries to Mr. House's body were unrelated to the crime

Dr. Blake examined photographs the police took of bruises on Mr. House's body that the prosecution argued at trial supported its view that House sustained the injuries in a life-and-death struggle with Carolyn Muncey. After being qualified as an expert in the subject, Dr. Blake concluded that each of these injuries were between two and seven days old, too old to have come from a struggle the night before. J.A. 241. Significantly, he also determined that the injury to Mr. House's right ring finger, easily the most severe injury to Mr. House, was not only too old to have been connected with Carolyn Muncey's murder, it was wholly inconsistent with hitting another person because there was no accompanying injuries to the adjoining fingers. J.A. 241-243.

v. Trial counsel did not see key investigation reports that impeached the prosecution's case

House's trial counsel, Chuck Burks, identified a number of significant police investigative reports that were not disclosed to him prior to or during trial. One report showed that House's tennis shoes had been tested and that no blood was found on them. J.A. 257-263. Burks testified that he would have used this report at trial to cast doubt about when the victim's blood came in contact with House's pants. Another police report that Burks had never seen reflects that Hubert Muncey, Jr., told investigators he had had sex with

Carolyn on the morning of July 13. This evidence, Burks testified, would have been important to support the defense argument that Muncey, not House, was the source of the semen stains and thus to discredit the prosecution theory that the motive for the crime was rape. *Id*. at J.A. 264-266.

b. The new evidence showed that Hubert Muncey killed Carolyn Muncey

Finally, House introduced evidence from five new witnesses who directly implicated Hubert Muncey, Jr., as Carolyn Muncey's killer. Each was a lifelong resident of Union County who knew Muncey and had no reason to falsely implicate him in his wife's murder.

i. Muncey argued with his wife at the dance and left thereafter

On the last evening of her life, Carolyn Muncey believed her husband was digging a grave. She was mistaken. Instead of returning home after work, Hubert Muncey went to the Saturday evening dance at the nearby C & C Recreation Center. At some point after she put her children to bed, Carolyn Muncey appeared at the dance and found her husband outside. Mary Atkins, a lifelong Union County resident, testified that she saw Carolyn and Hubert argue in the parking lot, and saw Hubert strike Carolyn. Carolyn then walked away. Atkins was certain that this fight took place on July 13. J.A. 225-230. She also testified that she knew that Muncey had abused Carolyn in the past and that she had previously seen bruises on Carolyn. She testified that she had known Hubert Muncey her entire life and had no animosity toward him.

Police officer Dennis Wallace provided security at the July 13 dance. He testified that Hubert Muncey attended part of it but left between 9:30 and 10:30 p.m., and Wallace did not see Muncey thereafter at the dance. Wallace

testified that he later responded to Muncey's missing persons report; when he arrived at the Muncey house, Muncey was intoxicated and did not appear upset.

ii. Muncey sought to construct a false alibi

Another longtime Union County resident, Artie Lawson, testified that Hubert Muncey came to her house early Sunday morning, July 14. He asked her to tell anyone who inquired that she had seen him at the dance the evening before, and that he had eaten breakfast at her house on Sunday morning at 6:00 a.m. Neither was true, and she refused. J.A. 230-232. She testified that she considered herself a good friend of Hubert Muncey.

iii. Muncey confessed to killing his wife

Two additional witnesses, both life-long friends of Hubert Muncey, Jr., testified about hearing Muncey tearfully confess to killing Carolyn Muncey. Penny Letner recalled that Hubert came to the house of her sister, Kathy Parker, shortly before House's trial. After a short while, he "went to crying and was talking about his wife, and her death and he was saying that he didn't mean to do it." J.A. 232. She testified that Muncey

> said 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 come home that she was still on him pretty heavily bitching him out again, and that he smacked her and that she fell and hit her head. He said I didn't mean to do it, but I had to get rid of her, because I didn't want to be charged with murder.

Id. Letner was 19 years old at the time and had not consumed any alcohol. Muncey's tearful confession scared her and she left immediately. J.A. 233.

Kathy Parker, Letner's sister, testified that she heard the same admission. She also became scared, and she ordered Muncey to leave. She testified that the next day she and her mother went to the Sheriff's Department to report Muncey's remarks, but after being passed off by a couple of deputy sheriffs, she spoke to no one about them. J.A. 234. "There wasn't anybody [sic] talk to me. I couldn't give a statement to anybody. They didn't want to hear it." J.A. 336. Parker also corroborated testimony that the Muncey's marriage was beset by violence. When questioned about whether Hubert Muncey, Jr., abused his wife, Parker said "she was constantly with black eyes and busted mouth." *Id*. at J.A. 235.

iv. Muncey had been plotting to get rid of Carolyn

Hazel Miller, another Muncey friend, also testified. She said that Hubert Muncey had come to her house two to three months prior to Carolyn Muncey's death and told her "he was upset with his wife, that they had had an argument and he said he was going to get rid of that woman one way or the other." J.A. 236. Miller also recalled taking her daughter, Kathy Parker, to the courthouse to report Muncey's confession. *Id*.

v. House testified that he was innocent

Paul House testified, consistent with his defense at trial, that he did not murder Carolyn Muncey, that he did not see or know that her body was off of Ridgecrest Road when he was there searching for Hubert Muncey on July 14, and that he had misled investigators because he was on parole for a sex offense and was afraid to draw attention to himself.

vi. Hubert Muncey, Jr., testified that he was innocent

Hubert Muncey, Jr., testified and denied that he killed his wife. He said that he and Carolyn had a few fights but otherwise got along fine. He testified that he was at the July 13 dance and did not recall leaving before it was over. While he acknowledged knowing Kathy Parker, Penny Letner, Mary Atkins, Artie Lawson and Hazel Miller, he denied any memory of telling them that he had killed his wife, that he wanted to get rid of her, or that he sought an alibi for his whereabouts on July 13 and 14. He could not say why they would want to implicate him falsely in his wife's murder.[9]

2. The District Court's findings

The district court ruled that House's evidence failed to establish that he was factually innocent; thus, it did not reach the merits of his ineffective-assistance-of-counsel-claim. The court made few credibility determinations.[10] With regard to the Letner/Parker testimony, the court did determine that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence." Cert. App. at 131.

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[9] Laura Muncey, now Laura Tharp, testified that she recalled the evening of January 13 when her mother disappeared. Her mother left the house after a man with a deep voice told her that Laura's dad had had a wreck down by the creek. When Laura got up, she did not see anything that had been disturbed in the house, and she said her parents got along fine. She did not recall telling Pam Luttrell that she had heard a car stopping that evening. The court found this testimony highly credible and concluded that it established that Hubert did not assault his wife in their home on the night she disappeared. Cert. App. at 13.

[10] The court found that House was not a credible witness. Cert. App. at 106.

D. The Court of Appeals' Divided Decision

An initial panel opinion affirming dismissal of the petition was withdrawn, and a sharply divided *en banc* court certified three questions to the Supreme Court of Tennessee after the majority determined that the new evidence of innocence created "a serious question or doubt that the defendant is guilty of first degree murder." *House v. Bell*, 311 F.3d 767, 777 (6th Cir. 2002). The dissenters acknowledged that while the new evidence "might convince some, or even most, reasonable jurors that Paul House is actually innocent or should not be convicted," 311 F.3d at 780, they believed that House had failed to meet the *Schlup* standard because, in their view, *Schlup* allows for merits review of a defaulted claim only "if a judge can conscientiously assert that every reasonable juror is almost certain to vote to acquit." *Id*. at 783.

The Warden urged the Tennessee Supreme Court not to respond to the certified questions, and that court (in a departure from prior practice) refused to answer them. The case was then rebriefed in the Sixth Circuit and the *en banc* court voted 8-7 to dismiss House's habeas petition. *House v. Bell*, 386 F.3d 668 (6th Cir. 2004). While the majority agreed that House's new evidence presented a colorable claim of actual innocence, 386 F.3d at 684, it concluded that *Schlup* required more. It reasoned that because House had not discredited each piece of the circumstantial case, he had failed to carry his burden. It opined that sufficient evidence of guilt remained to adequately support the conviction and disallow passage through the *Schlup* gateway.

Seven judges dissented. Six concluded not only that House's new evidence was sufficient to satisfy the *Schlup* gateway requirement and permit review of House's underlying constitutional claims, but also that this was the rare, extraordinary case in which a habeas petitioner has set forth

"a truly persuasive demonstration of 'actual innocence'" within the definition of Justice White's concurring opinion in *Herrera v. Collins*, 506 U.S. 390 (1993). Judge Gilman dissented alone, writing 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 concluded that the evidence was sufficient to satisfy *Schlup* and that the proper resolution was therefore 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, [with] the full knowledge of the controversy surrounding the blood evidence, and with the benefit of the testimony implicating Hubert Muncey." *Id.* at 710.

SUMMARY OF ARGUMENT

Paul House has presented evidence of actual innocence exceeding that required by this Court's holding in *Schlup v. Delo* to allow a habeas petitioner to pass through the procedural gateway and permit federal courts to review the merits of otherwise procedurally defaulted constitutional claims. He has also presented evidence warranting habeas relief on a free-standing claim of actual innocence. *See Herrera v. Collins*, 506 U.S. 390.

In considering House's *Schlup* claim, the lower courts erred grievously in their evaluation of House's post-conviction evidence of innocence. They did so by failing to give reliable, credible evidence of innocence the appropriate weight and failing to consider its significance in light of the purely circumstantial evidence used to convict. They did so also by concluding that solely because some record evidence pointing to guilt remained, House had fallen short of establishing a gateway innocence claim.

The lower courts also erred under *Herrera*. They should have adopted the standard announced in Justice White's concurrence in that case, 506 U.S. at 429, and concluded that House's presentation of new biological and

other physical evidence discrediting every aspect of the prosecution's trial case *and* pointing to a plausible alternative suspect such that no rational juror could vote to convict. They then should have granted immediate relief.

ARGUMENT

Paul House presents a compelling case of actual innocence which warrants relief under settled law. He produced objective scientific evidence disproving the two most incriminating pieces of physical evidence that the prosecution had argued at trial served to link him to the crime. In addition, he presented strong, credible testimony from several unbiased, uninvolved witnesses that Ms. Muncey's husband was her killer. Given the entirely circumstantial case against him and the paucity of credible evidence that remains, House has surely met and exceeded the requirements of *Schlup*. All the court of appeals judges below agreed that Mr. House has "presented a colorable claim of innocence." *See House*, 386 F.3d at 684, 710. Six concluded that he has proven his innocence outright under *Herrera*. *See House*, 386 F.3d at 708. Yet because of the majority's erroneous application of this Court's settled precedent, House's conviction and death sentence stand.

I. HOUSE HAS PRESENTED EVIDENCE WHICH QUANTITATIVELY AND QUALITATIVELY EXCEEDS THAT REQUIRED BY *SCHLUP*

A. *Schlup* Established A Standard For Gateway Claims Of Actual Innocence Which Affords Petitioners Presenting Persuasive Claims A Meaningful Avenue For Review Of Federal Constitutional Violations That Contributed To A Wrongful Conviction

Schlup v. Delo, 513 U.S. at 298, confirmed that a federal habeas court may reach the merits of a petitioner's

otherwise defaulted constitutional claims – that it may allow the petitioner to pass through the procedural "gateway" to the underlying claims – if the petitioner presents new, reliable evidence which undermines confidence in the trial verdict to such an extent that the habeas court finds it more likely than not that no reasonable juror would have voted to convict in light of the new evidence. *See Schlup*, 513 U.S. at 327, 329. The *Schlup* Court embraced the standard set forth in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), for evaluating gateway innocence claims: that the constitutional error complained of "probably" resulted in the conviction of one who is actually innocent. *See Schlup*, 513 U.S. at 322. In so doing, the Court explicitly rejected the "more exacting" standard announced in *Sawyer v. Whitley*, 505 U.S. 333 (1992), for cases in which capital sentencing error rather than a mistaken conviction was in controversy: that the habeas petitioner "'must show *by clear and convincing evidence* that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.'"[11] *Schlup*, 513 U.S. at 323 (quoting *Sawyer*, 505 U.S. at 336 (emphasis in *Schlup*)). In explaining its adoption of the *Carrier* standard for gateway claims of actual innocence, the Court emphasized the "equitable nature of habeas corpus," 513 U.S. at 319, and concluded that it was critically important to maintain a standard for evaluating gateway innocence claims which affords a petitioner in the "extraordinary" case presenting persuasive evidence of mistaken identity a "meaningful avenue by which to avoid a manifest injustice." *Id.* at 327.[12]

[11] The petitioner in *Sawyer* asserted that he was "actually innocent" of the death penalty and that his death sentence was therefore improper. *See Schlup*, 513 U.S. at 323.

[12] In adopting the *Carrier* standard, the Court by no means ignored the impact of gateway claims of innocence on the systemic interest in

(Continued on following page)

After announcing that the *Carrier* standard applies to gateway innocence claims, the Court provided lower courts with several guiding principles for evaluating such claims. First, the petitioner should succeed under *Schlup* only if he persuades the habeas court that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. Second, the petitioner must present *reliable* evidence, such as credible eyewitness accounts, exculpatory scientific evidence, or other critical physical evidence. *Id.* at 324. Third, the habeas court must make its gateway determination in light of *all the evidence* – both that adduced at trial and that newly presented – and must determine whether sufficient evidence of guilt remains unaffected by the new evidence so that a reasonable juror would still find the petitioner guilty beyond a reasonable doubt. *Id.* at 327-328, 331-332. Fourth, the Court was explicit that the habeas court must not substitute its own judgment for a jury's but must consider the evidence of innocence from the perspective of a "reasonable, properly instructed juror" conscientiously following instructions to consider all the evidence fairly and to hold the State to its burden of proving guilt beyond a reasonable doubt. *Id.* at 329, 331.

In Paul House's case, these principles have been disregarded by a bare majority of the court below. Under *Schlup*, House's presentation of solid scientific evidence discrediting the most incriminating physical evidence

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"finality, comity, and conservation of judicial resources." *Schlup,* 513 at 322. The Court painstakingly considered these interests and at the same time recognized that "[c]laims of actual innocence pose less threat to scarce judicial resources and to principles of finality and comity" than do other sorts of claims and that "a substantial claim that constitutional error has caused the conviction of an innocent person are extremely rare." *Id.* at 324.

against him in an entirely circumstantial case, *plus* the unbiased testimony of several witnesses that another plausible suspect was the real culprit, should have led the courts below to find that such a showing undermines confidence in the outcome of his trial sufficiently that no reasonable juror knowing all of this evidence existed would persist in believing House guilty beyond a reasonable doubt. The particular failings that led the Sixth Circuit majority to a manifestly improper application of *Schlup* are detailed in the following sections.

B. House's Evidence Of Innocence Exceeds The Requirements Of *Schlup*

House provided the district court with every type of evidence *Schlup* cited as necessary to establish a "credible" gateway claim of actual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324. His exculpatory scientific and critical physical evidence included the results of DNA testing that conclusively exclude House as the source of the semen found on Ms. Muncey's nightclothes and thereby obliterate the most incriminating physical evidence adduced at trial to link him to the victim. The disclosure that the prosecution's dramatic semen evidence was wrong, valueless and misleading insofar as it purported to identify House as Carolyn Muncey's assailant literally cuts the core out of the State's case by destroying the only motive – rape – that the prosecution urged upon the jury as an explanation for why House might have attacked and murdered Ms. Muncey. In addition, postconviction analysis of the prosecution's blood evidence by a respected, experienced, state-employed expert also reveals a strong likelihood that Ms. Muncey's blood ended up on House's clothing not because House bludgeoned her, but because the negligent or deliberate

mishandling of physical evidence by law enforcement agents put that blood on the clothing *en route* to the FBI lab. It is inconceivable that any reasonable juror would dismiss *both* of these revelations *together* as grounds for doubt about the State's case.

House has also exceeded the evidentiary requirement of *Schlup* by presenting "trustworthy eyewitness accounts" pointing to a credible alternative suspect: Hubert Muncey, Jr. *See House*, 386 F.3d at 683 ("House not only presented evidence to the district court that undermined the case against him, he also offered an alternative theory of the crime: that Mr. Muncey killed his wife."). Several witnesses who were lifelong friends of the Munceys and had no connection to Mr. House testified during the federal habeas hearing to detailed, first-hand accounts of Ms. Muncey's abusive husband declaring his intention to "get rid of . . . [her] one way or the other," confessing that he had killed her, and attempting to establish a false alibi for the time of the killing. *See House*, 386 F.3d at 702 (Merritt, J., dissenting, "Hours before his wife's body was found, Muncey . . . tried to establish an alibi for Saturday night. He in fact had no alibi. He left the dance an hour and a half early and is unable to account for his whereabouts at the very time the county coroner gave as his best estimate as the time of death. Then, early the next morning before the body was discovered, he went to Ms. Lawson in an effort to enlist her help in establishing an alibi."); *id.* at 708 (characterizing Letner and Parker as "having no connection to House and no bias against Mr. Muncey").

It is undisputed that Penny Letner and her sister, Kathy Parker, have been friends of Hubert Muncey, Jr., since they were all children. Hazel Miller and Artie Lawson had also known Muncey for years. *See House*, 386 F.3d at 699, 701. It is also undisputed that there has been no ill will between Muncey and Letner, Parker, Miller, or Lawson. *Id.* Finally, it is undisputed that Letner, Parker,

Miller, and Lawson do not know Paul House and have no reason to want to exonerate him – other than allegiance to the truth of facts they learned and are unwilling to deny. As *Schlup* made clear, the motives and loyalties of post-conviction witnesses who cast doubt on the prosecution's case for guilt at trial are crucially important. *See Schlup*, 513 U.S. at 316 (citing as "particularly relevant" to Schlup's innocence claim that he had presented affidavits of African-American inmates "attesting to the innocence of a white defendant in a racially motivated killing").

In sum, House's evidence dismantling the prosecution's case for guilt *while at the same time* pointing to a highly plausible alternative perpetrator amounts to "*Schlup* plus." Yet the district court and the Sixth Circuit concluded that "*Schlup* plus" somehow fell short of the requirements set forth in *Schlup* for establishing a gateway claim of actual innocence.

C. The Courts Below Misapplied *Schlup* By Viewing House's Evidence Of Innocence In Isolation From The Prosecution's Case At Trial

Schlup requires a habeas court to evaluate a petitioner's new evidence of innocence holistically and in the context of the evidence presented – and relied upon to convict– at trial. *See Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning 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 the trial.") (internal quotation marks omitted); *id.* at 331-32 ("In applying the *Carrier* standard to such a request, the District Court must assess the probative force of the newly presented

evidence in connection with the evidence of guilt adduced at trial."); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986).

The Sixth Circuit majority acknowledged that "[House] has presented a colorable claim of actual innocence." *House*, 386 F.3d at 684-685. Yet, contrary to *Schlup*, it proceeded to evaluate each piece of House's postconviction evidence in isolation, without considering the effect the new evidence would have had on a reasonable juror's assessment of the actual case presented by the prosecution at trial. Following the lead of the district court, the Court of Appeals majority examined each piece of testimonial and biological evidence singly and opined as to each one, separately, why it alone failed to undo the prosecution's case against House. *Id.* (discussing and dismissing *seriatim* 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). Two clear examples of the lower courts' failures to properly analyze House's evidence of innocence are their treatment of Dr. Blake's testimony and their treatment of the testimony of Ms. Parker and Ms. Letner.

Dr. Blake, the Assistant Chief Medical Examiner for the State of Tennessee and a witness who overwhelmingly testifies for the prosecution in criminal cases, testified for Mr. House that the enzymatic degradation of the blood staining the jeans led him to conclude that the blood was spilled on the jeans *after* it had been collected from Ms. Muncey's body, and that it did not land on the jeans while she was still alive. J.A. 250, 251. The district court weighed this evidence – based on scientific analysis by a qualified expert – against testimony by Agent Scott that he saw "what appeared to be blood stains" on House's jeans when he collected them from Turner's trailer. Cert. App. at 109; *House*, 386 F.3d at 681 (recounting the district court's summary of Agent Scott's testimony about discovering the jeans: "The jeans had 'reddish brown'

stains that *he suspected was* [sic] blood on the upper part of the jeans and near the cuff." [emphasis added]). The district court opined that Dr. Blake's expert scientific testimony did not "negate" Agent Scott's *suspicion* that he saw blood on the jeans, and therefore failed to undermine sufficiently the trial evidence against House.[13] Cert. App. at 132.

Given the prosecutors' central reliance on the blood evidence to secure House's conviction at trial, the district court's conclusion and the circuit's affirmance of it cannot be reconciled with *Schlup*. *Schlup* requires habeas courts to consider new evidence, from the perspective of a reasonable juror "in connection with the evidence of guilt adduced at trial." *See Schlup*, 513 U.S. at 328, 329, 331-332. In connection with a purely circumstantial case in which the prosecution has tied the defendant to his alleged victim by insisting that her blood was found on his jeans, it is altogether unworldly to suppose that reasonable jurors would fail to perceive a reasonable doubt when an acknowledged

[13] The district court recognized, "Without question, one or more tubes of Ms. Muncey's blood spilled at some time. However, the court concluded that "the spillage occurred after the FBI crime laboratory received and tested the evidence." Cert. App. at 131. This finding is wholly unsupported by the record. *See, infra* at 20-24. The record evidence establishes that: (1) Dr. Carabia did not seal the tubes after he drew Ms. Muncey's blood samples, H. T. III 127; (2) when the Styrofoam box was opened at the FBI, the box had previously been opened and resealed, *id*., at 152-53; (3) the vaginal secretion evidence that had been packed with the blood was no longer in that box, *id*, at 155-57; and (4) at least half a tube of blood is not accounted for. It was not used in the FBI testing, and the leakage inside the box concerned a small amount of blood. *See* Plaintiff's Exhibit 8. The district court did not address any of these facts and relied heavily upon Agent Scott's speculation that stains on the jeans were bloodstains. But the evidence is clear that the *blood* stains on House's pants were so minute and fine that they had to be observed with a microscope. Whatever brownish-appearing stains Scott could see were *not* bloodstains. At trial, the Attorney General told jurors that they could not see the bloodstains on the jeans. J.A. 11.

forensic expert who is employed by the State and who routinely testifies for the prosecution in criminal cases discovers and attests that the blood on the jeans actually got there through law enforcement authorities' mishandling of potential evidentiary materials. *See Schlup*, 513 U.S. at 329 ("It must be presumed that a reasonable juror would consider fairly all of the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt."); *id.* at 316 (noting that the source of the new evidence is significant); *see also House*, 386 F.3d at 686 (Merritt, J., dissenting, "Dr. Blake has testified for the prosecution . . . in hundreds of cases.").

The lower courts were similarly misguided in dismissing the Letner and Parker testimony recounting Mr. Muncey's confession. The district court disparaged their accounts on the ground that they allegedly waited too long to come forward. Cert. App. at 131; *House*, 386 F.3d at 684. This is unsupportable. First, the record contains unrebutted evidence, which the district court never acknowledged, that Ms. Parker attempted to report the confession to authorities but was unable get anyone to listen to what she had heard that contradicted the State's case-in-the-making against Mr. House. Cert. App. at 96; *House*, 386 F.3d at 683. Second, in *Schlup* itself this Court recognized that the district court had discounted Schlup's affidavits for the very same reasons the district court here has discounted the Parker and Letner testimony. *Schlup*, 513 U.S. at n. 19 ("The District Court focused primarily on the 'suspect' nature of affidavits that are produced after a long delay."). Yet, that credibility determination did not deter this Court from concluding that the affidavits were probative new evidence of a gateway innocence claim. And in Mr. House's case, the testimony brushed aside by the courts below came from two lifelong friends of Mr. Muncey; they had no motive to implicate him falsely in his wife's

murder; their timely attempts to report his confession to authorities were rebuffed; and when they were finally allowed to tell their story in court, the district court declared it tardy. *House*, 386 F.3d at 364.

This approach flouts *Schlup*'s requirement that a habeas court consider new evidence of innocence from the perspective of a reasonable juror. As with Dr. Blake's testimony, it is impossible to imagine that in an entirely circumstantial case, reasonable jurors would fail to appreciate the doubt cast on Mr. House's identity as the killer of Ms. Muncey when two witnesses who have long known her husband and who have no animus against him testify consistently – consistently with one another and with Hubert Muncey, Jr.'s previous abuse of his wife[14] – that they heard him admit to having gone too far at last and killed her. The lower courts' depreciation of this compelling evidence simply cannot be squared with the promise of *Schlup* that the gateway innocence standard it endorsed would provide wrongly convicted individuals a "meaningful avenue by which to avoid a manifest injustice."

Two additional points about *Schlup* highlight the force of Mr. House's gateway showing. (1) *Schlup* was not a circumstantial case. Two corrections officers who were eyewitnesses to the crime had identified Schlup as the culprit. *Schlup*, 513 U.S. at 302. (2) Schlup's postconviction showing did not involve exculpatory physical evidence. *Id.*; *id.* at 310-313. Yet, this Court strongly suggested that the affidavits which Schlup presented in federal habeas raised sufficient doubt about his guilt to allow consideration of his constitutional claims, *even*

[14] *See also State v. House*, 743 S.W.2d 141, 143 (Tenn. 1987) (recognizing that the Munceys "had been having marital difficulties and that . . . [Ms. Muncey] had been contemplating leaving . . . [Mr. Muncey]").

though Schlup's habeas evidence by no means negated every incriminating piece of evidence in the record. *Id.* at 332; *id.* at n. 19. By contrast, the prosecution's case against Mr. House at trial was entirely circumstantial. *House*, 386 F.3d at 671 (quoting *State v. House*, 743 S.W.2d 141, 142-44 (Tenn. 1987)). Mr. House's postconviction showing did include physical and expert forensic evidence which discredited – and, in regard to the prosecution's semen evidence, obliterated outright – the prosecution's circumstantial case. Yet the courts below found that Mr. House could not meet the *Schlup* gateway standard because this evidence did not dissipate each and every single shred of the State's tattered circumstantial web.[15]

[15] The wholly circumstantial nature of the case against House at trial bears emphasis. Tennessee courts have long applied the 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*, 928 S.W.2d 949, 955 (Tenn.Crim.App. 1996). At trial, House was unable to rebut much of the circumstantial case against him, and he was therefore convicted. But he has now dismantled nearly every piece of circumstantial evidence the jury heard. The only pieces of the prosecution's case which remain unchallenged are that House lied to authorities about an alibi and that he has a deep voice such as the one the victim's daughter said 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.

D. The Courts Below Misapplied *Schlup* By Rejecting House's Gateway Claim Solely On The Basis Of A Finding That The Record Contained Sufficient Remaining Evidence To Support A Verdict Of Guilt

Both the Sixth Circuit majority and the district court evaluated Mr. House's evidence of innocence exactly as *Schlup* directs courts *not* to: they clung to the slivers of incriminating evidence remaining after House had upended the pillars of the prosecution's case at trial and had even presented credible evidence identifying an alternative perpetrator. *See Schlup*, 513 U.S. at 331 ("petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict"). To compound the error, the Circuit Court majority engaged in rank speculation as to how Mr. House might plausibly still be guilty. *House*, 386 F.3d at 685 ("We note that the fact that mud may not have been present at the crime scene, and may have been scarce in the surrounding area, cannot be taken as proof that there was no mud anywhere on the route between Ms. Turner's trailer and the scene of the crime."; "The lack of any blood spatter on House's shoes is inconclusive as well, because it is not clear when House took his shoes off.").

The clearest example of the Sixth Circuit majority's failure to follow *Schlup* in this regard is its blithe dismissal of the undisputed DNA evidence disproving the prosecution's semen-source theory of House's identity as the killer. The *only* motive the prosecution ascribed to House at trial that could have given him a reason to assault and kill Ms. Muncey was rape; the most powerful evidence of his guilt at trial – and the central basis for his conviction – was the prosecution's claim that the semen found on her clothing was House's semen; and now House has successfully demonstrated – beyond any doubt – that

the semen found on Ms. Muncey's clothing was that of her husband alone. Yet, the Sixth Circuit majority, in the face of this *total* elimination of *any* evidence tending to establish rape as the motive for the Muncey murder, reasoned that it remains speculatively possible that Mr. House may nevertheless have sexually assaulted and then murdered Ms. Muncey. *See House*, 386 F.3d at 685 ("[T]he fact that 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 Ms. Muncey from her home with a sexual motive.") (emphasis added). In other words, all Mr. House has done is to show that there is not and never was a scintilla of valid evidence that Ms. Muncey was sexually assaulted; and that does not affirmatively negate the conjectural possibility that she *may have been*. This possibility is, of course, entirely fantastical; it is no more plausible than that Ms. Muncey's killer was bent on robbery, revenge, or some other purpose of which no evidence can be found. *See id.* at 686 (Merritt, J., dissenting, "There is now absolutely no evidence of sexual assault. The new evidence disproves the motive the jury accepted as the basis for the kidnapping [sic] and murder. . . ."); *id.* at 690-694 (Merritt, J., dissenting and detailing the State's reliance on the semen as proof of rape as the motive for the murder throughout House's trial and direct appeal).

The DNA evidence excluding Mr. House as the source of the semen has established that his conviction was obtained on a factual theory that was utterly false: that he raped Ms. Muncey before murdering her. The Sixth Circuit majority's steadfast insistence on insulating that conviction from review by substituting factually baseless speculation for the prosecution's proven false evidence is irreconcilable with *Schlup*. *See Schlup*, 513 U.S. at 331;

and compare id. at 309, n. 19 (noting that the district court evaluating Schlup's innocence claim weighed heavily the "'suspect'" nature of affidavits produced after a long delay and concluded that the affidavits Schlup presented attesting to his innocence as compared to the positive identifications of Schlup by two prison guards "failed to constitute a sufficiently persuasive showing of actual innocence") *with House*, 386 F.3d at 684-685 (concluding that House's inconsistent statements about his whereabouts the night of the murder and about the source of his injuries coupled with Laura Muncey's testimony that someone with a deep voice summoned her mother and with Sutton's testimony that the mud and blood were mixed on the jeans outweighed the evidence of Hube Muncey's confession and attempt to concoct an alibi, the lack of blood on House's shoes, the proof that the semen was Muncey's, and the testimony of, among others, the Assistant Chief Medical Examiner of the State of Tennessee, pointing to the blood's spilling on the jeans *en route* to the lab).

No gatekeeper faithful to *Schlup* can fairly review all the new evidence House has presented and conclude that it is insufficient to undermine confidence in the outcome of his trial for the purpose of establishing *Schlup*'s threshold showing of innocence warranting passage through the gateway to his underlying constitutional claims. *See Schlup*, 513 U.S. at 316-17("[I]f the habeas court were . . . convinced that [the] new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.").

The Sixth Circuit majority's treatment of House's new evidence of innocence is significantly out of line with a number of other courts that have granted passage through

the *Schlup* gateway after considering similar evidence discrediting the incriminating evidence which formed the basis for the petitioner's conviction, even where such evidence failed to negate every piece of incriminating evidence.[16] These cases demonstrate that in order for

[16] *See Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) (concluding that because the only physical evidence upon which Souter's conviction rested – the alleged fact that he had assaulted the victim with a liquor bottle found at the crime scene – had been discredited, and the remainder of the case against him was entirely circumstantial, he had succeeded in meeting the *Schlup* standard); *id.* at 596 ("The circumstantial facts, when taken together, are insufficient to establish Souter's guilt. The only direct evidence linking Souter to [the victim's] death is the bottle. In light of the new evidence . . . we find that it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict."); *Lucas v. Johnson*, 132 F.3d 169 (5th Cir. 1998) (granting passage through *Schlup* where the petitioner had confessed, and the confession was the centerpiece of the prosecution's case; on habeas, petitioner presented, *inter alia*: an audit from his employer indicating that he was at work at the time of the crime; a confession expert's testimony that the petitioner was prone to false confessions; and a report from the Texas Attorney General indicating that the petitioner was out of state when the crime took place); *Paradis v. Arave*, 130 F.3d 385, 396 (9th Cir. 1997) (granting passage through the *Schlup* gateway and 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 Paradis guilty beyond reasonable doubt of having killed [the victim] in Idaho"); *Carriger v. Stewart*, 132 F.3d 46 (9th Cir. 1997) (vacating district court opinion and remanding with instructions to grant writ after granting passage through *Schlup* and finding that the petitioner's underlying constitutional claims had merit; petitioner's conviction was based on a prison informer's testimony that the petitioner had confessed to the informer and on physical evidence to which the informer led police; on habeas, petitioner presented evidence that the informer himself had confessed several times to the capital murder for which petitioner had

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been convicted; the informer also confessed under oath in open court during habeas proceedings (but later recanted); the informer's confessions accurately described details of the crime that only the perpetrator would have known; the informer's corrections record showed that his m.o. was to commit violent crimes and then shift the blame to others).

District Courts are in accord with this approach. *See Watkins v. Miller*, 92 F. Supp. 2d 824 (S.D. Ind. 2000) (granting passage through *Schlup* where the petitioner presented DNA test results showing that he was not the source of the semen on the victim, which disproved the only theory the state presented at trial: that the petitioner alone raped and murdered the victim; discounting the state's postconviction arguments that it was possible that the petitioner and another person raped the victim, or that the petitioner murdered but did not rape the victim, where "the trial record contains not a hint of a suggestion that two different people were responsible for [the] rape and murder"); *Garcia v. Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004) (granting passage through *Schlup* where single eyewitness presented the only evidence against petitioner; and the petitioner's postconviction evidence included: proof that petitioner had been incarcerated in the Dominican Republic until a few hours before the murder took place in the Bronx; affidavits from alibi witnesses; evidence that the eyewitness had been taking several prescription drugs at the time of the murder, lineup, and trial; the court found probative that the jury heard none of the evidence establishing that the petitioner had been in the D.R. on the day of the murder even though it was theoretically possible that he could have made it to New York in time to commit the crime, "The fact that the petitioner was in jail in another country hours before the murder, especially when considered with all of the other alibi evidence, argues strongly against his participation in the murder, even without knowing whether he could have made the plane to New York."); *Reasonover v. Washington*, 60 F. Supp. 2d 937 (E.D. Mo. 1999) (granting passage through *Schlup* where the petitioner presented: tapes, made without their knowledge, of conversations between her and her alleged accomplice indicating that they were not involved in the crime; and tapes between petitioner and one of the cellmates to whom she allegedly confessed indicating that the cellmate lied about the confession; the court reasoned that the cellmate's testimony was the "linchpin" of the state's case, and therefore its being discredited significantly undermined the remaining evidence of guilt, which was either predicated on that alleged confession or was much weaker than the confession); *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997) (allowing passage through *Schlup* where no physical evidence linked the petitioner to the rape and the only evidence against him was the victim's tentative photo

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courts to afford petitioners a meaningful avenue by which they may overcome a procedural bar, as this Court mandated in *Schlup*, 513, U.S. at 327, they must weigh new evidence of innocence against the evidence the jury heard at trial. Physical evidence which disproves a circumstantial case against the defendant is the gold standard for establishing *Schlup* claims. *See Souter*, 395 F.3d 596-597; *Paradis*, 130 F.3d at 396; *Watkins*, 92 F. Supp. 2d at 838.

Even in cases where some evidence of guilt remains, a plausible postconviction showing which discredits key aspects of the prosecution's case at trial warrants passage through the *Schlup* gateway. *See Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004); *Garcia v. Portuondo*, 334 F. Supp. at 455. In cases where the trial evidence is weak or where there is only one witness to the crime, impeachment of the linchpin witness is often enough. *See Carriger*, 132 F.3d at 478; *Reasonover*, 60 F. Supp. 2d at 962-963, 964; *Richter*, 973 F. Supp. at 1130; *Bragg*, 128 F. Supp. 2d at 601, 603. We have found no case other than the Sixth Circuit's decision in *House* in which a court has been presented with both physical evidence disproving the case for guilt at trial *and* credible testimony pointing to an alternate suspect, yet has held that the petitioner has failed to meet the *Schlup* standard. To allow this aberrational precedent to stand would betray *Schlup*'s promise of a meaningful avenue for review for the handful of habeas

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identification of him; postconviction evidence included: alibi, forensic showing that the victim's wounds were self-inflicted; psychiatric, showing that the victim had a mental disorder which would render her incapable of distinguishing reality; and evidence that the victim made a false report of rape involving similar events a year after the incident for which petitioner was convicted); *Bragg v. Norris*, 128 F. Supp. 2d 587 (E.D. Ark. 2000) (holding that where petitioner presented ample evidence discrediting the trial testimony of the undercover agent which was the linchpin of the prosecution's case, the petitioner was allowed to pass through the *Schlup* gateway).

petitioners presenting credible claims of actual innocence and procedurally defaulted constitutional claims.

II. HOUSE HAS PRESENTED SUFFICIENT EVIDENCE OF INNOCENCE TO ESTABLISH A FREE-STANDING CLAIM WARRANTING HABEAS RELIEF

Six judges of the *en banc* Court of Appeals concluded that House has presented the quality and quantity of evidence required to establish a free-standing claim of actual innocence under *Herrera*. *House*, 386 F.3d at 708. Although this Court assumed without deciding in *Herrera* that such a free-standing claim of actual innocence would be cognizable under the appropriate circumstances, the lower federal courts are split as to whether such a free-standing claim of actual innocence could by itself establish a constitutional violation warranting habeas relief. *See Herrera*, 506 U.S. at 417 (referring to the "assumed right" of a capital habeas petitioner who has made a "truly persuasive demonstration of 'actual innocence' to be spared from execution); *id.* at 419.[17]

[17] *See*, *e.g.*, *Boyde v. Brown*, 404 F.3d 1159 (9th Cir. 2005) (recognizing the possibility of a free-standing claim of actual innocence); *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997); *Noel v. Norris*, 322 F.3d 500 (8th Cir. 2003); *Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003); *Clayton v. Gibson*, 199 F.3d 1162 (10th Cir. 1999); *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1995) (assuming *arguendo* the possibility of a free-standing actual innocence claim based on a truly persuasive showing of innocence); *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993); *Hazel v. United States*, 303 F. Supp. 2d 753 (E.D. Va. 2004); *cf. Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994) (recognizing the possibility of a free-standing innocence claim under *Herrera* but only in capital cases). *See also Conley v. United States*, 323 F.3d 7 (1st Cir. 2003) (noting in *dicta* that *Herrera* left open the question whether a free-standing claim of actual innocence is cognizable in federal habeas); *Lucas v. Johnson*, 132 F.3d at 1075 (same); *Cherrix v. Braxton*, 131 F. Supp. 2d 756 (E.D. Va. 2001); *Hartman v. Bagley*, 333 F. Supp. 2d 632

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Given the overwhelming evidence developed during federal habeas that the prosecution's trial case is improbable and resulted in the conviction of the wrong man, Mr. House urges this Court to recognize what six judges of the Court of Appeals did: that *Herrera* did establish the possibility of a free-standing claim of actual innocence when a habeas petitioner meets the requisite "extraordinarily high" threshold; and that Paul House has met that threshold and deserves immediate relief.[18]

A. Justice White's Concurrence In *Herrera* Sets Forth The Appropriate Standard For Free-Standing Habeas Claims Of Actual Innocence

Although the *Herrera* majority assumed that a prisoner who meets the "extraordinarily high" threshold of a free-standing claim for actual innocence would be entitled to federal habeas relief, the majority opinion stopped short of establishing what that showing would require. However, Justice White's brief concurrence sets forth a standard which strikes the appropriate balance of affording relief to prisoners who have made a truly persuasive showing of free-standing actual innocence while protecting the State's interest in the finality of convictions and screening out frivolous claims. Justice White's standard demands a showing "based on proffered newly discovered evidence and the entire record before the jury that convicted him, [that] 'no rational trier of fact could find proof of guilt

(N.D. Ohio 2004); *Lyon v. Senkowski*, 109 F. Supp. 2d 125 (W.D.N.Y. 2000). *See also LaFevers v. Gibson*, 238 F.3d 1263 (8th Cir. 2001) (citing *Herrera* and concluding that it established that no free-standing claim of actual innocence is cognizable in federal habeas); *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004) (same).

[18] House pled a *Herrera* claim in his federal habeas petition. D.Ct. Docket 73 at 28-29.

beyond a reasonable doubt.'" *Herrera*, 506 U.S. at 429 (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)); *see also id.* at 426 (O'Connor, J., concurring and discussing the State's interest in finality and courts' interest in limiting frivolous actual innocence claims).

Justice White's proposed standard differs from the lower standard set forth in *Schlup* in several respects: First, by substituting the "rational" juror for the "reasonable" juror and by requiring a showing that no juror *could* vote to convict, not just that they would not. *Cf. Schlup*, 513 U.S. at 327, 330 ("Under *Jackson*, the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion. Under [*Murray v.*] *Carrier* [, 477 U.S. 478 (1986) no reasonable juror would vote to convict], the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact."); *see House*, 386 F.3d at 689. Second, in a *Jackson*/*Herrera* inquiry, credibility determinations are outside the scope of review. *Schlup*, 513 U.S. at 330 (noting that credibility assessments are generally "beyond the scope of review," whereas under the gateway/*Carrier* standard, "the newly presented evidence may indeed call into question the credibility of witnesses presented at trial . . . [and] the habeas court may have to make some credibility assessments"). Finally, under *Jackson,* and likewise under Justice White's proposed standard in *Herrera*, "the mere existence of sufficient evidence to convict would be determinative of petitioner's claim[.]" *Schlup*, 513 U.S. at 330.

In short, the standard proposed by Justice White and the Sixth Circuit dissent in this case for evaluating free-standing claims of actual innocence, would require the habeas court to determine simply whether as a matter of law, regardless of credibility determinations and in light of the newly presented evidence, any rational trier of fact could vote to convict. Mr. House urges the Court to adopt

this standard. He also urges the Court to hold that even when his case is held to this heightened scrutiny, Paul House deserves relief.

B. House Has Established His Innocence Even Under The "No Rational Juror" Standard

As discussed in detail above, by any fair reading House has succeeded in razing the pillars of the prosecution's case against him. He has also gone further and provided credible evidence pointing to Hubert Muncey's guilt of the crime. In other words, he has not only undermined the case for his conviction; he has presented a persuasive affirmative case of innocence. He has done so by adducing biological evidence as well as witness accounts that without question would have been probative in the rational juror's evaluation of this purely circumstantial case. *See* note 14, *supra* (citing Tennessee cases establishing the standard for conviction in a circumstantial case); *Herrera*, 506 U.S. at 418 (recognizing that even "suspect" affidavits proffering hearsay presented over a decade after trial would be of probative value for the jury).

Without unassailed physical evidence, without a motive, without eyewitnesses, without a confession, and without convincing circumstantial evidence linking him to the crime,[19] no rational juror would have any basis for

[19] Without the blood and semen, the only circumstantial evidence remaining against House are: the fact that he has a low voice and the victim's daughter heard someone with a low voice summon her mother; the questionable circumstances under which House encountered Billy Ray Hensley on the road near the Munceys' driveway in the vicinity where the body was discovered; the fact that House lied about his whereabouts the night of the murder and the sources of the injuries he displayed when questioned by police. Surely these thin reeds cannot be

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convicting House beyond a reasonable doubt. Add to that the rational juror's consideration of testimony from several lifelong friends of the victim's husband that he had a history of abusing her, admitted to killing her during one of his assaults, lied about his whereabouts the night of her death, and attempted to fabricate an alibi, and there is no escaping reasonable doubt. *See House*, 386 F.3d at 708 ("[T]here is no evidence of a motive for House. All of the state's physical evidence, both blood and semen, allegedly tying House to the murder, has been effectively rebutted. The new . . . evidence as a whole so completely undermines the case against House and establishes a persuasive case against Muncey that, had it been presented at trial, no rational juror could have found evidence sufficient for conviction.").[20]

Put simply, viewing the trial and habeas evidence as a whole, there remains no legal or factual basis upon which to hang Paul House's conviction, and there is plenty of basis for reversing it. A petitioner who has demonstrated as much warrants immediate relief.

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characterized as establishing guilt beyond a reasonable doubt, especially when weighed against the new evidence of innocence.

[20] *See also Carriger*, 132 F.3d at 477 (suggesting that the petitioner might have established a claim under *Herrera* if he would have shown that "new and reliable physical evidence, such as DNA, . . . would preclude any possibility of . . . guilt" and recognizing that another inmate's confession to the crime exonerating the petitioner "does constitute some evidence tending affirmatively to show [his innocence]"); *Turner v. Calderone*, 281 F.3d 851, 873 (9th Cir. 2002) (stating in *dicta* that a claim under *Herrera* could be established if the petition presents "affirmative proof of actual innocence based on newly discovered evidence"); *Cherrix v. Braxton*, 131 F. Supp. 2d at 766 (recognizing that DNA testing "substantially more advanced" than that used at trial may suffice to exonerate the petitioner and warrant relief under *Herrera*).

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

Stephen Michael Kissinger
Counsel of Record
Federal Defender Services
of Eastern Tennessee, Inc.
530 South Gay Street, Suite 900
Knoxville, TN 37922
(865) 637-7979

GEORGE H. KENDALL
HOLLAND & KNIGHT, LLP
195 Broadway, 25th Floor
New York, NY 10007
(212) 513-3200

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
NORMAN J. CHACHKIN
MIRIAM S. GOHARA
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200

Counsel for Petitioner