

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**

—◆—
REPLY BRIEF OF PETITIONER

—◆—
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REPLY BRIEF OF PETITIONER

The State urges the Court to reject Mr. House's compelling demonstration of innocence on two grounds. First, it advances a legal argument which it waived in the district court, made untimely in the court of appeals, and withheld from its brief in opposition in this Court, and which is substantively specious. Second, it presents a view of the record and the district court's findings which is factually incomplete and inaccurate. When the facts are properly understood, they leave no doubt that Mr. House has made a showing of innocence more than sufficient to pass through the *Schlup v. Delo*, 513 U.S. 298 (1995), gateway. Such a showing, indeed, calls for relief under the still more demanding standard of *Herrera v. Collins*, 506 U.S. 390 (1993).

I. The State's Argument that AEDPA Amendments Supplanted *Schlup* Is Not Properly Before the Court and Lacks Merit.

The State belatedly seeks to interject into this case an argument that AEDPA amendments to the successor-petition and evidentiary-hearing provisions of the habeas statute implicitly alter the rule of *Schlup v. Delo* under which the case was litigated and decided below. This argument comes too late and is wholly lacking in substantive merit.

A. This argument is not properly before the Court.

In the district court, the State made no argument that any AEDPA amendments altered the *Schlup* standard; instead, it took the position that *Schlup*, as written by this Court, provided the governing standard for determining when a defaulted claim could receive merits review.¹ Both

¹ For example, in its Answer to the Amended Petition, the State said: "[i]n an extraordinary case where a constitutional violation has
(Continued on following page)

parties and the district court analyzed House's evidence of innocence under the *Schlup* test. See JA 347.

In the court of appeals, the State made no mention of its present AEDPA argument until the eleventh hour. The appeal was first briefed before a panel, then briefed twice before the *en banc* court. Throughout the panel briefing and the first *en banc* briefing, the State consistently asserted that this Court's *Schlup* decision provided the applicable rule of decision.² Only in a supplemental brief during the second *en banc* review did the State advance its AEDPA argument.³ Seeing that this came so late, none of the fifteen judges of the court of appeals acknowledged it. Like the district court, both the majority and the dissenters assessed House's claim under the governing rule of *Schlup*. See JA at 410-11; 432-33; 480.

In this Court, in its brief opposing certiorari, the State argued that the Sixth Circuit's analysis comported with *Schlup*, that the court of appeals had correctly deferred to the district court's findings made as "a putative 'reasonable juror' for purposes of *Schlup*," and that there was no circuit split justifying certiorari. BIO at 13, 19. Nowhere did the Warden suggest that the rule of *Schlup* had been changed by AEDPA or that the standard for showing innocence had been elevated by AEDPA to "clear and convincing evidence." Under Supreme Court Rule 15.2, "a respondent has a duty to 'address any perceived misstatement of fact or law in the petition that bears on what

resulted in the [conviction] of one who is actually innocent, a federal habeas court may grant the writ even absent a showing of cause for the procedural default. The Supreme Court has stated that to establish the requisite probability, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence that he has presented." Answer 66-67, citing *Schlup v. Delo*, 115 S.Ct. at 867. In discussing the fundamental miscarriage of justice exception in its Post-Evidentiary Hearing Brief/Closing Argument, the State again confirmed that *Schlup* set forth the governing standard. See page 2 of that document.

² See Warden's Proof Brief at 17-18, 26; Final Brief at 16-17, 29-30.

³ See Warden's Supplemental Brief at 12-18.

issues properly would be before the Court if certiorari were granted.” *Johnson v. California*, 541 U.S. 428, 431-32 (2004). Arguments made for the first time in merits briefing before this Court, seeking to alter the issues decided below and upon which *certiorari* was granted, need not be considered here. *E.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004); *Roberts v. Galen of Virginia*, 525 U.S. 249, 253-54 (1999); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 170-71 (1999); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, n.9 (1992). And where, as is now the case, a respondent seeks to spring upon the Court belatedly an argument whose “complex nature . . . and . . . broad implications suggest that its consideration by the lower courts would help in its resolution,” the Court has customarily “exercise[d its] . . . Rule 15.2 discretion and deem[ed] the argument waived.” *Baldwin v. Reese*, 541 U.S. 27, 34 (2004); *Alabama v. Shelton*, 535 U.S. 654, 660 n.3 (2002).

B. AEDPA did not change the rule of *Schlup* in first petition cases.

In any event, the State’s argument that AEDPA amendments modified the rule of *Schlup* and now require a first federal habeas petitioner to demonstrate innocence by “clear and convincing” evidence in order to excuse a procedural default is baseless. The State itself concedes, as it must, that “the federal habeas statute does not specifically address procedural default of claims. . . .” Resp. Br. at 22. But the State asks the Court to infer an implicit Congressional intent to abrogate *Schlup* by extrapolating from two 1996 amendments concerning, respectively, second or successive petitions (28 U.S.C. § 2244(b)) and the holding of evidentiary hearings (28 U.S.C. § 2254(e)(2)).⁴

⁴ AEDPA’s amended § 2244(b) requires (with one exception) that a petitioner who is seeking to raise a previously-unraised claim in a second or successive federal habeas petition show that the facts underlying the claim would establish his or her innocence by clear and convincing evidence. By its terms, this provision applies only to a “claim
(Continued on following page)

AEDPA made extensive, elaborate, highly detailed amendments to federal habeas corpus practice, abrogating some previously established rules, refining others, and leaving still others intact. Congress obviously knew what it wanted to change and what it did not. It did not undertake to change the *Schlup* standard for adjudicating assertions of actual innocence as miscarriages of justice that will excuse the procedural default of a claim “when dismissal of a *first* habeas petition is at issue.” *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). And a statute that selectively modifies some things but not others presents an overwhelming case for indulging “the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so.” *Jones v. United States*, 526 U.S. 227, 234 (1999).

II. The State’s *Schlup* Submission Distorts the Record, Which Shows that the Prosecution’s Circumstantial Case Was Based on False and Wholly Unreliable Evidence.

Schlup holds that when a habeas petitioner adduces new evidence of innocence to justify review of a defaulted claim, the new evidence must be examined in the context of all the evidence in the record. 513 U.S. at 327-28. The State’s submission flouts this rule. It urges the Court to look only at the evidence that supports the State’s case, not all the evidence. And in doing so, again and again it

presented in a second or successive habeas corpus application,” not to first habeas corpus applications, like Mr. House’s. Likewise, AEDPA’s amended § 2254(e)(2) forbids federal evidentiary hearings when a habeas petitioner has failed to develop facts in state court, unless he or she shows that these facts establish innocence by clear and convincing evidence. By its terms this provision deals only with the circumstances under which a federal district court may “hold an evidentiary hearing,” not with the circumstances under which the procedural-default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), will be excused – the question presented in Mr. House’s case.

omits important facts and mischaracterizes the district court's factual findings.

The State's aversion to discussing the full record is understandable. For what that record shows is that the State's case against Mr. House at trial consisted of several items of circumstantial evidence only tenuously suggesting guilt, held together and powerfully bolstered by seemingly unassailable scientific evidence: semen consistent with House's found on Ms. Muncey's clothing; Ms. Muncey's blood found on Mr. House's blue jeans. This powerful scientific evidence served both to identify Mr. House as Ms. Muncey's killer and to supply the sole theory offered by the prosecution to explain why Mr. House might have wanted to kill her. But all of this scientific evidence has now been proved worthless, with the State (1) conceding that the semen on Ms. Muncey's clothing was her husband, Hubert Muncey, Jr.'s, and (2) unable to account for one full test tube of blood from Ms. Muncey's autopsy which, according to Dr. Cleland Blake, the Assistant Chief Medical Examiner for the State of Tennessee, most likely got onto Mr. House's blue jeans while the jeans and the autopsy blood were bundled together in police custody.

Thus, the whole record reveals much more than a prosecution case no longer capable of convincing reasonable jurors of Mr. House's guilt. It reveals that the scientific-seeming evidence so crucial to the prosecution's theory of guilt at trial was affirmatively misleading. And the record also contains post-trial evidence specifically identifying the person who probably did kill Carolyn Muncey by beating her savagely on the night of July 13, 1985. That person was not Mr. House, who, the evidence shows, was two miles away and without transportation at the time of the killing. It was Hubert Muncey, Jr., who had previously beaten his wife (so that no fewer than four witnesses recalled seeing her prior injuries), who was seen striking his wife near a dance just shortly before her death, who tried to arrange an alibi for the time of her death, who lied about not seeing his wife after he left home early that morning, who lied to law enforcement and to the district court about his history of spousal abuse, and

who later tearfully confessed to friends that he had done the killing.

Unlike the State, Mr. House invites this Court's examination of all the evidence of record. He acknowledges that some of the individual circumstances that the prosecution presented to convict him *could* still be viewed as indicative of guilt. The full record, however, reveals that many of those circumstances provided only equivocal support for the prosecution's case, and that – in order to tie them together and to tie Mr. House to the crime – the prosecution necessarily placed heavy reliance on supposedly unimpeachable scientific evidence that has now been shown to be anything but unimpeachable.

A. On the whole record, the prosecution's circumstantial case without its scientific evidence is equivocal at best, in part exculpatory, and entirely inadequate to convince a reasonable juror of Mr. House's guilt beyond a reasonable doubt.

Wherever the State points to evidence supporting its theory of Mr. House's guilt, the whole record contains countervailing, reliable evidence of Mr. House's innocence. Yes, the record reveals that on the night Carolyn Muncey disappeared from her home, Mr. House was absent from his girlfriend's trailer for an hour and returned bearing signs of a struggle. JA 134-35. But it also reveals that the trailer was two miles from the Muncey home, JA 82, and that Mr. House did not leave the trailer until the time that Ms. Muncey was leaving her home. R4, Vol. VIII, p. 1106. Yes, the record reveals that Mr. House has a low voice and that Ms. Muncey was beckoned from her home by a man with a low voice who honked a car horn. JA 18, 21-22. But it also reveals that Mr. House had no access to a car at the time. JA 87-88, 95-98. The prosecution witness who testified to hearing the man's low voice was Ms. Muncey's ten-year-old daughter, Laura. But Laura also testified that she did not hear any sounds of a struggle at the time when Mr. House was supposedly beating her mother to death

while attempting to rape her. JA 18-27. And some time after Laura woke briefly and heard the man with the low voice, there is evidence placing Carolyn Muncey in the parking lot of the C&C Recreation Center, where she argued with her husband, Hubert Muncey Jr., and the argument ended with his striking her. JA 225-30.

Yes, the record contains testimony by FBI Agent Chester Blythe that on every item of Ms. Muncey's clothing he located blue jeans fibers "consistent in every way that you could examine them" with fibers taken from the blue jeans Mr. House was wearing on the night of the murder. Resp. Br. at 37 n.29. But it also contains Agent Blythe's concessions that (1) the fibers were so common that they could as easily have come from the jeans then being worn by many of the jurors listening to his testimony, R4, Vol. VI, pp. 868-69; and (2) Ms. Muncey's housecoat, bra, and panties were all made of cotton, R4, Exhibit 32; and (3) cotton clothing readily transfers fibers and retains transferred fibers, R4, Vol. VI, p. 867; but (4) no fibers from Ms. Muncey's clothing were found on Mr. House's blue jeans. *Id.*

Yes, the record contains lay testimony by Mr. House's girlfriend, Donna Turner, that she observed injuries to Mr. House's body after he returned to the Turner trailer on the night Carolyn Muncey was murdered. R4, Vol. VI, pp. 1129-30. But it also contains the expert medical testimony of Assistant Chief Medical Examiner of the State of Tennessee, Dr. Cleland Blake, concluding – on the basis of decades of experience and training – that (1) those injuries were too old to have come from a struggle the same night, and (2) they were inconsistent with striking another person. JA 241-43.

Yes, the record contains testimony by Billy Ray Hensley that he saw Mr. House in the vicinity of Ms. Muncey's body on the afternoon following her murder. From the State's argument, one would suppose that the evidence relating to Mr. Hensley's observations of Mr.

House that afternoon consists of Mr. Hensley's testimony that he saw House wiping his hands on a black⁵ rag and that, when Hensley soon thereafter returned with a friend, Hensley led the friend to a location from which the friend was able to see Ms. Muncey's body. JA 133. But this is not what the record shows. It shows that (1) when Hensley returned with his friend to the place where he had seen Mr. House, Ms. Muncey's body was not visible from that location or nearby, R4, Vol. V, p. 727; (2) Hensley admitted on cross examination that his original claim that he had seen Mr. House coming up the embankment above Ms. Muncey's body was false; his testimony ultimately was that he saw House only near the roadway, *id.* at 745; and aerial photographs introduced in federal court demonstrated Hensley's view was blocked by a barn, R279, Exhibit 6; (3) Hensley testified that House had affirmatively attracted Hensley's attention by waving him down and telling him that House was looking for Mr. Muncey to help him search for his wife, R4, Vol. V, pp. 690-91; (4) this is consistent with a statement made by Mr. House to the police describing his presence on the roadway that afternoon and his reason for being there, R4, Vol. VII, pp. 966-67; and (5) it is also consistent with testimony by Billy Hankins that he saw a man fitting House's description walking toward the Muncey home along the roadway that day, R4, Vol. VIII, pp. 1176-78, and with testimony by Donna Turner that she saw Mr. House and Mr. Muncey together later in the day. R4, Vol. VIII, p. 1115.

And, yes, the record does show that Mr. House lied to the police about his one-hour absence from Donna Turner's trailer and about the clothes he was wearing on the night of Ms. Muncey's murder. It does show that he gave varying

⁵ The State and the courts below repeatedly describe Hensley's testimony as saying that the rag was "dark." Resp. Br. at 38, n.31; JA 133. This description would perhaps support the prosecution's contention that the rag was actually House's yellow-trimmed navy blue tank top. JA 91. But Hensley's testimony was quite specific that the rag was "black." JA 32-33.

accounts of the origins of his injuries. But it also shows, as House has already pointed out, that the truth about these events is exculpatory: the bruises were unrelated to the crime, regardless of their origin, and Mr. House's absence from Donna Turner's trailer was inconsistent with House's being the low-voiced person who called Ms. Muncey from her home.

Because the most incriminating pieces of the evidence just discussed were featured prominently in the decisions of the Sixth Circuit majority and of the district court below, we have thought it necessary here to put them into context for this Court's review. Whatever can be said about them or inferred from them in support of the prosecution's case against Mr. House, we think it self-evident that no reasonable juror would conceivably have voted to convict Mr. House of murder on the basis of this evidence alone. That is why the prosecution went to great pains at trial to construct a case for guilt that centered upon apparently incontrovertible forensic-scientific evidence – a case in which semen and blood and their analyses were the critical ingredients, not only of the prosecution's proof of Mr. House's identity as a murderer, but also of the sexual motivation that provided the prosecution's sole theory of why he murdered Ms. Muncey and how the whole sequence of events leading to her death that night unfolded.

B. On the whole record, the prosecution's critical scientific evidence has now been shown to have little or no incriminating force.

The State's disregard of the full record is most glaring when it comes to facts that demonstrate the unreliability or outright falsity of the scientific evidence which the prosecution presented at trial. Here is what the record shows on that score:

1. DNA evidence refutes the prosecution's theory of the case.

At trial, the prosecution elicited expert testimony that semen stains were found on Ms. Muncey's underwear and robe and were consistent with Mr. House's blood type and secretor status. The prosecutors asked the jury to infer from this damning evidence that House attempted to rape Ms. Muncey, she resisted, and he killed her. This was the only reason ever suggested why Mr. House might have assaulted Ms. Muncey. It was made to look persuasive because defense counsel presented no expert rebuttal and could do no more than suggest that that the stains may have been from Hubert Muncey's semen.

DNA testing has now conclusively excluded House and identified Muncey as the source of the semen. Forced to admit this, the State attempts to write a revisionist history of the trial in which the prosecution's entire theory of the case is jettisoned *ex post* and this Court is hoodwinked with statements like "[t]he State never contended at trial that House raped the victim or even that the semen found on Mrs. Muncey's nightgown could only have come from the petitioner." Resp. Br. at 29. While such assertions are carefully crafted to avoid literal inaccuracy, their false implications are manifest as soon as one asks *what else was the prosecution's elaborate expert testimony about the semen stains on Ms. Muncey's garments⁶ intended to prove, if not that Mr. House attempted to rape her, that the attempted rape was his motive for an otherwise inexplicable assault on Ms. Muncey, and that the attempt left her clothing marked with semen that was consistent with Mr. House's emissions?* What else than this line of proof was the prosecution seeking to bolster when it took the steps it did to deny Mr. House's defense counsel access to available means of disputing that the semen stains on Ms.

⁶ See, e.g., the testimony of FBI expert Paul Bigbee, set out in the dissenting opinion of Judge Merritt below. JA 441-43.

Muncey's clothing were left there by Paul Gregory House?⁷ To what else than this line of proof was the prosecution referring when it argued in closing to the jury that Mr. House's evident motive for the killing was "that he was subjecting the lady to some kind of indignity . . . and . . . kill[ed] her because of her resistance"?⁸ And by what other logic was the prosecution proceeding when it sought a death sentence for Mr. House on the theory that he killed Ms. Muncey in an attempt to rape her⁹ and when it argued to the jury that Mr. House was a previously convicted sex offender who had shown by this rape attempt that he was incapable of rehabilitation?¹⁰ In stark contrast to the State's present cavalier dismissal of the importance of the semen evidence, the trial prosecutors knew very well that their case for guilt and death depended crucially on linking the semen evidence to Mr. House – a link we now know was falsely forged.

⁷ Mr. House's prosecutors knew that Hubert Muncey, Jr., had told investigators that he and his wife had had sexual relations on the last morning of her life. If Muncey was truthful, these relations could refute the notion that the semen stains on Ms. Muncey's clothing were evidence of an attempted rape by her murderer. So the prosecutors took two steps to make sure the jury never heard about this innocent explanation of the stains. First, they did not disclose Hubert Muncey's statement to defense counsel. JA 264-66. Second, they did not send the FBI lab information that would have allowed a determination of Hubert Muncey's secretor status. R4, Vol. VI, p. 928. These tactics left the defense without proof to support its argument that the best explanation for the semen stains was recent relations between Ms. Muncey and her husband.

⁸ R4, Vol. IX, pp. 1302, 1305.

⁹ One of the three statutory aggravating circumstances that State asked the jury to find at the penalty phase was that the murder was committed while the defendant was committing or attempting to commit rape or kidnapping. JA 109.

¹⁰ See the passages of the prosecution penalty-phase argument set out in the dissenting opinion of Judge Merritt below. JA 443-44.

2. The whole record now leaves the prosecution's bloodstain evidence subject to inescapable doubts.

FBI testing of jeans that House wore on the night of the crime showed several very small bloodstains consistent with Ms. Muncey's blood, a finding confirmed as to one of these stains by DNA testing. The State continues to urge that these findings establish House's identity as Ms. Muncey's killer despite post-trial evidence that the stains most likely came to be on the jeans through transfer from a test tube containing Ms. Muncey's autopsy blood. To disparage the post-trial evidence, the State necessarily regales this Court with an attack upon the credibility of its own Assistant Chief Medical Examiner, Dr. Cleland Blake, which no prosecutor would risk presenting to a Tennessee jury.

Dr. Blake's post-trial testimony was unequivocal that the bloodstains on Mr. House's jeans had been caused by degraded, "rotted," liquid blood of the kind which was missing from one of the test tubes of autopsy blood that had been packaged with the jeans for transmission to the FBI lab for testing. *See* Pet. Br. at 16-21; *see also* the more detailed discussion in the dissenting opinion of Judge Merritt below. JA 446-55. In response, the State asserts that Dr. Blake's "opinion was based entirely upon an erroneous interpretation of an abbreviation contained in the report [of FBI Agent Bigbee, who had done the prosecution's blood testing]." Resp. Br. at 32 n.22. This claim is based in turn upon Agent Bigbee's comment that Bigbee did not have "the foggiest idea" how Dr. Blake came up with the notion that the initials "INC" in Bigbee's reports stood for "incomplete." The State fails to inform this Court that (1) Bigbee himself testified at Mr. House's trial that the initials "INC" stood for an "incomplete" result, and thereafter used the term "incomplete" as interchangeable with the term "inconclusive," R4, Vol. VI, p. 906; and (2) when Dr. Blake was asked about his use of the term "incomplete," Dr. Blake stated that he meant the same thing. R275, Vol. II, p. 119. The State also points to Agent Bigbee's testimony that he disagreed with Dr. Blake's

expert opinion, but ignores (1) Agent Bigbee's concession that Dr. Blake's conclusion was a reasonable explanation for the similarities in the degradation of the two blood specimens, R276, Vol. III, p. 170, and (2) the fact that Dr. Blake and Agent Bigbee were in total agreement regarding the basic scientific principles regarding blood degradation upon which Dr. Blake relied.

Unable to discredit Dr. Blake's opinion with scientific evidence, the State turns to blood-spatter expert Paulette Sutton and argues that the transfer bloodstains on the jeans are inconsistent with direct spillage and consistent with a bloody object being wiped across Mr. House's jeans while they were being worn. Here the State neglects to mention (1) that Ms. Sutton conceded she could not determine the nature of the bloody object or who wiped the object, R276, Vol. III, p. 217, and (2) that the basis for Ms. Sutton's conclusion that the mixture of blood and mud on Mr. House's jeans is inconsistent with a transfer occurring in the evidence container was *Ms. Sutton's opinion that the transfer would have occurred when the mud was wet*. The latter omission is particularly misleading because the record shows that Mr. House's blue jeans had moist mud on them when they were seized by law enforcement, JA 274, and that there was no mud at the crime scene. JA 304, 308, 310. The Warden also fails to mention that although Ms. Sutton found bloodstains on the inside of the cuff area of Mr. House's blue jeans, she was unable to detect any blood on the tennis shoes he was wearing the night of the crime – shoes that did not come into the possession of law enforcement until *after* the autopsy samples and blue jeans had been transported to the FBI. JA 291-92, 296, 305.

The State next tells this Court that a reasonable juror would reject Dr. Blake's expert finding of autopsy-blood spillage because TBI Agent Charles Scott testified that when Scott initially seized Mr. House's jeans he saw stains which he thought "might" have been blood on them. In this submission, the State disregards the ample evidence that the stains on Mr. House's blue jeans that actually were Ms. Muncey's blood were very small and barely discernable, if discernible at all, to the naked eye. Finally, the

State simply ignores the fact that Dr. Blake's opinion regarding the source of the bloodstains is the only opinion which explains *the incontrovertible fact that the entire contents of one of the tubes of autopsy blood remains completely unaccounted for*. That the State can make an argument so full of misleading half-truths suggests how very unlikely it is that any reasonable juror hearing what remains of the prosecution's case at trial could fail to have a reasonable doubt of Mr. House's guilt.

3. The State gains no fair support from the district court's findings of fact.

The State asserts that Mr. House's showing of "reliable, credible evidence of innocence" is defeated by "valid credibility determinations entrusted to the district court as trier of fact at the federal evidentiary hearing." Resp. Br. at 16. But the district court's actual "credibility determinations" are few and immaterial;¹¹ and its only factual finding of consequence to which the State can point is: "the court concludes that the spillage [of blood from the test tubes packaged with Mr. House's jeans] occurred after the FBI crime laboratory received and tested the evidence." (JA 348; *see* Resp. Br. 33, 39.) This finding has two palpable flaws. Legally, it does not speak to the relevant *Schlup* gateway inquiry whether a reasonable juror, hearing that the State's crucial bloodstain evidence had been produced

¹¹ The district court divided its memorandum opinion into distinct sections containing findings of fact and conclusions of law. In its findings of fact, it summarized, largely without comment, portions of the Tennessee Supreme Court's opinion and portions of the evidence presented at the evidentiary hearing. Throughout, the court made only three credibility findings. It noted that Laura Tharp, the victim's daughter, was a credible witness and that she had testified consistently with her testimony at trial. JA 323. It found from Mr. House's demeanor that he was not a credible witness. JA 329. And it found that the fact that Mr. Muncey had engaged in sexual intercourse with his wife on the morning of her death indicated at least a "modicum of compatibility." JA 325. These findings do not reinvest with any confidence the State's failed case for Mr. House's guilt.

by a process in which some of the victim's missing, degraded autopsy blood, not fresh blood, stained the suspect's jeans – *and* hearing Tennessee's Assistant Chief Medical Examiner testify that the blood on the jeans was degraded autopsy blood – would entertain a reasonable doubt of the prosecution's proof of identity. (See Judge Merritt's trenchant analysis at JA 446-55.) And, factually, this finding by the district court is clearly erroneous.

The district court stated only that the "evidence introduced during the evidentiary hearing" supported its conclusion. JA 348. Certainly, photographic evidence and blood stains on the outside of the Styrofoam box containing the autopsy samples show that a small amount of blood leaked from *one* of the autopsy sample tubes onto the surrounding packing material and the Styrofoam box after the FBI had received and tested Mr. House's blue jeans. But the photographic evidence also shows that a *second* autopsy sample tube was *completely empty* when it arrived at the laboratory of a Tennessee serologist, and that none of the blood from that sample had leaked inside of the Styrofoam container. JA 307. TBI Agent Charles Scott stated in an affidavit that he had personally carried the autopsy samples from the FBI crime laboratory to the serologist and that he neither spilled blood nor observed any spillage of blood from the autopsy samples after FBI testing. R123, Attachment 1. Agent Bigbee, the person at the FBI crime laboratory who tested the autopsy samples, stated that he used no more than one-fourth of one autopsy sample during the course of testing. R276, Vol. III, pp. 161, 164. He also testified that there was no accidental spillage of blood from the autopsy samples while they were in the possession of the lab. JA 279. While there was conflicting evidence about what happened to the missing three-fourths tube of autopsy blood, the uncontradicted evidence in the record shows that the blood *from that* tube did not "leak" or "spill" after the FBI crime laboratory had received and tested Mr. House's blue jeans. Any conclusion or "finding" by the district court that it did is clearly, palpably erroneous.

C. A proper inquiry under *Schlup* or *Herrera* requires consideration of the entirety of evidence indicating Hubert Muncey's guilt.

The State largely dismisses the substantial evidence pointing to Hubert Muncey, Jr., as the person who very probably killed Carolyn Muncey. It justifies this disregard of the evidence by asserting that the district court made one additional finding of fact, *i.e.*, that Kathy Parker and Penny Letner, the two friends of Mr. Muncey's who testified that he confessed the murder to them, were incredible. But the record shows no such finding. The district court did not find that either Ms. Letner or Ms. Parker was not a credible witness. It stated only that it was "not impressed with the allegations of individuals who wait over ten years to come forward with their evidence" especially when "there was no physical evidence in the Munceys' kitchen to corroborate his alleged confession that he killed her there." JA 348. This discussion of the women's testimony appears in the court's conclusions of law and reveals on its face that it is based upon faulty reasoning. But even if it were to be treated as a finding of fact, it is also clearly erroneous.

Ms. Parker and Ms. Letner did not "wait over ten years to come forward with their evidence." Ms. Parker testified without rebuttal or impeachment that she went to the police to report Mr. Muncey's confession the very next day after he made it, but that no one would listen to her. And the district court's suggestion that the women's testimony conflicts with Laura Tharp's statement that she saw no sign of a struggle in the kitchen when she got up to look for her mother is doubly unfounded. First, neither Ms. Letner nor Ms. Parker testified that Mr. Muncey said he killed his wife in the kitchen. Second, there is un rebutted and unimpeached evidence that Ms. Muncey was not killed until later in the evening, after Laura and her brother had returned to bed and gone back to sleep. R4, Vol. V, p. 671.

The record also flatly contradicts the district court's implication that Hubert Muncey's confession, as heard by

Ms. Letner and Ms. Parker, is uncorroborated. The record reveals: (1) the trial testimony of the medical examiner that Ms. Muncey died from a blow to the head, resulting in her very nearly immediate unconsciousness – which comports with Mr. Muncey’s admission of inflicting a blow to his wife’s head that resulted in her immediate unconsciousness, R4, Vol. VII, pp. 993, 1014; JA 232-33; (2) the trial testimony of several witnesses that Ms. Muncey’s body was found near the Muncey home partially hidden under branches and with injuries consistent with being dragged through the woods, R4, Vol. V, p. 765, Vol. VII, pp. 1013-14 – which comports with Mr. Muncey’s admission that, upon finding he had killed his wife, he hid her body to avoid going to jail, JA 233; (3) Mr. Muncey’s denial that had ever abused his wife, R276, p. 44 – despite the testimony of no less than four witnesses, including Constable Wallace, that they had either seen Ms. Muncey’s face bearing the marks of prior assaults or knew of Mr. Muncey’s reputation in the community as a spousal abuser, R4, Vol. VII, p. 1087; R274, pp. 13, 15-16, 39; (4) Mr. Muncey’s assault upon his wife earlier on the night she was killed, JA 225-30 – together with his subsequent denial of having even seen her at that time, R276, pp. 40-41; and, (5) Mr. Muncey’s claim that he did not leave the dance until it ended around one o’clock in the morning, *id.*, – despite Constable Wallace’s testimony that Mr. Muncey left the dance earlier in the evening and did not return. R276, p. 56.

Ms. Parker and Ms. Letner would be highly credible to any reasonable juror, and the district court’s only stated reasons for dismissing their testimony are neither reasonable nor prognosticative of a juror’s probable reaction to it. Both women are long-time friends of Mr. Muncey’s and neither has any connection to Mr. House or any reason to lie to help Mr. House. Their testimony is internally consistent, it is corroborated in key respects by the physical evidence, and, when viewed in the light of the entire record, it accords well with the testimony of several other witnesses (Mary Atkins, Ricky Green, Constable Wallace, and Hazel Miller) and is more consistent with the testimony of Laura Tharp Muncey than is the prosecution’s

theory of the case. Both the district court and the Sixth Circuit majority erred in failing to give appropriate weight to all of the evidence of Hubert Muncey's identity as the actual killer of his wife, which complemented Mr. House's demonstration of his own innocence. Together, the two kinds of evidence more than meet the *Schlup* gateway standard of undermining confidence in the trial verdict to such an extent that it is probable no reasonable juror would vote to convict Mr. House on the prosecution's wholly disjointed, partly exculpatory, and fundamentally equivocal remaining evidence.

III. Mr. House is Also Entitled to Relief Under *Herrera*.

The State argues that Mr. House's claim of a right to be spared execution if he has proved his innocence by newly discovered evidence is not before the Court.¹² It is.

¹² It also argues (1) that "a plain reading of *Herrera* makes it clear" that a death-sentenced inmate has no federal constitutional right to avoid execution by a mere showing of innocence (Resp. Br. at 42); (2) that if such a right exists, the standard for claiming it should be proof of innocence beyond a reasonable doubt, (Resp. Br. at 46-49); and (3) that Mr. House's evidence of innocence fails to meet even the less exacting standard proposed by Justice White's concurring opinion in *Herrera*. (Resp. Br. at 49). We have addressed arguments (2) and (3) at Pet. Br. at 46-49 and see no need to add here anything more than the citations which confirm that a majority of the Justices in *Herrera* did not endorse the view that the State's argument number (1) plainly reads into that decision. *See* 506 U.S. at 427 ("Nowhere does the Court state that the Constitution permits the execution of an actually innocent person. Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim.") (Justices O'Connor and Kennedy, concurring); *id.* at 429 ("In voting to affirm, I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.") (Justice White, concurring); *id.* at 431 ("We are really being asked to decide whether the Constitution forbids the execution of a person who has been validly
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Mr. House pleaded the claim in his habeas corpus petition, and the court of appeals granted a COA on all claims. In the court of appeals, although Mr. House did not make a separate submission of his case for innocence under *Herrera*, both parties extensively briefed the factual question whether and to what extent Mr. House's new evidence had destroyed the prosecution's case against him and shown him to be a victim of mistaken identity – *i.e.*, actually innocent in the ordinary sense of that phrase. The only difference between “actual innocence” for *Schlup* purposes and “actual innocence” for *Herrera* purposes is the *quantum* of proof of innocence required; and the principal dissent in the court of appeals found Mr. House innocent enough to satisfy *Herrera*.

28 U.S.C. § 2106 informs both this Court and the court of appeals that when the judgment of a lower court is “lawfully brought before it for review,” it may “direct the entry of such appropriate judgment . . . or require such further proceedings to be had as may be just under the circumstances.” Six dissenting judges in the court of appeals, after considering Mr. House's argument that he was “actually innocent” for *Schlup* purposes, concluded that his proof of innocence was so overwhelming as to constitute “actual innocence” for *Herrera* purposes as well. They therefore voted to give him the relief appropriate under *Herrera*. A majority of the court of appeals should have done the same under § 2106 if it reached the same conclusion; and this Court should do the same if it, too, finds the *Herrera* standard satisfied.¹³ The propriety of

convicted and sentenced but who, nevertheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, . . . , I do not see how the answer can be anything but ‘yes.’” (Justices Blackmun, Stevens and Souter, dissenting).

¹³ The State suggests that state judicial remedies may still be available to Mr. House. (Resp. Br. at 45 & n.35.) The suggestion is disingenuous. Mr. House has fruitlessly sought to reopen his former state habeas petition so that the habeas court could, *inter alia*, hear his evidence of innocence. Although that motion was filed three years ago, the State has never filed an answer and the court has done nothing. This is the

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such a disposition, in the light of § 2106 and the inherent relationship between the *Schlup* and *Herrera* issues, is established *a fortiori* by this Court's recent exercise of its discretion to consider an argument raised and briefed here, although not raised in a federal court of appeals in exactly the same terms, in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

CONCLUSION

The decision of the court of appeals denying Mr. House relief for innocence should be reversed.

Respectfully submitted,

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proceeding that the State describes in its footnote 35 without mentioning the age and posture of the case. The State also argues that Mr. House must pursue executive clemency proceedings before raising a *Herrera* claim. (Resp. Br. at 44-45.) It fails to mention that under Tennessee law clemency is to be considered only after the conclusion of state and federal postconviction proceedings. See *Coe v. State*, 17 S.W.3d 249, 250 n.1 (Tenn. 2000).