No.

IN THE
Supreme Court of the United States

RICCO BROWN,

Petitioner,

v.

JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND PAMELA J. BONDI, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

During the evening of September 11, 2001, in Jacksonville, Florida, two intruders armed with pistols and wearing scary Halloween masks and bandanas burgled a home and committed assault and battery of its occupants. During the struggle, a victim tore off an intruder's mask and bandana. The victims immediately implicated Ricco Brown, who had been personally known to three of them before these crimes. Based on the victims' eyewitness identifications, Mr. Brown's statements to a jailhouse informant, and a stipulation that DNA testing of the mask could neither include nor exclude Mr. Brown as a donor, a jury concluded Mr. Brown was one of the intruders and convicted him of armed burglary, aggravated battery, and aggravated assault. Subsequent DNA testing during post-conviction proceedings excluded Mr. Brown as a donor on the mask (thereby contradicting the DNA stipulation), but could neither include nor exclude him as a donor on the bandana (for which no testable DNA had been recovered at trial). A DNA expert testified it was "possible" the bandana had blocked Mr. Brown's DNA from reaching the mask. Despite "serious misgivings about reliability of the jury verdict," the District Court dismissed Mr. Brown's federal habeas petition as untimely, and the Court of Appeals affirmed.

Does new DNA evidence that disproves eyewitness identifications and other evidence of guilt, except for one remotely "possible" explanation, sufficiently alter the evidentiary landscape such that it satisfies the actual-innocence gateway of *Schlup* v. *Delo*, 513 U.S. 298 (1995), *House* v. *Bell*, 547 U.S. 518 (2006), and *McQuiggin* v. *Perkins*, 133 S. Ct. 1924 (2013), to allow merits review of the petitioner's procedurally defaulted habeas claims?

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

Petitioner, Ricco Brown, was Petitioner-Appellant below.

Respondents, Julie L. Jones, Secretary, Florida Department of Corrections, and Pamela J. Bondi, Attorney General, State of Florida, were Respondents-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ricco Brown, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is available at 580 Fed. App'x 721 (11th Cir. 2014) (unpublished). The order of the District Court (Pet. App. B) is available at 2013 U.S. Dist. LEXIS 135829 (M.D. Fla.) (unpublished).

The Florida First District Court of Appeal's June 25, 2009 opinion affirming the denial of a motion for new trial (Pet. App. C) is available at 12 So. 3d 222 (Fla. 1st DCA) (unpublished). The Florida Fourth Judicial Circuit's June 27, 2008 order denying a motion for new trial (Pet. App. D) is unreported. The First District's October 19, 2007 opinion reversing the denial of a motion for DNA testing (Pet. App. E) is reported at 967 So. 2d 398 (Fla. 1st DCA). The First District's June 20, 2007 opinion affirming the denial of post-conviction relief (Pet. App. F) is available at 961 So. 2d 936 (Fla. 1st DCA) (unpublished). The Fourth Judicial Circuit's February 6, 2007 order denying a motion for DNA testing (Pet. App. G) is unreported. The Fourth Judicial Circuit's September 14, 2006 order denying post-conviction relief (Pet. App. H) is unreported. The Fourth Judicial Circuit's May 16, 2005 order denying post-conviction relief (Pet. App. I), which was not appealed, is unreported. The First District's October 27, 2003 opinion affirming the direct appeal (Pet. App. J) is available at 857 So. 2d 881 (Fla. 1st DCA) (unpublished).[1]

[1] Undersigned counsel did not previously represent Mr. Brown before the District Court, the Court of Appeals, or any other court. Instead, after the Court of Ap-

JURISDICTION

The Court of Appeals filed its opinion on September 8, 2014. Pet. App. A. On November 19, 2014, Justice Thomas extended the time within which to file the petition for a writ of certiorari to and including February 5, 2015. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, which provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

During the evening of September 11, 2001, in Jacksonville, Florida, two intruders armed with pistols and wearing scary Halloween masks and bandanas burgled a home and committed assault and battery of its occupants. During the struggle, a victim tore off an intruder's mask and bandana. The victims immediately implicated Mr. Brown, who had been personally known to three of them before these crimes. Based on the victims' eyewitness identifications, Mr. Brown's statements to a jailhouse informant, and a stipulation that DNA testing of the mask could neither include nor exclude Mr. Brown as a donor, a jury concluded Mr. Brown was one of the intruders and convicted him of armed burglary, aggravated battery, and aggravated assault. Subsequent DNA testing during post-conviction proceedings excluded Mr. Brown as a donor on the mask (thereby contradicting the DNA stipulation), but

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peals affirmed the dismissal of Mr. Brown's habeas petition, the District Court appointed undersigned counsel pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, to prepare this petition for a writ of certiorari.

could neither include nor exclude him as a donor on the bandana (for which no testable DNA had been recovered at trial). A DNA expert testified it was "possible" the bandana had blocked Mr. Brown's DNA from reaching the mask.

Despite "serious misgivings about reliability of the jury verdict," the District Court dismissed Mr. Brown's habeas petition as untimely. Pet. App. B at 1. As the District Court saw it, this new DNA evidence did not sufficiently alter the evidentiary landscape such that it satisfied the actual-innocence gateway of *Schlup* v. *Delo*, 513 U.S. 298 (1995). In sum, "[a]lthough Petitioner may have shown that a reasonable doubt exists in the light of the new evidence, he has not shown that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Pet. App. B. at 19. Seizing on the DNA expert's concession that it was "possible" the bandana had blocked Mr. Brown's DNA from reaching the mask, the Court of Appeals affirmed. Pet. App. A.

A. Trial Proceedings

About an hour after the crimes were committed, the State of Florida arrested and charged Mr. Brown with armed robbery in violation of Fla. Stat. §§ 812.13(2)(a) & 775.087, armed burglary in violation of Fla. Stat. §§ 810.02(2)(b) & 775.087, aggravated battery in violation of Fla. Stat. §§ 784.045 & 775.087(2), and aggravated assault in violation of Fla. Stat. §§ 784.021 & 775.087. C.A. App. 16-14 at 11-12.

1. Cheryl Wiggins Testifies

Earlier that evening, Cheryl Wiggins and her husband, Melvin Wiggins, Sr., had returned home and were watching television in bed. *Id.* at 56-58, 60. Their

teenage son, Melvin Wiggins, Jr., was playing video games in his bedroom with his friends, Brad Tolliver and Michael Best. *Id.* at 60-61. Nakita Leatherbury, the six-year-old adopted daughter of Jessica Alexander (Mrs. Wiggins's friend and Mr. Brown's girlfriend), was playing at the front of the home. *Id.* at 60-61; *see also id.* at 354-55. Mrs. Wiggins was babysitting Nakita. *Id.* at 60-61.

When Nakita walked to the back of the house, Mrs. Wiggins noticed she had a strange expression on her face. *Id.* at 61. Mrs. Wiggins walked to the front of the house and saw a masked man holding a gun to Mr. Wiggins, Jr.'s head. *Id.* at 61-62. She thought someone was playing a joke. *Id.* at 62. But when Mrs. Wiggins saw the front door wide open, she realized something was wrong. *Id.* She called 911, asked for help, locked the front door, and threw the phone onto the chair. *Id.*

After she threw the phone onto the chair, Mrs. Wiggins grabbed a knife off a table and returned to Mr. Wiggins, Jr.'s bedroom. *Id.* at 65. A man grabbed Mrs. Wiggins by the neck and said, "Bitch, you done called the motherfucking police on me, I'm going to blow your motherfucking brains out." *Id.* At that time, Mrs. Wiggins could not identify the man because he was wearing a mask. *Id.* Nevertheless, before she saw the man's face, she recognized his voice as Mr. Brown's:

> Q. Okay. And so when he grabbed you and made these threats, what happened?
>
> A. I say, no, I didn't—I recognized his voice at one point. I said, no, I didn't Ricco, you know my phone is out of order, like that, so we tussled on back to the back in the hallway and he kept pushing that gun harder and harder to my head, harder and harder to my head.
>
> Q. Now, you said you recognized his voice?
>
> A. Yes, I recognized his voice before I saw his face.

Q. Now, after that individual spoke to you, did you recognize who that individual was?

A. Yes. It was Ricco Brown.

Q. This man right here (indicating)?

A. That man right there (indicating).

Q. What happened next after you started struggling?

A. We struggled in the hallway. Like I said, he kept pushing that gun harder to my head and he kept saying he was going to blow my brains out, so I said, lord, give me strength. I thought to myself, if he going to kill me, I want to know who's going to kill me, and I reached up and grabbed the mask and pulled it off and immediately I saw him. I noticed his eyes before I notice his face and I started screaming, "Ricco, Ricco, why you doing this to me? Ricco, why you doing this to me?"

Q. Now, ma'am, when you said you noticed his eye, what did you notice about Mr. Brown's eye?

A. He have a weak eye and he was laying flat on me, you know, I could like touch his face with the speaker.

Q. And immediately once you ripped that mask off, you recognized him?

A. I knew it was Ricco.

Id. at 66-67.

At that time, Mr. Wiggins, Sr. joined the fray, but the intruder hit him in the head with a gun. *Id.* at 67-68. When Mrs. Wiggins tore the intruder's mask and bandana off, his face had a panicked expression. *Id.* at 68. But she could not see the other intruder's face because he was still wearing his mask. *Id.* When police arrived, Mrs. Wiggins told them, "That Ricco Brown came in my house and violated."[2] *Id.*

[2] It is unclear whether Mrs. Wiggins meant Mr. Brown had violated the law, violated probation, or both.

On cross-examination, Mrs. Wiggins admitted that, even before this incident, she did not like Mr. Brown. *Id.* at 74. In fact, although she had met Mr. Brown several times through Ms. Alexander, Mrs. Wiggins and Ms. Alexander "didn't talk that much about boyfriends because she know how I felt." *Id.* Mrs. Wiggins further testified that Mr. Brown and Mr. Wiggins, Sr. were not friendly, either. *Id.* at 70.

Mrs. Wiggins also admitted on cross-examination that, like many violent crime victims, "The only thing I really heard and saw was the gun." *Id.* at 82. For that reason, "some of the details are a little fuzzy":

> A. You know, when things happen like that, you're not really noticing a person's attire. You're fighting for your life at that time and I didn't have time to really notice everything about him but everything I did know and all the details I can give you I'm trying to do it now.
>
> Q. I know and I appreciate that. I'm just trying to get how much detail you remember. Specifically, if the bandanna came off, were you able to see his hair?
>
> A. That, like I say, that, when you asked me that before, I tried to tell you I don't remember how his hair was.
>
> Q. You don't remember. Was his hair uncovered?
>
> A. I don't remember how his hair was because it was, like I say, I was fighting for my life. I couldn't pay attention to every detail, his hair, but I knew this, his face, because he was like right in here laying on top of me when he was fighting me with the pistol to my head. I do know it was Ricco Brown.
>
> Q. Okay. So some of the details are a little fuzzy for you?
>
> A. Yeah, some of it is.

Id. at 90-91.

Mrs. Wiggins explained that she locked the door because "I wanted them to be caught in my house." *Id.* at 83. Asked to characterize the intruders' appearance,

Mrs. Wiggins explained, "Both of them was slender dudes, the way Ricco look now." *Id.* at 89. When Mr. Brown and Ms. Alexander returned to the house around 9:00 P.M., Mrs. Wiggins pointed him out to police, and, as Mrs. Wiggins had predicted, Mr. Brown "got out and acted like ain't nothing happened." *Id.* at 86.

Mrs. Wiggins also clarified that Mr. Brown was wearing a bandana under his mask:

> Q. They were both wearing Halloween masks. Do you recall making a statement that one of them was wearing a bandanna?
>
> A. Ricco had the bandanna on under his mask.
>
> Q. He had a bandanna on under his mask?
>
> A. Yes.
>
> Q. Was he wearing it over his mouth?
>
> A. All I know is when I pulled off the mask, the bandanna came off. I don't know whether he had it here or there, but it was up under the mask.

Id. at 91.

2. Melvin Wiggins, Sr. Testifies

Mr. Wiggins, Sr. had known Ms. Alexander for 14-15 years and had met Mr. Brown only "several" times when he had dropped Nakita off at his home or arrived with Ms. Alexander. *Id.* at 98-99.

That evening, Mr. Wiggins, Sr. went to bed early and was awakened by yelling. *Id.* at 99-100. When he left his bedroom, he saw an intruder fighting with Mrs. Wiggins. *Id.* at 100. Mr. Wiggins, Sr. intervened and grabbed the intruder, who

struck him in the head with a gun. *Id.* When the intruder "snatched away," Mr. Wiggins, Sr. recognized him as Mr. Brown. *Id.* at 102.

> Q. What was your reaction when you recognized this person you knew was inside your house with a gun?
>
> A. Well, the first thing I just hollered at him, "What the hell are you doing in my house with a gun?" And I proceeded to say, "What did Cheryl do to you that you have to be in my house with a gun?"
>
> Q. And what was this defendant's reaction, if any?
>
> A. He just stood up there with the gun, holding on to me and her.

Id. at 102-03.

At this point, Mr. Wiggins, Sr. was "thinking that [Mrs. Wiggins and Mr. Brown] just got into an argument because I know they didn't get along at all. And I thought that it was something that escalated into an argument then, you know, something like that. I didn't realize what was happening until later." *Id.* at 104. But then, Mr. Wiggins, Sr. saw the second intruder holding a gun to Mr. Wiggins, Jr.'s head, so he "just . . . gave up fighting" and continued to lay on the ground. *Id.* Then, the intruders escaped through the front door. *Id.* at 105. (Mr. Wiggins, Sr. did not mention that Mrs. Wiggins had already locked the front door. *See id.*) Through Mr. Wiggins, Sr., the State then introduced into evidence two photographs that depicted Mr. Wiggins, Sr.'s injuries from the fracas. *Id.* at 106-08.

Police arrived 15-30 minutes later, and Mr. Wiggins, Sr. implicated Mr. Brown. *Id.* at 105-06. When Mr. Brown and Ms. Alexander arrived at the home to pick up Nakita shortly thereafter, police arrested Mr. Brown. *Id.* at 106.

On cross-examination, Mr. Wiggins, Sr. admitted that, before this incident, he had told Ms. Alexander that Mr. Brown was not welcome in his home. *Id.* at 111. Mr. Wiggins, Sr. clarified that he had previously met Mr. Brown "[s]everal times." *Id.* at 109. Mr. Wiggins, Sr. also explained that Mr. Brown's eye is noticeable. *Id.* at 113. When the intruders ran away, Mr. Wiggins, Sr. did not hear a car drive away. *Id.* at 114.

Mr. Wiggins, Sr. described the unmasked intruder as "maybe about [five]-nine, six foot at the most, about [170] pounds, maybe," and the other intruder as "kind of smaller, skinnier" and "[s]ort of tall a little bit and, you know, he wasn't real, real tall, but he was just, just looked, you know, skinny, sort of like." *Id.* at 115-16.

On redirect, Mr. Wiggins, Sr. described his relationship with Nakita as "[v]ery close." *Id.* at 119. In fact, "I'm the only father that she knows." *Id.* He also explained that Nakita calls Mrs. Wiggins "Auntie Chubby." *Id.* at 119.

3. Melvin Wiggins, Jr. Testifies

Mr. Wiggins, Jr., was in his room with friends, Mr. Best and Mr. Tolliver, playing video games. *Id.* at 125-26. His parents were in their bedroom, and Nakita was also in the house. *Id.* at 126. Suddenly, "[t]wo grown men with masks came into [his] room with a gun pointed." *Id.* at 127. Mr. Wiggins, Jr. did not know how they opened the front door, but they must have walked straight through the living room to the back. *Id.* The intruders were "dressed in dark clothing and had masks and

had mittens or something over their hands so they wouldn't get prints on the weapons they used." *Id.* Mr. Wiggins, Jr. identified the recovered mask. *Id.*

When the intruders entered his room, they told Mr. Wiggins, Jr. to give them everything he had. *Id.* at 127-28. But he "couldn't understand what they were saying because they were mumbling and [he] couldn't catch their voices because they were trying to hide their pitches of voice and I couldn't describe it." *Id.* Both intruders had pistols, and Mr. Wiggins, Jr. concluded, from seeing their uncovered skin, that they were black males. *Id.* at 129. Mr. Wiggins, Jr. just sat there because he was confused, upset, and could not believe this was happening. *Id.* After Mr. Wiggins, Jr. saw his mother walk by and go into the living room, one of the intruders left the room to see where she was going; before he left, he told the second intruder to steal Mr. Wiggins, Jr.'s necklace, which he did. *Id.* at 129-30.

When the first intruder left the room, Mr. Wiggins, Jr. heard a commotion:

> Q. What did you hear?
>
> A. Well, I heard a lot of tussling and when I looked around my—my father got up and went to the living room when my mother and the other character went into the living room, so when the three of them was up front, I heard a lot of tussling and the wrestling around, and after a minute I heard my mother yelling, "Ricco, what are you doing in my house? Ricco, what are you doing here," and so on and so on.
>
> Q. Did you ever see the face of the individual who was tussling with your parents?
>
> A. No, I did not.

Id. at 131-32.

The second intruder left after the commotion; the intruder in the living room with his parents told the second intruder to leave, and they escaped. *Id.* at 133. The

police arrived quickly, and Mr. Wiggins, Jr. debriefed them. *Id.* at 133. Mr. Wiggins, Jr. saw neither intruders' face, and they stole his necklace. *Id.* at 133-34. Before this incident, Mr. Wiggins, Jr. had seen Ricco maybe two or three times, but could not identify him in court. *Id.* at 132.

On cross-examination, Mr. Wiggins, Jr. claimed one intruder wore a bandana, while the other wore a mask. *Id.* at 134. The intruder with the bandana had it "[k]ind of around his face around the mask." *Id.* Mr. Wiggins, Jr. paid little attention to the intruders' eyes and noticed nothing about them. *Id.* at 135. The intruder with the bandana stayed in Mr. Wiggins, Jr.'s room, while the intruder with the mask was with his parents. *Id.* at 135-37. Mr. Wiggins, Jr.'s bedroom is the last one in the house; he had no window facing the road and heard no car approach or any knocking on the front door. *Id.* at 144. Mr. Wiggins, Jr. suspected Mr. Brown was involved: "Because basically my mother and him didn't like each other at all, and then when my mother screamed his name, 'Ricco, Ricco, what are you doing here,' I just kind of put two and two together and added it up, maybe he did this. I don't know." *Id.* at 148. When the intruders first entered his room, Mr. Wiggins, Jr. had no idea who they were. *Id.* at 148-49.

4. Michael Best Testifies

Mr. Best was playing video games in with Mr. Wiggins, Jr. and Mr. Tolliver when two intruders ran into the bedroom, both wearing Halloween masks with socks on their hands and carrying pistols. *Id.* at 151-53. The intruders focused all their attention on Mr. Wiggins, Jr., asked for "Dread," and made Mr. Wiggins, Jr.

remove his necklace. *Id.* at 153. Mr. Best was in fear and could not see their faces. *Id.* at 153. After one intruder left the room, Mr. Best "heard rumbling, like they were knocking stuff over and about 30 seconds, I'm not real positive about it, but his mom started screaming, 'Ricco, Ricco.'" *Id.* at 154. Mr. Best could not identify either intruder because he stayed in the bedroom until they escaped. *Id.* at 154-56.

On cross-examination, Mr. Best admitted that, because he was scared, he noticed nothing physically about the two intruders. *Id.* at 157. One "was wearing like a ski mask type thing" like a toboggan that "was all the way over his face," so Mr. Best could not see his eyes. *Id.* Mr. Best had never met Mr. Brown and could not identify him in court. *Id.* at 158. The intruder in the Halloween mask was the one who left the room and went up front. *Id.* at 159. Mr. Best did not hear a car approach or leave. *Id.* at 160.

5. Seven-Year-Old Nakita Leatherbury Testifies

Seven-year-old Nakita's nickname for Mrs. Wiggins was "Auntie Chubby." *Id.* at 182-83. That evening, there was a knock on the door. *Id.* at 184. Nakita thought it was her adoptive mother, Ms. Alexander, arriving to take her home. *Id.* When Nakita opened the door, she saw two men in masks with socks on their hands and carrying guns. *Id.* Nakita explained:

> Q. Okay. And when these two men were standing there, did they say anything to you?
>
> A. Where is "Auntie Chubby" at? I don't remember.
>
> Q. Where is "Auntie Chubby" at?
>
> A. (Nods head.)

Q. Is that a yes?

A. Yes.

Q. What did you do when these men said where is "Auntie Chubby" at?

A. I stayed on the couch.

Q. Okay. Now, Nakita, "Auntie Chubby", is that your name you have for Ms. Cheryl?

A. Yes.

Q. Okay. Does anybody else call Ms. Cheryl "Auntie Chubby"?

A. No.

Q. Because Ms. Cheryl is not chubby, is she? She's actually pretty skinny, isn't she?

A. Yes.

Q. Okay. So that's a name that you use to call Ms. Cheryl?

A. Yes.

Id. at 184-85.[3]

After the intruders went into the back, Nakita saw one intruder choking Mrs. Wiggins on the dining room table; he was wearing a mask, and Nakita never saw him without it. *Id.* at 186. Nakita did not recognize the intruders or their voices. *Id.*

Later that night, Nakita told Officer Brent Ellis she did not recognize the intruders. *Id.* at 187. Nakita saw one intruder's face before they escaped, but she did not know if it was the one wrestling with Mrs. Wiggins. *Id.* at 189-90. Nakita knew

[3] It is unclear from this testimony whether Nakita meant the intruder said the exact words "where is 'Auntie Chubby' at," or whether Nakita meant the intruder asked for Mrs. Wiggins, to whom she referred as "Auntie Chubby."

Mr. Brown and identified him in court; she liked Mr. Brown and did not want to see anything bad happen to him. *Id.* at 190.

On cross-examination, Nakita said the man she saw was not Mr. Brown and asserted she never told anyone that the man she saw was him. *Id.* at 191. During the commotion, Mrs. Wiggins "was yelling Ricco's name out." *Id.* at 191-92.

6. Officer Brent Ellis Testifies

Officer Ellis responded to the Wiggins residence. *Id.* at 194-95. An excited and upset Mrs. Wiggins said they had just been robbed by two intruders and implicated Mr. Brown. *Id.* at 195. Mr. Wiggins, Sr. also implicated Mr. Brown. *Id.* While Officer Ellis was there, Mr. Brown arrived, and Mr. Wiggins, Sr. identified him. *Id.* at 196-97.

Nakita said two men in masks knocked on the front door, and she let them enter. *Id.* at 198, 210. Nakita said one asked where is "Auntie Chubby," and she pointed to the back of the house, where both intruders went. *Id,* at 201. With the jury instructed that it was to be considered only for impeachment, not substantive evidence, Officer Ellis testified that when he asked whether she recognized either suspect, Nakita said, "told me it was her mother's boyfriend, Ricco Brown," because "[s]he saw his face as he was running out after the mask had been pulled off by Ms. Wiggins." *Id.* at 212.

On cross-examination, Officer Ellis admitted law enforcement had recovered Mr. Wiggins, Jr.'s necklace on the living room floor. *Id.* at 213, 219.

7. Detective Kimberly Ann Long Testifies

At the scene, Detective Kimberly Ann Long took photographs and collected a Halloween mask and a bandana as evidence. *Id.* at 227-28. The mask was admitted into evidence. *Id.* at 228-29. Detective Long did not photograph or recover any necklace. *Id.* at 230-31.

On cross-examination, the defense asked Detective Long whether she was aware of any DNA testing on the mask and bandana. *Id.* at 232. The State objected. *Id.* At sidebar, the parties agreed to stipulate to DNA results. *Id.* at 233-236.

8. The Trial Court Reads The DNA Stipulation

Counsel drafted a stipulation together, and Mr. Brown confirmed he agreed to it. *Id.* at 237-49. The trial court then read the DNA stipulation to the jury:

> The parties in the case have stipulated that State's Exhibit 5, the mask recovered from the crime scene at [the Wiggins residence] was preserved and examined by the Florida Department of Law Enforcement Crime Lab for the presence of fingerprints. No fingerprints were found on the mask, State Exhibit 5. State's Exhibit 5 was also analyzed for the possible presence of DNA evidence. DNA evidence was found, yet the DNA samples found were the results of multiple donors. The Defendant, Ricco Brown, could neither be identified [n]or excluded as a possible donor of the DNA that was found on State's Exhibit 5.

Id. at 251; C.A. App. 16-14 at 46.

9. Jailhouse Informant Charles Ricco Smith Testifies

Since he had been 18 years old, Charles Ricco Smith, a jailhouse informant, had known Mr. Brown. C.A. App. 16-15 at 264-65. In jail, Mr. Brown asked Mr. Smith to get his family or friends "to shake up one of the Wiggins." *Id.* at 284-85. Mr. Smith declined, but suggested his girlfriend could offer the Wiggins family a bribe. *Id.* For this service, Mr. Brown agreed to pay Mr. Smith $5,000 through Ms.

Alexander. *Id.* at 286. Mr. Brown confided he was in jail for home-invasion robbery. *Id.* at 286. He said it was Ms. Alexander's idea, because she had seen a lot of money or drugs there. *Id.* at 286-87.

Mr. Brown said he did the robbery with two brothers-in-law; one went into the house with him, while the other stayed in the car. *Id.* at 287-88. (No other witness testified they had heard a car approach or drive away.) Mr. Brown said they wore masks, and when he knocked on the door, his daughter answered, so he asked if "Auntie Chubby" was home. *Id.* at 288. Mr. Brown said his daughter asked "daddy is that you," and he answered "no, this ain't me." *Id.* (Nakita had testified she did not recognize the intruders and did not mention this supposed exchange.) Mr. Brown said they searched the son's room first, then the master bedroom; they stole money and drugs from a drawer. *Id.* at 289. (No other witness testified the intruders entered the master bedroom or stole money or drugs, from a drawer or otherwise.)

On their way out, Mr. Brown said he got into a confrontation with Mrs. Wiggins, who called his name and snatched his mask. *Id.* at 289-90. Mr. Brown hit her with the gun, and they fled. *Id.* at 289-90. (Mrs. Wiggins and Mr. Wiggins, Sr. testified the intruder struck Mr. Wiggins, Sr., not Mrs. Wiggins.) Mr. Brown said the other intruder was Brad Johnson, his brother-in-law. *Id.* at 290. After the robbery, Mr. Brown said he ditched the money and marijuana and discussed an alibi with Ms. Alexander: "they discussed that they was going to be having sex while the action supposed to have took place and he asked her for oral sex, but she said no, so they just had regular sex." *Id.* at 291. (No witness testified about sex.) Mr. Brown

said he and Ms. Alexander then returned to the house to make him appear innocent. *Id.* at 291-92. Mr. Smith claimed he learned all this information exclusively from Mr. Brown. *Id.* at 292.

On cross-examination, Mr. Smith explained his middle name, Ricco, is not his street alias. *Id.* at 293. In his sworn statement to the State, Mr. Smith said he had learned the name Wiggins from "Brad"; Mr. Smith said this was a "vocabulary error." *Id.* at 293-95. Mr. Smith said "Brad" was Mr. Johnson, Mr. Brown's "co-defendant." *Id.* at 295-98. Mr. Smith had known Mr. Johnson for about six years and sometimes hung out with him. *Id.* Mr. Smith identified Mr. Johnson's photograph and testified his eye was "in, but it's put-out," like a glass eye. *Id.* at 298-99. Mr. Smith also conceded his statement to the State had said Mr. Brown returned to the residence afterward by himself. *Id.* at 302-04.

10. The State Rests, And The Trial Court Denies A Motion For Judgment Of Acquittal

The State rested. *Id.* at 306. Mr. Brown moved for judgment of acquittal, arguing (1) the intruders did not burgle because they had Nakita's permission to enter, (2) there was no evidence that Mr. Brown himself had robbed anything from the victims, and (3) as to the aggravated battery and assault, there was no evidence the gun was a real weapon. *Id.* at 306-07, 310-15. The motion was denied. *Id.* at 316.

11. The Defense Recalls Officer Brent Ellis

The defense recalled Officer Ellis, primarily to discuss whether or not the stolen necklace was recovered at the scene. *See id.* at 333-53.

12. Jessica Alexander Testifies

Ms. Alexander lived with Mr. Brown, her boyfriend, and Nakita, her non-biological daughter. *Id.* at 354-55. On September 11, Ms. Alexander and Mr. Brown dropped his nine-month-old son off at his mother's home around 6:30 P.M. *Id.* at 360-61. Earlier, Mr. Brown had dropped Nakita off at the Wiggins residence. *Id.* at 357. When Ms. Alexander and Mr. Brown returned to the Wiggins residence to collect Nakita, she wanted to continue playing, so they left without seeing Mrs. Wiggins. *Id.* at 361-62. Ms. Alexander did not let Mrs. Wiggins know they were leaving Nakita longer, "[b]ecause Cheryl doesn't like Mr. Brown and [she] didn't want Cheryl to even see him in the car because [she] try to separate [her]self from her and him. They have a conflict going on . . . ." *Id.* at 362. Ms. Alexander and Mr. Brown went to the store, then home; while there, Jason Hughes asked for Mr. Brown, but she told him Mr. Brown was not home. *Id.* at 364-65.

Around 8:45 pm, she and Mr. Brown left to pick up Nakita, and she did not see police vehicles in front of the house when they arrived. *Id.* at 365-67. When Ms. Alexander and Mr. Brown "went up to Cheryl's house everybody rushed out of the house." *Id.* at 367. "[T]he police came out, Snoop and Melvin, Jr., ran shouting at Ricco and throwing punches and stuff, but I was like, what's going on, what's going on, what's going on, what's happening."[4] *Id.* at 368. Next thing Ms. Alexander knew, the police arrested Mr. Brown. *Id.* at 369.

[4] Snoop is Mrs. Wiggins's nephew. *Id.* at 357.

Ms. Alexander claimed the Wiggins family sold drugs: "I bought marijuana from the Wiggins. That's how I got marijuana that I smoke. . . . They sold marijuana from their house." *Id.* at 367. On cross-examination, Ms. Alexander amplified that claim by explaining that the prosecutor himself had told her:

> A. It's not a lie. Mr. [prosecutor], come on, let's be for real. Let's be for real. You told me yourself, you always do this and it's not under oath or whatever because nobody is there and say something and then you want to come back with it, just like Mr. Valentine. He know good and well I didn't say anything about no mask and you all keep on going on about it and it's making me look bad like I don't know what I'm talking about and I'm sitting up here telling the truth. Ricco Brown was not there. Ricco Brown was with me. And you did tell me that you knew the Wiggins were selling drugs. How else would I know the fact that, you know, you know, Judge, you know, nobody don't run up in nobody's house, unless they're going in there looking for something, unless they know it's drugs or something and you told me they can't report it to the police because they can't call the police and say somebody robbed my house and took my drugs and my money. Come on. I'm college-educated. I'm an assistant manager at my job. I'm 40 years old. If I'm out here wasting my time trying to defend somebody that did something and I want to just get them off, how would I benefit? I'm spending my money hiring an attorney to try to defend this man because I know he was with me, okay, and you going to sit up here and try to tell me something otherwise. Don't try to make me look like no fool, Mr. [prosecutor]. Don't even do it like that.

Id. at 377-78.

13. Jason Hughes Testifies

On the morning of September 11, 2001, Mr. Brown went with Mr. Hughes, his friend, to pick up his son. *Id.* at 395-96. They returned to Mr. Brown's apartment, and Mr. Hughes went home. *Id.* at 396. Around 5:00 or 6:00 P.M., Mr. Hughes returned and asked for Mr. Brown. *Id.* Ms. Alexander said Mr. Brown was not there. *Id.* Ms. Alexander did not let Mr. Hughes enter, but the car she shared with Mr. Brown was in the driveway. *Id.* at 397.

14. Ricco Brown Declines To Testify, And The Defense Rests

The defense rested. *Id.* at 404. After a colloquy with the trial court, Mr. Brown confirmed he did not want to testify. *Id.* at 405-07, 414-17.

15. In Rebuttal, The State Calls Detective David Valentine To Testify

In rebuttal, the State called Detective David Valentine, who testified that, during a blood draw, Mr. Brown referred to Mr. Smith: "I told that green buck-ass nigger to see if he would tell that lame ass jailhouse shit." *Id.* at 433. Detective Valentine wrote down what Mr. Brown said and showed it to Mr. Brown, who added the words "lame ass." *Id.* at 433.

During his investigation, Detective Valentine found no evidence of drug activity at the Wiggins residence and was not aware of "Auntie Chubby" appearing in any reports. *Id.* at 433-34.

On cross-examination, Detective Valentine testified he took the Halloween mask from the property room to FDLE for DNA and fingerprint analysis. *Id.* at 441. Asked why it took until October 4, 2001 to do so, Detective Valentine explained the procedure for deciding whether a case warrants submission for DNA testing. *Id.* at 442. Although found together, the mask and bandana were submitted to FDLE on separate dates. *Id.* at 442-43.

16. The Jury Acquits Ricco Brown Of Armed Robbery, But Returns Guilty Verdicts For Armed Burglary, Aggravated Battery, And Aggravated Assault

After closing arguments and jury instructions (*id.* at 479-600), the jury returned a verdict of not guilty of robbery, but guilty of armed burglary, aggravated battery, and aggravated assault. *Id.* at 614-16; C.A. App. 16-14 at 76-81.

17. The Trial Court Sentences Ricco Brown, And The Appellate Court Affirms The Direct Appeal

The trial court sentenced Mr. Brown as a habitual offender to concurrent sentences of life for armed burglary, 30 years for aggravated battery, and 10 years for aggravated assault. C.A. App. 16-18 at 211-18. Mr. Brown took a direct appeal, which was summarily affirmed. Pet. App. J.

B. Post-Conviction Proceedings

1. The Post-Conviction Court Denies The Motion For Post-Conviction Relief, And Ricco Brown Does Not Appeal

In a motion for post-conviction relief, Mr. Brown presented six claims of ineffective assistance of counsel. C.A. App. 8-3. The post-conviction court summarily denied the motion, finding all grounds "facially insufficient" for failure "to allege, much less establish, that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel's deficient performance in any of the six grounds." Pet. App. I at 3. Mr. Brown did not appeal.

2. The Post-Conviction Court Denies The Amended Motion For Post-Conviction Relief, And The Appellate Court Summarily Affirms

Eleven months later, Mr. Brown filed an amended motion for post-conviction relief, which presented the first five claims of ineffective assistance of counsel from his original motion. C.A. App. 8-5. The post-conviction court summarily denied this amended motion as "procedurally barred" upon finding it "does not set forth any basis upon which the Court could conclude that the matters therein could not have been raised through the September, 2004 motion." Pet. App. H at 1-2. Mr. Brown appealed, but the appellate court summarily affirmed. Pet. App. F.

3. The Post-Conviction Court Denies The Motion For Post-Conviction DNA Testing, And The Appellate Court Reverses And Remands

Mr. Brown filed a *pro se* motion for post-conviction DNA testing. C.A. App. 8-8. The post-conviction court summarily denied it. Pet. App. G at 1-2. Mr. Brown appealed, and the appellate court reversed and remanded. Pet. App. E at 1-3. In particular, the appellate court directed the post-conviction court either to attach portions of the record that conclusively demonstrated Mr. Brown was not entitled to relief or to hold an evidentiary hearing. *Id.*

4. The Post-Conviction Court Convenes A DNA Evidentiary Hearing, But Thereafter Denies The Motion For Post-Conviction DNA Testing And The Motion For New Trial, And The Appellate Court Affirms

On remand, the post-conviction court authorized the transfer of evidence (e.g., the bandana and mask) for the purpose of Y-STR DNA testing (which had not been available during the trial) to be performed by DNA Labs International

("DLI").[5] C.A. App. 16-23 at 152-54. After test results returned (*id.* at 177-80), the post-conviction court convened evidentiary proceedings at which Mr. Brown was not present. C.A. App. 16-24 at 10-11. DLI tested the mask and bandana. With the mask, DLI developed a partial Y-DNA profile that "indicate[d] a mixture of at least four male individuals" and excluded Brown as a contributor to that DNA. With the bandana, DLI developed a partial Y-DNA profile that "indicate[d] a mixture of two male individuals," but could not exclude Brown as a contributor to that DNA. When the evidentiary hearing concluded, Mr. Brown's public defender stated he "wouldn't have any good faith basis to file a motion for new trial on Mr. Brown's behalf." *Id.* at 10-11.

On May 23, 2008, Mr. Brown filed a *pro se* motion for new trial. C.A. App. 8-11. In a single order, the post-conviction court denied the *pro se* motion for post-conviction DNA testing and the *pro se* motion for new trial. Pet. App. D at 1-5. Mr. Brown appealed, but the appellate court summarily affirmed. Pet. App. C.

C. Federal Habeas Proceedings

Finally, Mr. Brown filed a *pro se* petition for a writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254, which presented five grounds for relief. C.A. App. 1, 2. Respondents, Julie L. Jones, Secretary, Florida Department of Corrections, and Pamela J. Bondi, Attorney General, State of Florida, moved to dismiss the petition as untimely per AEDPA's one-year statute of limitation. C.A. App. 8.

[5] Y-STR ("short tandem repeat") DNA testing isolates DNA on the male Y chromosome and determines the statistical probability whether a particular male contributed DNA.

Before ruling on this motion, the District Court appointed counsel for Mr. Brown, directed the parties to designate DNA experts and conduct limited discovery, and convened an evidentiary hearing. C.A. App. 17, 18, 29, 39. As his DNA expert, Mr. Brown's counsel designated Gary W. Litman, Ph.D. C.A. App. 30. Respondents did not counter-designate an expert.

1. Dr. Gary Litman Analyzes The DNA Evidence

Dr. Litman reviewed FDLE's 2002 testing and DLI's 2008 testing and summarized his opinions and findings. C.A. App. 36. According to Dr. Litman, FDLE's 2002 Y-STR DNA testing of the mask concluded it "cannot exclude the Petitioner and are considered to be as common as occurring in 1 in 1,000 to 1 in approximately 8,000 individuals, which when adjusted by the 10-fold rule would be estimated to be seen in: 1 in 100 to 1 in 800 or 1 in 10,000 to 1 in 80,000 individuals." *Id.* at 5. As for the bandana, FDLE "did not produce an STR DNA typing pattern." *Id.* When DLI audited these results in 2008, it found FDLE's conclusions were "contrary to the accepted protocol for calculating DNA statistics." *Id.* at 6. Applying the correct protocols to the first mask swab, DLI concluded its "statistical estimates place[d] the frequency of occurrence at 1 in 7 to 1 in 26 individuals." *Id.* "In applying the 10-fold rule, this would range from 1 in 0.7 to 1 in 2.6 individuals and 1 in 70 to 1 in 260 individuals." *Id.* Applying the correct protocols to the second mask swab, DLI concluded the "estimated frequency of occurrence . . . ranges from 1 in 47 to 1 in 94 individuals." *Id.* The "estimated frequency of occurrence using the 10-fold rule would range from 1 in 4.7 to 1 in 9.4 individuals and 1 in 470 to 1 in 940 individuals." *Id.*

"DLI also typed the bandana using Y-STR DNA typing and concluded that it contained a mixture of two male individuals from which Petitioner cannot be excluded." *Id.* at 8. "Notably, of 16 markers, results only were observed at four; however, it must be noted that one of the four was not consistent with the Petitioner." *Id.* "Using a database (multi-ethnic/racial groups), the frequency of the two alleles (DYS391 = 10, DYS393 = 13) that were considered for statistical calculations, is 1 in 3 individuals for the African American, Caucasian and Hispanic populations." *Id.* at 9. But in this circumstance, "Despite the power of STR DNA typing, in instances of frequent likelihoods of occurrence, such as that evidence here (1 in 3), the prejudice that is introduced by the common perception that "DNA typing" can provide dispositive far outweighs the probative value of the finding." *Id.* In light of this analysis, Dr. Litman concluded:

> [T]he testing conducted by FDLE may be flawed as noted by DLI reports. According to the DLI report of March 24, 2008, Y-STR DNA typing of the mask indicates that at least four male individuals were potential wearers, from which the Petitioner is excluded. DNA evidence had been presented to the jury at Petitioner's original trial that is different than what has been relayed by DLI. Due to FDLE destroying the DNA file, there is no telling if the methods used were proper and if the conclusions they reached are correct.

Id.

Respondents accepted Dr. Litman's opinions and findings. C.A. App. 37.

2. The District Court Conducts Evidentiary Proceedings

The District Court convened two evidentiary hearings, and Dr. Litman testified at the second. C.A. App. 61, 66.

He explained Y-STR DNA testing is "exclusively directed at the male chromosome." C.A. App. 61 at 8. "It does not produce values of high probative value in most circumstances." *Id.* Instead, it "tend[s] to be in the ranges of the thousands, one in 1,000 or that type of number." *Id.* In other words, although its results "certainly are probative," it "lack[s]" the "near astronomical odds that are generated by the other technology." *Id.* Because it is "patrilineally inherited," "[o]ne of the complications in it is that a male, his son, his father, his uncle all would share the same D.N.A. typing pattern." *Id.*

When DLI performed Y-STR DNA testing of the bandana, it found matches "at two of the genetic markers" and "concluded that one in three individuals would be expected to possess such markers at that position and that involved a range, depending on which racial ethnic group is at question, of between one and two and one and four persons." *Id.* at 12-13. In other words, the "conclusion reached as to the bandana is that Mr. Brown cannot be excluded as a contributor to the minor component of this profile."[6] *Id.* at 15. But, because this conclusion was based on matches at only 2 of 16 alleles, Dr. Litman characterized it as one of "very, very limited probative value." *Id.* at 14. For that reason, Dr. Litman explained he was not "comfortable with Mr. Brown being included in that statistic or excluded." *Id.* at 28. Asked whether this meant that Mr. Brown never wore the bandana, Dr. Litman testified, "I don't think it says that." *Id.* Whether it was possible that this meant that Mr.

[6] Dr. Litman explained "minor component" meant the individual who contributed less DNA: "Quantitatively, there were two contributors. One contributed more D.N.A. than the other. So the one that contributed more is the major contributor. The one that contributed less is the minor." *Id.* at 15.

Brown never wore the bandana, Dr. Litman testified, "Maybe. Maybe not. I don't know." *Id.*

As for the mask, Dr. Litman noted that, in 2008, FDLE stated it would not have calculated a DNA result based on its then-current protocols. *Id.* at 16-17. DLI's "initial conclusion was that they did not agree with the manner in which [FDLE's] calculation had been conducted in 2002." *Id.* at 17. When DLI performed Y-STR DNA testing, it found a "mixture of at least four male individuals" from which Mr. Brown "can be excluded as a contributor." *Id.* at 17-18.

On cross-examination, the following colloquy ensued:

> Q. Is it possible for someone to wear a mask over a bandana and not leave D.N.A.?
>
> A. I don't have any specific way that I could answer that. If someone had a cloth fabric over their mouth, which is the usual source of D.N.A., and then put something else on top of it, I—it very well might not transfer through. It's just hard to say.
>
> Q. But it's possible for someone to put on a mask over a bandana and not leave their D.N.A.?
>
> A. That's—yes.
>
> Q. Is it possible for someone to wear a bandana over one's face and not leave a definitive D.N.A. sample?
>
> A. I can only answer that by saying there are very, very large numbers of cases in Florida in which D.N.A. is deposited on bandanas. In any given circumstance, it's very hard for me to state that it wouldn't be possible. It is a very good source—a mouth is a very good source of D.N.A.
>
> Q. Depending on where the sample was taken, is it possible where the sample—
>
> A. If the sample—
>
> Q. —was taken?

A. I'm sorry for interrupting you. If the sample were taken from the wrong part of the mask, then you would not detect any.

Q. Do we know where on the bandana the sample was taken from D.L.I.'s testing, based on what D.L.I. reports that we have?

A. I believe that what they analyzed was what F.D.L.E. gave them.

Id. at 20-22.

Under questioning from the District Court, Dr. Litman explained the DNA stipulation at trial was inaccurate because the Y-STR DNA test would have excluded Mr. Brown from the mask. *Id.* at 23-24. Nevertheless, "Mr. Brown could neither be identified nor excluded as a contributor to the minor portion of the D.N.A. found on the bandana." *Id.* at 24.

3. The District Court Rules The Petition Is Untimely

Ultimately, the District Court ruled the petition was untimely and that Mr. Brown had failed to satisfy the actual-innocence gateway of *Schlup* v. *Delo*, 513 U.S. 298 (1995), to allow merits review of Mr. Brown's procedurally defaulted habeas claims. Pet. App. B at 17-19 (citations omitted). The District Court recited the *Schlup* standard (Mr. Brown "'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence'") and applied it to the evidence:

> The record reflects the following. Cheryl Wiggins, one of the eyewitnesses, testified that she recognized Petitioner after she grabbed the mask and bandana from the burglar's face. She testified that Petitioner wore the bandana underneath the mask. She also testified that she recognized Petitioner's voice. Additionally, she attested that Petitioner was previously known to her. Melvin Wiggins, Sr., another eyewitness, testified that he had previously known Petitioner. He too stated that he recognized Petitioner during the crime. Although the results

> from the STR (short tandem repeat) DNA typing showed that Petitioner was excluded as a contributor to the DNA profile as a wearer of the mask, he could not be similarly excluded from the minor component of the DNA profile as a wearer of the bandana. Both eyewitnesses had a demonstrated dislike for the Petitioner, a fact that was made known to the jury. The eyewitness testimony from these two eyewitnesses remains uncontradicted by the newly submitted scientific evidence. Indeed, Dr. Litman testified that it is possible to wear a mask over a bandana and not leave DNA on the mask. Although Dr. Litman testified that Petitioner can neither be identified or excluded as a contributor to the minor component of the DNA profile as a wearer of the bandana, this is simply not enough scientific evidence to show that it is more likely than not that no reasonable juror would have convicted Petitioner in the light of the new evidence.

Pet. App. B at 13, 17-18 (citations and footnote omitted).

Measuring this evidence against the *Schlup* metric, the District Court concluded, "[a]lthough the Court does not have complete confidence in the jury's verdict, and the Court is not entirely convinced that a jury, upon re-trial, if presented with the new DNA test results along with supporting expert analysis, would reach the same result, Petitioner has not met his substantial burden." *Id.* at 18. In a footnote, the District Court conceded, "the subsequent DNA test results from the bandana are of little probative value considering Dr. Litman's assessment that one in three individuals would possess the two alleles utilized for the statistical calculations." *Id.* at 18 n.9. Despite that concession, the District Court ultimately ruled, "[a]lthough Petitioner may have shown that a reasonable doubt exists in the light of the new evidence, he has not shown that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 19. The District Court *sua sponte* granted a certificate of appealability. *Id.* at 20-21.

4. The Court Of Appeals Affirms

On appeal, the Court of Appeals concluded the Y-STR DNA results did not meet the *Schlup*, *House*, and *McQuiggin* standard because "Brown's DNA evidence fails to contradict the eyewitness identifications of him as the perpetrator of his crimes." Pet. App. A at 2. In its view, the new DNA results "d[id] not prove that Brown did not wear the mask left at the scene or contradict the testimony from Cheryl and Melvin Sr. identifying Brown as a burglar." *Id.* at 14. "Although the results exclude[d] Brown as a contributor of DNA on the mask, Brown's expert, Dr. Litman, acknowledged that Brown could have left DNA on another part of the mask." *Id.* at 14-15. Moreover, Mrs. Wiggins "testified that Brown was wearing a bandana under his mask, a bandana was found at the scene with the mask, and Dr. Litman acknowledged that a bandana worn under a mask could prevent DNA from transferring to the mask." *Id.* at 15. As such, the "new DNA test results do not eliminate Brown as the burglar who wore the mask or contradict Cheryl's and Melvin Sr.'s positive identification of Brown as the perpetrator." *Id.* Furthermore, "other eyewitnesses' accounts" also "point to Brown's involvement." *Id.* For instance, Mrs. Wiggins "called the perpetrator by Brown's first name," and the intruders "referred to Cheryl by a nickname used by Nakita." *Id.* The Court of Appeals therefore affirmed. *Id.* at 16.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS APPLIED TESTS INCOMPATIBLE WITH *SCHLUP* V. *DELO*, *HOUSE* V. *BELL*, AND *MCQUIGGIN* V. *PERKINS* WHEN IT CONCLUDED THE NEW DNA EVIDENCE FAILED TO CHANGE THE EVIDENTIARY LANDSCAPE AND SATISFY THE ACTUAL-INNOCENCE GATEWAY

The Court of Appeals required Mr. Brown to satisfy exceedingly stringent tests that were contrary to this Court's procedural actual-innocence standards. First, the Court of Appeals considered the evidence of Mr. Brown's guilt in a vacuum without questioning whether the new DNA evidence challenged that evidence's credibility. Second, the Court of Appeals demanded absolute certainty that Mr. Brown did not commit the crimes, which is not the test.

A. To Establish Procedural Actual Innocence, A Petitioner Must Show It Is More Likely Than Not That No Reasonable Juror Would Have Convicted Beyond A Reasonable Doubt, But Need Not Show "Absolute Certainty" Of His Innocence

In a trilogy of cases, this Court has explained the standards that govern claims of procedural actual innocence, such as the one Mr. Brown now raises. *See generally McQuiggin* v. *Perkins*, 133 S. Ct. 1924 (2013); *House* v. *Bell*, 547 U.S. 518 (2006); *Schlup* v. *Delo*, 513 U.S. 298 (1995).

In *Schlup*, this Court distinguished procedural actual innocence from substantive actual innocence. 513 U.S. at 313-14. Specifically, a claim of substantive actual innocence means the habeas petitioner did not commit the crime. *Cf. Herrera* v. *Collins*, 506 U.S. 390, 417 (1993) (assuming *arguendo* that execution of an actually innocent defendant would be unconstitutional); *see also McQuiggin,* 133 S. Ct. at 1931 ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."). In contrast, a claim of proce-

dural actual innocence is a gateway for bringing a procedurally defaulted habeas claim. *Schlup*, 513 U.S. at 313.

Ordinarily, to bring a procedurally defaulted habeas claim, a petitioner must "establish 'cause and prejudice' sufficient to excuse his failure." *Id.* Absent cause and prejudice, a habeas petitioner "may obtain review of his constitutional claims only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Id.* One example of fundamental miscarriage of justice is a case presenting a claim of procedural actual innocence. *Id.* In other words, procedural innocence is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* (quoting *Herrera*, 506 U.S. at 404).

Given these distinctions, procedural claims "need carry less of a burden" than substantive claims. *Id.* at 316. For instance, for a substantive claim, "the evidence of innocence would have had to be strong enough to make [a petitioner's punishment] 'constitutionally intolerable' *even if* his conviction was the product of a fair trial." *Id.* (emphasis in original). Put otherwise, a substantive claim "would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [a petitioner's] innocence." *Id.* at 317. But, for a procedural claim, "the evidence must establish sufficient doubt about [a petitioner's] guilt to justify the conclusion that his [punishment] would be a miscarriage of justice *unless* his conviction was the product of a fair trial." *Id.* at 316 (emphasis in original). In other words, "a

petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

Schlup took care to explain that this distinction is subtle: "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329. "Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.*

House, in turn, clarified that "the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence." 547 U.S. 518, 538 (2006). Rather, a "petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *Id. House* further explained this analysis requires habeas courts "to assess how reasonable jurors would react to the overall, newly supplemented record," which "'may include consideration of 'the credibility of the witnesses presented at trial.'" *Id.* (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 330 (1979)).

Finally, *McQuiggin* once again "stress[ed]" that "the *Schlup* standard is demanding." 133 S. Ct. at 1936. "The gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the

outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error.'" *Id.* (quoting *Schlup*, 513 U.S. at 316).

B. The Court Of Appeals Failed To Consider How The Eyewitness Identifications And Jailhouse Informant's Testimony Were Unreliable And Lacked Credibility

In performing a truncated application of the *Schlup* standard, the Court of Appeals failed to consider, as encouraged by *House*, whether the eyewitness identifications and the jailhouse informant's testimony were credible in light of the new DNA evidence.

1. The Eyewitness Identifications Are Not Credible

"The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States* v. *Wade*, 388 U.S. 218, 228 (1967). "The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country." *Perry* v. *New Hampshire*, 132 S. Ct. 716, 738 (2012) (Sotomayor, J., dissenting) (citation and punctuation omitted). In fact, "[r]esearchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification." *Id.* at 738-39 2012) (Sotomayor, J., dissenting) (citation omitted). Indeed, "[s]tudy after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; [and] that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy." *Id.* at

739 2012) (Sotomayor, J., dissenting) (collecting authorities). For instance, eyewitness identifications are often unreliable when they involve "cross-racial identification, identification after a long delay, identification after observation under stress, and such psychological phenomena as the feedback factor and unconscious transference."[7] *United States* v. *Angleton*, 269 F. Supp. 2d 868, 873 (S.D. Tex. 2003).

This home invasion presents a classic situation in which the eyewitnesses were making an "identification after observation under stress," subject to the "feedback factor," and influenced by "unconscious transference." *Angleton*, 269 F. Supp. 2d at 873. For that reason, the eyewitness identifications are unreliable.

a. Observation Under Stress

In a moment of complete candor, Mrs. Wiggins admitted, "The only thing I really heard and saw was the gun." C.A. App. 16-14 at 82. That admission should come as no surprise, because she was involved in a highly dangerous and emotional struggle during which her life and her loved ones' lives were in danger. Obviously, it is stressful to have armed intruders invade one's home, brawl, brandish their pistols, and exclaim, "Bitch, you done called the motherfucking police on me, I'm going to blow your motherfucking brains out." C.A. App. 16-14 at 62. Additionally, it bears mention that these crimes occurred on September 11, 2001—i.e., the same day terrorists crashed two planes into the World Trade Center, toppling the twin towers,

[7] "The 'feedback factor' involves the effect of post-event information on the memory of the event, including discussions among witnesses which may unconsciously reinforce mistaken identifications. 'Unconscious transference' allows a person to remember a face but not the circumstances under which the person saw the face." *Id.* at 873 n.3 (citations omitted).

crashed a third plane into the Pentagon, crashed a fourth plane into a field in Pennsylvania, and murdered 2,977 innocent people. In almost four centuries of modern American history, few days, if any, can compare to the amount of emotional trauma experienced by the national consciousness. Collectively, these sources of significant stress render the eyewitness identifications unreliable.

b. The Feedback Factor

Moreover, each of the eyewitnesses was subject to the feedback factor: Mr. Wiggins, Sr. and Mr. Wiggins, Jr. both heard Mrs. Wiggins repeatedly shout "Ricco." *Id.* at 66-67 (Mrs. Wiggins), 100-03 (Mr. Wiggins, Sr.), 148 (Mr. Wiggins, Jr.). In fact, when asked why he suspected Mr. Brown was the intruder, Mr. Wiggins, Jr. candidly admitted he was subject to the feedback factor: "Because basically my mother and him didn't like each other at all, and then when my mother screamed his name, 'Ricco, Ricco, what are you doing here,' I just kind of put two and two together and added it up, maybe he did this. I don't know." *Id.* at 148. Even though Mr. Wiggins, Sr. and Jr. were not particularly familiar with Mr. Brown (in fact, Mr. Wiggins, Jr. could not identify Mr. Brown in court), *id.* at 98-99, 132, they both concluded, after being influenced by Mrs. Wiggins's exclamations, that Mr. Brown was involved. *Id.* at 102, 148. And it was not until after these exclamations that Mr. Wiggins, Sr. was pistol-whipped—in the head, no less—and then obtained his first unobstructed view of the unmasked intruder. *Id.* at 102. The feedback factor renders the eyewitness identifications unreliable.

c. Unconscious Transference

Further, Mrs. Wiggins and Mr. Wiggins, Sr. were both influenced by unconscious transference, because they both focused their gaze on the unmasked intruder's "weak eye." *Id.* at 67, 113. Yet Mr. Smith testified that Mr. Brown's brother-in-law and supposed accomplice, Mr. Johnson, also had a defective eye. *Id.* at 298-99. Although the Mr. Wiggins, Sr. and Mrs. Wiggins testified they knew and did not like Mr. Brown, *id.* at 70, 74, 104, 111, they did not testify that they knew Mr. Johnson. Accordingly, it is quite likely that Mr. Wiggins, Sr. and Mrs. Wiggins confused Mr. Johnson for Mr. Brown. Unconscious transference renders the eyewitness identifications unreliable.

d. Nakita's Testimony

Finally, Nakita's testimony is best understood as that of a seven-year-old girl. There is no indication she meant the intruders used the precise words "Auntie Chubby." *See supra* note 3. It is equally likely she meant the intruders asked for Mrs. Wiggins, whom she happened to call "Auntie Chubby." But even if the intruders did say "Auntie Chubby," that would not implicate Mr. Brown any more than it would implicate Mr. Johnson, who, as Mr. Brown's brother-in-law, more likely than not had visited Ms. Alexander's and Mr. Brown's home, where Nikita lived, on many occasions.

2. The Jailhouse Informant's Testimony Is Incredible

Mr. Smith's testimony is so incredible it borders on comical. First of all, Mr. Smith had known Mr. Johnson for about six years and sometimes hung out with him. *Id.* at 293. In all likelihood, Mr. Smith learned everything he knew from Mr.

Johnson. *See id.* at 293-95. And much of Mr. Smith's testimony was contrary to all evidence in the case. He testified there was a getaway car, when no other witness testified they heard a car approach or drive away. *Id.* at 287-88. He testified Nakita recognized Mr. Brown, when Nakita testified she recognized nobody. *Id.* at 288. He testified the intruders entered the master bedroom and stole money and drugs from a drawer, when no other witness so testified. *Id.* at 289. He testified the intruder struck Mrs. Wiggins with the gun, when Mrs. Wiggins and Mr. Wiggins, Sr. both testified he struck Mr. Wiggins, Sr. *Id.* at 289-90. And he testified about Mr. Brown's supposed sex alibi, when no other witness testified about sex. *Id.* at 291.

Finally, Mr. Brown's written statement about Mr. Smith to Detective Valentine that "I told that green buck-ass nigger to see if he would tell that lame ass jailhouse shit," *id.* at 433, does not change that lack of credibility. From this statement, it is impossible to tell what precisely Mr. Brown told Mr. Smith and whether or not those statements were intentionally fabricated lies.

C. Given This Lack Of Credibility In The Evidence Of Mr. Brown's Guilt, The Court Of Appeals Overlooked How The New DNA Evidence Establishes It Is More Likely Than Not That Every Juror Would Have Found Reasonable Doubt

Given this lack of credibility in the eyewitness identifications and the jailhouse informant's testimony, it is the new DNA evidence that establishes it is more likely than not that every juror would have found reasonable doubt. That is because, contrary to the Court of Appeals' conclusion, the new DNA evidence did contradict the eyewitness identifications.

The Court of Appeals seized on Dr. Litman's statement that it was "possible" the bandana prevented Mr. Brown's DNA from reaching the mask. *Compare* Pet. App. A at 10, 11, 15, *with* C.A. App. 61 at 20-22. But this is altogether the wrong test. For instance, it is "possible" that Brazilian supermodel Giselle Bündchen will divorce New England Patriots starting quarterback, Super Bowl champion, and future Hall of Famer Tom Brady and marry undersigned counsel. But that is not a realistic possibility. A reasonable doubt involves "the kind of doubt that would make a person hesitate to act" in the most serious and important affairs of one's life. *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Only a fool would not hesitate to reorder the most serious and important affairs in his life based on such a remote possibility. In a similar vein, by definition, reasonable jurors are not fools, and only a fool would return a guilty verdict against Mr. Brown based on the fact that it is "possible" that the bandana somehow blocked his DNA from reaching the mask.

For that to be the case, the bandana must have covered Mr. Brown's mouth. As Dr. Litman testified, "a mouth is a very good source of D.N.A." C.A. App. 61 at 21. If the bandana did not cover Mr. Brown's mouth, then it is a forensic miracle that Mr. Brown was excluded as a DNA donor on the mask. *See id.* at 18. But if the bandana did cover Mr. Brown's mouth, then it is astonishing why his DNA on the bandana (1) was the minor component rather than the major component, and (2) was found at only 2 alleles instead of all 16. *See id.* at 14-15. Had Mr. Brown truly worn the bandana and mask, the DNA samples should have been much larger and better. Ordinarily, the simplest explanation is best, which means Mr. Brown

never wore the bandana or mask because he did not burgle the Wiggins residence or assault and batter its occupants. At the very least, given this new DNA evidence, every reasonable juror would have had reasonable doubt whether Mr. Brown did.

* * *

The Court of Appeals performed a truncated application of *Schlup*, *House*, and *McQuiggin*. It failed to perform the delicate counterfactual "assess[ment] how reasonable jurors would react to the overall, newly supplemented record." *House*, 547 U.S. at 538. Instead, it demanded Mr. Brown's new DNA evidence to establish "absolute certainty" of his innocence (which is not required), and it considered the eyewitness identifications and jailhouse informant's testimony in a vacuum without assessing how reasonable jurors would react to the new DNA evidence and questioning those witnesses' credibility (which is not permitted). *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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