No. 17-7045

In the Supreme Court of the United States

DANIEL CLATE ACKER, PETITIONER

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2001, a Texas jury convicted petitioner of the capital murder of petitioner's girlfriend, Marquetta George. The jury determined petitioner murdered his girlfriend by strangulation, blunt-force injury, or a combination of the two. Following direct review and a series of failed state habeas petitions, a federal court granted petitioner an evidentiary hearing on his gateway claim of actual innocence, in an attempt to excuse procedural defaults.

Among the evidence presented at the federal hearing was testimony from two new medical experts, one for the State and one for petitioner. The State's expert testified that he agreed with one aspect of the medical examiner's expert opinion of cause-of-death presented at petitioner's trial (blunt-force injury) but disagreed with another (strangulation). The State's evidentiary-hearing expert's opinion did not exonerate petitioner. In stark contrast to petitioner's defense at trial, in that expert's opinion the nature and degree of George's injuries suggested that she had been run over by a vehicle, which petitioner had testified at trial that he did not do.

Consistent with the instructions in *Schlup v. Delo*, 513 U.S. 298 (1995), for assessing a gateway claim of actual innocence, the district court engaged in a thorough review of all the evidence. It determined that reasonable jurors would still find petitioner guilty of capital murder in light of the new evidence. This was not a close call for the court: It held that the totality of the evidence "overwhelmingly supports the strong inference" that petitioner killed his girlfriend. *Acker v. Director, TDCJ-CIV*, No. 4:06-cv-469, 2016 WL 3268328, *24 (E.D. Tex. June 14, 2016). A unanimous panel of the Fifth Circuit concluded that no reasonable jurist would debate the district court's conclusion, and denied a certificate of appealability. No judge called for a poll in response to petitioner's en banc petition.

Petitioner's certiorari petition suffers from a significant vehicle problem, because it omits and therefore waives a necessary antecedent issue: Whether petitioner has made the "extraordinary," "rare" (*Schlup*, 513 U.S. at 324) showing that he is actually innocent of capital murder, as a gateway to presenting procedurally defaulted claims—despite the district court's "clear[] appl[ication of] *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt" (*House v. Bell*, 547 U.S. 518, 540 (2006)) of petitioner's guilt.

Petitioner has sought certiorari on the following questions that were not considered below:

1. Whether it is a due-process violation for a habeas petitioner's conviction to be left undisturbed on habeas review based on (A) new evidence supporting one of several theories presented to the jury and (B) a medical examiner's opinion later questioned by other experts, when that examiner's earlier testimony was not retroactively rendered "false" simply because other experts disagreed with one aspect of that opinion.

2. Whether an oft-denied circuit split over the requirement of prosecutorial knowledge in eliciting false testimony is implicated by this case, when there was no false testimony.

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BRIEF IN OPPOSITION

This case concerns the district court's straightforward application of the *Schlup* standard for gateway actual innocence. That gateway showing is a necessary, antecedent issue to the questions petitioner seeks to present. By not raising that question, petitioner has forfeited review. In any event, the petition does not warrant review of the Fifth Circuit's correct ruling that petitioner failed to show that reasonable jurists would debate the district court's determination that, based on all the evidence (old and new), reasonable jurors would have found petitioner guilty beyond a reasonable doubt. Nor does it warrant review of a (procedurally defaulted and unexhausted) due-process claim grounded in a mischaracterization of the evidence reviewed by the district court.

STATEMENT

1. In 2001, a Texas jury convicted petitioner of capital murder for the death of his girlfriend, Marquetta George. R.420. A grand jury indicted petitioner—and he was tried—on the theory that he kidnapped George and then murdered her either by strangulation, blunt-force injury, or a combination of the two. R.1963-64, 1974-75.[1]

At petitioner's trial, several witnesses testified that petitioner and George got into a heated argument at a nightclub the evening before George's death. R.421. Petitioner suspected that George was sleeping with another man, and this infuriated him. R.422. Multiple times that night, he threatened to kill her. R.421. Because of his behavior, petitioner ended up getting kicked out of the nightclub. R.421. He returned several times, looking for George, but could not find her. R.421.

Petitioner ended up staying out all night looking for George. 19 R.R. 92-93.[2] The next day, while still searching for George, he continued to make threats that he would kill her if he found out that she was seeing somebody else. R.422. Later that morning, a man dropped off George at the trailer she shared with petitioner and then left. R.422. Minutes after entering the trailer, George came running out of the house toward her neighbors, screaming at them to call the police (which they did). R.422. Petitioner then ran out, grabbed George, slung her over his shoulder, and forced her—kicking and screaming—into his pickup truck before speeding off down the road. R.422.

[1] "R." refers to the record in the Fifth Circuit.

[2] "R.R." refers to the court reporter's trial transcripts in petitioner's state proceeding.

Soon after, about ten miles away from petitioner and George's home, Brodie Young drove by a peculiar scene on the side of a country road. R.423. Young saw petitioner get out of his truck, go over to the passenger-side door, pull a non-responsive George out of the vehicle, and lay her on the ground. R.423. Young found the scene suspicious enough that he drove to the sheriff's office to report the incident; by that time, someone had already found George's body and alerted law enforcement. R.423. Petitioner was quickly arrested. R.1987.

Medical examiner Dr. Morna Gonsoulin performed George's autopsy, and later testified at trial about George's injuries and the causes of her death. R.423-24. In Dr. Gonsoulin's opinion, George's extensive injuries (including a crushed skull, multiple rib fractures, a torn heart, various other internal injuries, abrasions all over her body, and a deep laceration in her lower right leg) suggested that she had died from homicidal violence. R.423-24. Dr. Gonsoulin opined that the injuries were consistent with strangulation and "blunt force injury resulting from an impact with or being ejected from a motor vehicle." R.424. She could not say which method in particular—that is, manual strangulation or impact with a blunt-force object—actually caused George's death. 20 R.R. 221.

Petitioner testified at his trial, admitting that he had carried George to his truck but denying that he had forced her into it and that he had kidnapped her. R.424. He also insisted on his innocence of the murder charge. R.424-425. Petitioner testified that George jumped from the moving truck, an action he said George had attempted in the past. R.424-25. He said that he tried to reach over to stop her, but that this time she was successful. R.424. Petitioner said that he circled back and found George's body, and then he picked her up with the intention of putting her into his truck; but petitioner said that when he discovered she was dead, he put her back down on the side of the road. 21 R.R. 242-43. Petitioner said

that he panicked, took off, and did not report the accident right away for fear of getting a driving-while-intoxicated charge. 22 R.R. 83-83.

At the end of trial, the court instructed the jury on the offenses of kidnapping, murder, and capital murder—the latter two on the theories that petitioner killed George by strangulation and/or the infliction of blunt-force injuries. R.357-65. The jury convicted petitioner of capital murder and the trial judge sentenced him to death. R.420-21.

2. Petitioner, represented by counsel, appealed his conviction and sentence. The Texas Court of Criminal Appeals affirmed. *See Acker v. Texas*, No. AP-74, 109, 2003 WL 22855434 (Tex. Crim. App. Nov. 26, 2003) (not designated for publication) (at R.420-40).

3. Petitioner, again represented by counsel, filed a state habeas petition presenting forty-six claims of error. R.443-519. The trial court held an evidentiary hearing on those claims. While that petition was pending, petitioner filed a separate *pro se* habeas petition. The Texas Court of Criminal Appeals considered the initial petition on the merits and denied petitioner's claims. *See Ex Parte Acker*, Nos. WR-56, 841-01 & 841-03, 2006 WL 3308712 (Tex. Crim. App. Nov. 15, 2006) (not designated for publication) (at R.556-57.). It also dismissed the *pro se* petition on procedural grounds. R.556-57.

4. Petitioner then filed a timely first habeas petition in federal court. R.94-350. Because that petition presented claims that petitioner had not raised in his initial state habeas petition, at petitioner's request, the district court held the proceedings in abeyance while petitioner exhausted his state remedies. R.1040-42. The Court of Criminal Appeals dismissed the resulting successive habeas petition as an abuse of the writ. R.25-26.

Back in federal court, petitioner filed the habeas petition at issue here. R.1063-1344. Petitioner sought, and the district court granted, an evidentiary hearing on his gateway actual-innocence claim to excuse his state-habeas procedural default. R.2058-2219.

By this stage in the post-conviction proceedings, both petitioner's and the State's new medical experts agreed that the injuries suffered by George were inconsistent with strangulation. *See, e.g.*, R.2066. Both also agreed that George died as a result of blunt-force injuries. R.2111-12. But they disagreed on the likely cause. Petitioner's expert, Dr. Larkin, was of the opinion that George likely jumped from the vehicle; but even petitioner stipulated that if Dr. Larkin (who was unavailable to testify at the hearing) were questioned, Dr. Larkin would concede based on the medical evidence that it was impossible to say whether George had jumped or been pushed out of the car and that it was possible that George had been run over. R.2176. The State's expert, Dr. Di Maio, meanwhile, was of the opinion that George had been run over by a vehicle. R.2126. In Dr. Di Maio's opinion, George's injuries were too extensive and particular to have been caused merely by falling out of a car. R.2126.

Petitioner also presented witnesses at the federal evidentiary hearing who testified to matters that had been excluded from his trial on state-law evidentiary grounds. R.2058-2219. The parties submitted post-hearing briefs. R.1827-1909.

In a 108-page opinion, the district court denied petitioner's petition, holding that petitioner had failed to make a sufficient showing to overcome the procedural bar, and *sua sponte* denied a certificate of appealability. *Acker*, 2016 WL 3268328.[3] The district court

[3] The district court's opinion is available at 2016 WL 3268328 and in the record at ROA.1945-2053. The district court's opinion is also included in the Appendix (Pet. App. B) with Westlaw pagination.

considered "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id.* at *8 (quoting *House*, 547 U.S. at 538) (internal quotations omitted); *accord Schlup*, 513 U.S. at 327-28. Based on its thorough review of the evidence, 2016 WL 3268328, at *10-24, the district court determined that "the totality of the evidence, if presented to a reasonable jury, overwhelmingly supports the strong inference" that petitioner caused George's death by blunt-force injury, *id.* at *24.

5. Petitioner then sought a certificate of appealability from the Fifth Circuit. In an unpublished per curiam opinion, the court denied that request. *See Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017) (per curiam).[4] The court extensively analyzed petitioner's gateway claim of actual innocence, which he raised to excuse the procedural default of his other claims. *Id.* at 392-97. Like the district court before it, the court of appeals considered all the evidence—that introduced at trial, that excluded from trial, as well as new evidence introduced at the federal evidentiary hearing—and considered the inferences that could be drawn from all that evidence in making its probabilistic determination of what reasonable, properly instructed jurors would have done. *Id.* at 393-97.[5] Ultimately, the Fifth Circuit concluded that "reasonable jurists could not debate the district court's decision that the totality of the evidence, including the new medical expert testimony and the evidence that

[4] The court of appeals' opinion is also included in the Appendix (Pet. App. A) with Westlaw pagination.

[5] Although extensive, the court of appeals' analysis was necessarily less exhaustive than the district court's because it was deciding whether to issue a certificate of appealability. At that stage, a court of appeals is required to make a "threshold inquiry" rather than engage in "full consideration of the factual or legal bases adduced in support of the claims" without jurisdiction to do so. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

the trial court excluded, supports the conclusion that Acker murdered George on a theory with which he was charged in the indictment and on which his jury was instructed." *Id.* at 394. The court also concluded that reasonable jurists would not debate "the district court's conclusion that Acker failed to carry his burden of demonstrating 'that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.'" *Id.* (quoting *House*, 547 U.S. at 538). Because the court of appeals concluded that petitioner failed to make out a gateway showing of actual innocence, the court did not consider the merits of his procedurally defaulted habeas claims. *Id.* at 397.

Petitioner filed a petition for rehearing en banc. No judge called for a response to the petition, and it was denied. Doc. No. 00514153810, *Acker v. Davis*, No. 16-70017 (5th Cir. Sept. 13, 2017).[6]

ARGUMENT

I. A Significant Vehicle Problem Precludes Review of Both Questions Presented, Because Petitioner Has Not Presented the Necessary, Antecedent Question Whether He Can Show Actual Innocence under the *Schlup* Gateway for Procedurally Defaulted Claims.

A. Consideration of the Procedurally Defaulted Issues in the Questions Presented Would Require Petitioner First to Satisfy *Schlup*'s Actual-Innocence Gateway.

Petitioner's petition misconstrues the posture of his habeas case. His petition to this Court includes one stray reference to *Schlup*, in a footnote to the facts section, as part of a discussion about how counsel agreed in the federal evidentiary hearing that the court could consider all the evidence. Pet. 20 n.21. This elides the fact that the procedurally defaulted

[6] The Fifth Circuit's denial of petitioner's petition for rehearing en banc is also included in Pet. App. A, following the panel opinion.

questions presented in the instant certiorari petition are all contingent on first satisfying the *Schlup* actual-innocence gateway to overcome procedural default[7]—as petitioner acknowledged below.[8]

Petitioner's due-process claim is, at best, procedurally defaulted. Under the most charitable reading, that claim was raised belatedly for the first time in petitioner's third state habeas petition.[9] The Texas Court of Criminal Appeals denied that petition as an abuse of the writ. *See Ex Parte Acker*, No. WR-56, 841-04, 2008 WL 4151807, at *1 (Tex. Crim. App. Sept. 10, 2008) (per curiam) ("We have reviewed these claims and find that they do not meet the requirements of Article 11.071, Section 5 for consideration of subsequent claims. This application is dismissed as an abuse of the writ."); *see also Acker*, 693 F. App'x at 398; *Acker*, 2016 WL 3268328, at *6. The Fifth Circuit has observed that "the Texas abuse of the writ

[7] *See, e.g.*, *Acker*, 693 F. App'x at 397 (court of appeals noting that it resolved petitioner's claim on the threshold *Schlup* showing of actual innocence; "[b]ecause reasonable jurists could not debate the district court's decision that Acker failed to show actual innocence, consideration of his procedurally defaulted due process claim is not necessary"); *Acker*, 2016 WL 3268328 at *12 (district court noting that it was only "considering the validity of the actual innocence claim itself as a gateway to whether to consider Petitioner's other, constitutional, claims on their merits").

[8] *See, e.g.*, Application of Petitioner-Appellant for Certificate of Appealability and Brief in Support, at 27 *Acker v. Davis*, No. 16-70017 (5th Cir. Nov. 16, 2016), Doc. 00513762916 ("COA Application") ("[The cases cited in support of the procedurally defaulted due-process claim] discuss the due process violation when an appellate court upholds a conviction based on a theory that was not submitted to the jury, whereas *this Court will be making a determination based on the Schlup/House standard for actual innocence gateway claims*.") (emphasis added); COA Application i (asking for two of the issues on which he sought certificates of appealability, his gateway "claim of actual innocence" and his underlying claim alleging "a violation of due process" to be "[c]onsidered jointly"); COA Application 21-23 (discussing the case as involving the *Schlup* standard of review); R.2069-70, 2171, 2193 (petitioner's counsel repeatedly stating at the evidentiary hearing that the standard of review to be applied in his case is *Schlup* gateway actual innocence).

[9] *See infra* Part II.A (discussing that, in fact, petitioner never presented his current conception of this claim to the State court, and thus never exhausted his state remedies).

doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) (collecting cases). And petitioner does not challenge that in his certiorari petition.[10]

The state court's denial of petitioner's claim as an abuse of the writ erected a roadblock to the federal district court's consideration of that claim. It is well established that a federal court may not grant a petition for a writ of habeas corpus where the state court expressly denied the claim based on an independent and adequate state procedural bar. *Coleman v. Thompson*, 498 U.S. 411, 423-24 (1991). The way petitioner attempted to get around this procedural default was by claiming that his is the "narrow" exception where "the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). That actual-innocence claim—"a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *Schlup*, 513 U.S. at 315—is a threshold issue to the questions petitioner now seeks to present.

[10] To the extent petitioner now seeks to present his due-process claim as not having been procedurally defaulted, but rather adjudicated on the merits, that would effectively spell the end of his due-process claim by excluding the evidence from the federal evidentiary hearing. This Court held in *Cullen v. Pinholster* that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of [28 U.S.C.] § 2254(d)(1) on the record that was before the court. 563 U.S. 170, 185, 188 (2011); *id.* at 184 (observing that "evidence later introduced in federal court is irrelevant to § 2254(d)(1) review"). This does not apply to petitioner's threshold actual-innocence claim. *See Acker*, 2016 WL 3268328, at *9 n.9.

Petitioner, however, did not include this necessary, antecedent issue in his questions presented. "As a general rule," this Court does "not decide issues outside the questions presented by the petition for certiorari." *Glover v. United States*, 531 U.S. 198, 205 (2005); *see also* S. Ct. R. 14.1 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). He has thus forfeited review of this only issue actually decided below (*see, e.g.*, *Acker*, 693 F. App'x at 397) and a necessary precursor to his due-process claims. *See, e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-45 (1992) (holding forfeited an issue not raised in the petition for certiorari).

B. The Courts Below Correctly Denied Relief on Petitioner's Gateway Actual-Innocence Claim.

The district court—and, as part of its limited review for the purpose of assessing petitioner's application for a certificate of appealability, the court of appeals[11]—followed *Schlup* to the letter. The district court exhaustively reviewed all the evidence in this case, including new evidence presented at the federal hearing as well as evidence excluded from the trial on evidentiary grounds but reoffered by petitioner at the federal evidentiary hearing. After considering the totality of the evidence, the district court determined that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Acker*, 2016 WL 3268328, at *7-24; *see House*, 547 U.S. at 537-38 (discussing standard); *Schlup*, 513 U.S. at 332 (same). And the court of appeals—after conducting its own exhaustive review of the

[11] Before considering an appeal on its merits, a court of appeals must first determine that the habeas petitioner made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (discussing the § 2253(c) standard). The Fifth Circuit held that Acker did not make this showing. *See Acker*, 693 F. App'x at 394.

evidence—held that that ruling was not debatable. *Acker*, 693 F. App'x at 392-97. Petitioner has provided no reason for this Court to upset those conclusions.

1. This Court has stated that it is exceedingly difficult to pass through the *Schlup* gateway: "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 . . . ." *House*, 547 U.S. at 538. Simply establishing "reasonable doubt" is insufficient. *Schlup*, 513 U.S. at 329. That is because the standard "does not merely require a showing that reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.*

As this Court put it in *Schlup*, a petitioner "comes before the habeas court with a strong—and in the vast majority of cases conclusive—presumption of guilt." *Id.* at 326 n.42. Not surprisingly, then, successful gateway claims of actual innocence are "extremely rare," *id.* at 321, with relief reserved for the "extraordinary case" (*Murray v. Carrier*, 477 U.S. 478, 496 (1986)) where there was "manifest injustice," *Schlup*, 513 U.S. at 327.

In assessing a gateway claim of actual innocence, the federal court "consider[s] 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327-28). "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Id.* (quoting *Schlup*, 513 U.S. at 329).

2. In keeping with the *Schlup* standard, the district court engaged in a wide-ranging analysis of the record in petitioner's case, taking into account all the evidence, including new evidence derived from the federal evidentiary hearing, and assessing the credibility of

that evidence and witness testimony. *See Acker*, 2016 WL 3268328, at *10-24; R.1963-89. The court of appeals then did so again, albeit in the threshold posture of assessing whether petitioner was entitled to a certificate of appealability. *See Acker*, 693 F. App'x at 385-97.

The district court first examined the indictment and jury instructions, correctly noting that the jury could properly have convicted petitioner under a theory of strangulation, blunt-force injury, or a combination of the two. *Acker*, 2016 WL 3268328, at *10-11; R.1963-65.

The court then scoured the trial record for evidence bearing on whether petitioner was actually innocent. *Acker*, 2016 WL 2016 WL 3268328, at *13-16; R.1968-75. As part of that review, the court properly took account of the several witnesses who testified that petitioner threatened George the night before, and the morning of, her death. These included Mary Peugh who witnessed the heated argument between petitioner and George at the nightclub the night before George's death, and who heard petitioner say, "I'm going to kill that bitch," after the argument at the nightclub. 19 R.R. 25. Similarly, Timothy Mason testified that petitioner told him that same night that "he was going to kill" George. 19 R.R. 41. As petitioner's friend of fifteen years (19 R.R. 42), Mason would have been in a good position to know if these were just idle words. But he found the threat credible enough to warn George himself before leaving the nightclub because he "wanted to get away from there." 19 R.R. 41.

After staying out all night looking for George, petitioner made similar threatening statements to George's mother about his desire to find George and the man he suspected she had been sleeping with, and to kill them. *See* R.1971 (discussing 19 R.R. 89-115). Further buttressing that claim was testimony from petitioner's sister, Dorcas Vittatoe, who

saw an emotionally distraught petitioner the morning of George's death, searching for George and talking about what he would do to her. 19 R.R. 73-74. The night before, petitioner also made similar threatening statements to Vittatoe about George . *See* 19 R.R. 71 ("If I find her with another man they will pay."); *see also* 19 R.R. 69-71 (petitioner asked Vitatoe for his knife back; Vitatoe refused to give it to him).

The trial record further establishes that when petitioner finally caught up with George on the morning of her death, he assaulted her. *See, e.g.*, 21 R.R. 224-25; 22 R.R. 50-56. Petitioner's neighbor, Thomas Smiddy, testified that when petitioner arrived back at the trailer house he shared with George, George ran out of the house toward Smiddy, sought shelter behind Smiddy's wife (who also testified in petitioner's murder trial), and yelled at the Smiddys to call the sheriff. 19 R.R. 146. Petitioner came over to them, Smiddy's terrified wife got out of petitioner's way, and petitioner picked up George, threw her over his shoulder, and put her in the cab of the truck. 19 R.R. 147. The whole time, George was kicking and screaming. 19 R.R. 147. Smiddy heard what sounded like George being hit. 19 R.R. 148, 175. Smiddy called the sheriff; meanwhile, petitioner took off swerving back and forth down the road, with George not visible in the truck. 19 R.R. 149.

The district court also took account of the testimony of Brodie Young, who saw petitioner sitting seemingly alone in his truck on the side of the road, "looking peculiar," "like maybe he was talking to himself." 19 R.R. 205. After driving by petitioner, Young observed in his side mirror petitioner getting out of the truck, rushing around to the front, opening the passenger side door, and pulling a lady out. 19 R.R. 206. "Then it looked like he laid her on the side of the road and then got back in his truck." 19 R.R. 208; *see also* 19 R.R. 218 ("I seen him get out of the truck and rush around in front of it and open the front door and pull

the lady out. Then he had his arms under her arms and put her down real quick and then got back in the truck and took off. And that's when I took off."). Young said that petitioner "just put her down on the side of the road right off the edge of the grass and the blacktop." 19 R.R. 208.

The district court also took into account evidence favorable to petitioner. *Acker*, 2016 WL 3268328, at *16-24. The district court, though, was free to make different assessments of that evidence besides what petitioner might have preferred. *Cf. Schlup*, 513 U.S. at 340 (O'Connor, J., concurring) (explaining that a court applying *Schlup* review can "draw reasonable inferences" in its "retrospective analysis of the evidence considered by the jury"). For instance, in looking to the hearsay testimony petitioner had wanted to introduce at trial, the court credited petitioner with producing "at least some evidence" that George had previously attempted to jump from petitioner's truck, while also noting the incontrovertible fact that there was "no actual evidence" that George had jumped from petitioner's truck on the day of her death. *Acker*, 2016 WL 3268328, at *21.[12]

The court also took due consideration of the fact that petitioner maintained in his defense that George died as a result of jumping from his moving truck, while also taking into account the obvious "self-serving nature" of that testimony. *Id.* And the court considered the proffered testimony from petitioner's private investigator, whose experiment tended to suggest that it would have been impossible or at least very difficult for petitioner to push

[12] Nor, for that matter, was this unadmitted hearsay testimony uniformly beneficial to petitioner. For example, testimony from Sabrina Ball at petitioner's federal evidentiary hearing about George's statements that she had previously attempted to jump from petitioner's truck included further evidence of petitioner's history of being violent toward George. *See* R.2161 ("[George said that petitioner] was beating [her] head against the dash").

George out of his truck, while also discounting its probative value due to the experiment's flawed characteristics. *Id.*

The district court also extensively analyzed the medical expert testimony offered at the federal evidentiary hearing. *Id.* at *16-22. As a result of that testimony, in making its assessment of petitioner's actual innocence, the court discounted evidence presented at petitioner's trial suggesting that he had strangled George. *See, e.g.*, *id.* at *12 ("Here, it is clear that one of the prosecution's theories—strangulation—is effectively negated by the evidence provided by both Petitioner's and the State's medical experts, post-conviction. The Court must consider that evidence in making its probabilistic determination [of what a reasonable jury would do].").

The court took into account the opinion of petitioner's medical expert, Dr. Larkin, that George's injuries were sustained by falling from the truck as well as his "plausible alternative scenario" in which he concluded that George voluntarily jumped. *Id.* at *19; *see also id.* at *18, *22. At the same time, though, the court took account of stipulations entered into by petitioner's and the State's medical experts—that "from the medical evidence alone it is impossible to say whether there was a pushing or a jumping of the victim from the vehicle" and that "if questioned, Dr. Larkin would . . . concede that it's possible that Ms. George was run over"—which tended to undercut the weight of that testimony in light of other evidence in the case. *Id.* at *22 (quoting R.2176).

The court also analyzed the testimony of the State's new expert, Dr. Di Maio. *Id.* at*16-22. Dr. Di Maio opined that George suffered numerous external and internal injuries (including a shredded brain, crushed chest, a blown-out heart, internal-organ lacerations, and muscle tears) consistent with having been run over. *Id.* at *19 (discussing R.2111). As to

some of George's injuries, Dr. Di Maio testified, "the only way you could have got it is a tire going over." *Id.* at *22 (discussing R.2111). Dr. Di Maio concluded that George's head was "squashed," *id.* at *17 (discussing R.2109)—a conclusion very similar to that reached by the state's medical expert at trial, that George's "head was crushed," 20 R.R. 208. In Dr. Di Maio's opinion, George could not have gotten those injuries merely by jumping or being pushed out of the truck. 2016 WL 3268328, at*20 (discussing R.2110).

* * *

Only after considering and analyzing all the evidence from the trial and evidentiary hearing pertaining to petitioner's actual innocence did the district court conclude that petitioner did not meet the "daunting" task of showing that "he did not commit the crime of conviction." *McGowen v. Thaler*, 675 F.3d 482, 499 (5th Cir. 2012). That is, the court "clearly appl[ied] *Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt." *House*, 547 U.S. at 540. And its conclusion was hardly equivocal: "[T]he totality of the evidence, if presented to a reasonable jury, overwhelmingly supports the strong inference that Ms. George was unconscious or incapacitated when Mr. Young saw Petitioner pull her from the truck and lay her along the road in front of the truck, that Petitioner subsequently ran over Ms. George with his truck, and that event was the cause of her death." *Acker*, 2016 WL 3268328, at *24.[13]

[13] For the same reason—that is, petitioner's inability to prove actual innocence in light of all the evidence, old and new—the district court correctly rejected petitioner's "pro forma attempt" to make out a "'freestanding' claim" of actual innocence. *Acker*, 2016 WL 3268328, at *9. This Court has not resolved whether such a standalone claim even exists. *See, e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

II. Review of Petitioner's Due-Process Claim Is Unwarranted Because the Issue Is Not Fairly Presented and, in Any Event, Is Meritless.

Following the federal evidentiary hearing, petitioner pivoted from his earlier litany of habeas claims to the due-process argument he now makes here. In keeping with precedent,[14] the courts below had no occasion to review this claim on the merits because petitioner cannot satisfy the *Schlup* actual-innocence gateway to overcome the procedural default of this due-process issue. *See Acker*, 693 F. App'x at 397; *Acker*, 2016 WL 3268328, at *11 ("the issue here is not due process or some other constitutional claim, it is a claim of actual innocence, which is not itself a constitutional claim"). In any event, petitioner's current theory that his trial retroactively lacked fundamental fairness—because his sentence is being upheld on a theory (death by blunt-force injury) supposedly not presented to his jury, Pet. 7-15, 19-27; because of a handful of evidentiary rulings with which he disagrees, Pet. 15-19; and because of supposedly "false testimony," Pet. 27-36—is belied by the facts in his case.

A. Petitioner Has Not Exhausted His State-Court Remedies.

As a threshold matter, petitioner's claim is beyond federal courts' review. The due-process claim on which petitioner now seeks relief was never presented in state court.

Petitioner's most recent state-habeas petition, his *third* such petition—and the federal petition on which this action is based—mentioned an alleged denial of due process but did

[14] *See, e.g.*, *Rocha v. Thaler*, 626 F.3d 815, 824 (5th Cir. 2010) ("Only if the petitioner can show that he is actually innocent of the death penalty can a federal court proceed to consider the merits of the alleged underlying constitutional violation. If a petitioner cannot establish his actual innocence, a federal court cannot, and does not, consider the merits of his habeas claim."); *accord Schlup*, 513 U.S. at 315 (discussing the "gateway" status of actual-innocence review, through which the petitioner must pass before he can "argue the merits of his underlying claims").

not include his current due-process claim. *See* R.1063-1344 (discussing due-process in the context of trial-court bias, ineffective assistance, and cumulative error). Petitioner's current conception of his due-process claim—that he was convicted based on false evidence on a theory that was never submitted to his jury, *see* Pet. 15-19, 25-36—was never submitted to a state court for review. It thus remains unexhausted. *E.g.*, *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Because the long-emphasized rule requiring fair presentation "would serve no purpose if it could be satisfied by raising one claim in state courts and another in federal courts," this Court has "required a state prisoner to present the state courts with the *same claim* he urges upon the federal courts." *Picard v. Connor*, 404 U.S. 270, 276 (1971) (emphasis added).

At the very least, because petitioner's current claim relies almost entirely on new evidence from the federal evidentiary hearing—which petitioner never subsequently presented to a state court—any claim presented to the state court before that hearing has been fundamentally altered. *Vasquez v. Hillery*, 474 U.S. 254, 259 (1986); *see also Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000) (requiring a claim to be represented to the state court before resolution if it is "in a significantly different and stronger evidentiary posture than it was before the state courts"); *Joyner v. King*, 786 F.2d 1317, 1320 (5th Cir. 1986) ("[W]e are unwilling to . . . accommodate new factual allegations in support of a previously asserted legal theory, even though these factual allegations came into existence after the state habeas relief had been denied."); *accord Dickens v. Ryan*, 740 F.3d 1302, 1318-19 (9th Cir. 2014) (en banc); *Demarest v. Price*, 130 F.3d 922, 935-36 (10th Cir. 1997).

Without first presenting this claim in state court, and giving that court a chance to consider its merits, federal courts are in no position to assess whether a denial "resulted in a

decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." 28 U.S.C. § 2254(d)(2). Therefore, even if petitioner were to make out a successful gateway showing of actual innocence, a significant barrier would remain—his need to exhaust state remedies by repetitioning Texas courts—before federal courts could address his current due-process claim.

B. Petitioner Is Not Being Kept in Prison Based on a Theory Not Presented to His Jury.

Petitioner points to several cases (Pet. 25-27) establishing that a court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella v. United States*, 445 U.S. 222, 236 (1980) (citing *Dunn v. United States*, 442 U.S. 100, 106 (1979)). Broadly speaking, the due-process problem in those cases was that "[t]he jury was not instructed on the nature or elements" that formed the basis for the prosecution's appellate theory. *Chiarella*, 445 U.S. at 236; *see also Dunn*, 442 U.S. at 106 ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to the jury at trial offends the most basic notions of due process."); *accord Cola v. Reardon*, 787 F.2d 681, 696 (1st Cir. 1986). None of these cases are implicated here.

1. The due-process concern in the line of cases petitioner points to was the possibility that the defendant had "been punished for noncriminal conduct." *Chiarella*, 445 U.S. at 237 n.21; *accord Cola*, 787 F.2d at 687 (discussing how the charged offense—"participation in [certain] loan transactions"—was determined to be "no crime at all"). There is no similar concern here. Petitioner merely contends that his trial focused principally on one method of committing capital murder (strangulation) as opposed to another (blunt-force injury). *Cf. Gattis v. Snyder*, 278 F.3d 222, 238 n.7 (3d Cir. 2002) ("[Petitioner] was not convicted of this

murder on the basis of evidence that he murdered someone else or committed a different crime; his conviction was not affirmed on the basis of evidence that he murdered someone else .... [I]t is unclear that there was a different 'theory' here in the sense at issue in *Dunn* and *Cola*; the only variation concerns precisely how [petitioner] killed [the victim].").

2. Petitioner also ignores the distinction between a direct appeal and habeas review. The cases petitioner cites concern the impropriety of upholding a defendant's sentence *on direct appellate review* on a theory not raised at trial. *See generally United States v. McCormick*, 500 U.S. 257, 270 (1991); *Chiarella*, 445 U.S. 222; *Dunn*, 442 U.S. 100; *Rewis v. United States*, 401 U.S. 808 (1971); *see also Cola*, 787 F.2d at 687 ("Cola asserts that the state appeals court, in upholding his conviction on a theory of guilt not presented at trial, violated his due process rights to have such guilt determined on a basis set forth in the indictment and presented to the jury.").

The issue before the district court here was not whether petitioner's conviction should be affirmed, but whether petitioner met his burden on his gateway actual-innocence claim by showing that no reasonable juror would have found him guilty. The district court was entirely correct to note that "the purpose of adjudicating an actual-innocence claim is fundamentally different from either affirming a conviction on direct appeal or determining whether a habeas petitioner has made a showing under 28 U.S.C. § 2244(d) on a constitutional claim." *Acker*, 2016 WL 3268328, at *11. "[T]he Court's role in an actual-innocence claim is to make a *probabilistic determination* on *a totality of the evidence, including newly adduced evidence*, whether reasonable jurors would have found the Petitioner guilty beyond a reasonable doubt." *Id.* As a result, the court properly brushed aside the different-theory-on-appeal cases relied upon by petitioner as "not clearly pertinent here." *Id.*

Petitioner points to no decision employing the *Chiarella* and *Dunn* line of cases—or any others—to limit a federal court's inquiry, on habeas review of a gateway actual-innocence claim, to the principal theory raised at trial.[15] To the contrary, petitioner observes that this Court's case law "'makes plain that the habeas court must consider 'all the evidence,' old and new, incriminatory and exculpatory,'" in making its gateway actual-innocence assessment. Pet. 20 n.21 (quoting *House*, 547 U.S. at 538). In fact, the First Circuit—which decided *Cola*, a case petitioner relies upon, *see* Pet. 26—subsequently cleared up any confusion about whether *Cola* applied to assessments on habeas as opposed to direct review. In *Gattis v. Snyder*, the First Circuit rejected a habeas petitioner's attempt to invoke *Dunn* and *Cola*, declaring "[t]he fundamental flaw" in that argument to be that "[t]he allegedly different theory of guilt was not presented on direct appeal in support of his conviction but in the course of a post-conviction hearing." 278 F.3d at 238; *accord Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) (noting that habeas proceedings are "independent civil dispositions of completed criminal proceedings," and invoking the same limitations on the reasoning in *Cola* and *Dunn*) (quotations omitted).

Contrary to petitioner's protests, *see* Pet. 27, this distinction between direct and habeas review is hardly novel, and for good reason. *See Acker*, 2016 WL 3268328, at *11. As this

[15] Nor does petitioner point to cases limiting a federal court's inquiry in the context of assessing a gateway claim of actual innocence, which is what the district court did here. *See Acker*, 2016 WL 3268328, at *7-24. It is well established that "[t]he habeas court must make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Schlup*, 513 U.S. at 328 (quotations omitted); *see also House*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.") (quotations omitted).

Court has observed, "[t]he principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). The two serve different functions. Direct review is the "principal avenue for challenging a conviction." *Id.* Habeas review, by contrast, is "secondary and limited" because "[f]ederal courts are not forums to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In light of this distinction, courts have routinely "applied different standards on habeas than would be applied on direct review." *Brecht*, 507 U.S. at 634.

3. In any event, the "new" theory petitioner complains of—murder by blunt-force injury—is not new. The theory that petitioner killed George by blunt-force injury featured prominently in every stage of petitioner's prosecution. Petitioner avers otherwise only through the occasional selective quotation.

The prosecution's case featured a blunt-force-injury theory right from the beginning. In his discussion of how petitioner's prosecution was founded on a strangulation theory, petitioner quotes testimony from the grand jury foreman about what the grand jury was and was not able to determine regarding how petitioner strangled George. *See* Pet. 9 (citing 19 R.R. 128). But *immediately after* that quoted passage, the prosecutor asked about, and the foreman testified to, the same sort of grand jury determinations but this time regarding the blunt-force-injury theory of murder:

> Q: Regarding blunt force injury was the Grand Jury able to determine what object was caused to impact with Ms. George?
>
> A: No, sir.
>
> Q: Were you able to determine whether or not it was a -- so it would again be a true statement to say that the Grand Jury was unable to determine the exact nature of the object?
>
> A: Yes, sir.

Q: That was used to impact with or that Ms. George impacted with?

A: Yes, sir.

19 R.R. 129:4-15; *cf.* Pet. 9 (selectively quoting only the portion of the transcript preceding this line of inquiry).

There is no question, either, that petitioner was in fact charged with causing George's death by inflicting blunt-force injury.[16] Petitioner attempts to suggest that there was no separate theory of murder by blunt-force injury by pointing to the fact that the "indictment states 'strangulation . . . *and* blunt force injury,' not 'or blunt force injury.'" Pet. 8. As the district court recognized, *see Acker*, 2016 WL 3268328, at *11, however, it is "well settled that, under Texas state law, the indictment may allege differing methods of committing an offense in the conjunctive, and a defendant may be found guilty under any of the theories." *Johnson v. Thaler*, No. 3:11-CV-3032-B (BH), 2012 WL 4866500, at *6 (N.D. Tex. Sept. 29, 2012) (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)). Whether petitioner thinks phrasing this in the disjunctive might have made more sense is irrelevant, since "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) quotations omitted). Petitioner makes no attempt to explain how Texas's criminal procedure of-

[16] *See Acker*, 2016 WL 3269328, at *10 ("[Petitioner] did then and there, intentionally cause the death of an individual, namely, Marquetta Follis George, by homicidal violence, to wit: manual strangulation and ligature strangulation with an object, the exact nature of which is unknown to the grand jury, *and blunt force injury resulting from causing her to impact a blunt object*, the exact nature of which is unknown to the grand jury, and Daniel Clate Acker was then and there in the course of committing and attempting to commit the offense of kidnaping of Marquetta Follis George.") (emphasis added).

fends constitutional guarantees. *Cf. Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (observing, in the habeas context, that "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees").

In his opening statement, the prosecutor made it clear to the jury that the State's case included blunt-force injury as a theory of petitioner's guilt:

> The body makes it to Dallas; the autopsy is performed; and the doctors tell us she died from strangulation as well as from blunt force trauma. Blunt force injuries. They cannot say which caused her death exactly, but both of the injuries were capable of causing her death. They cannot tell you that she was alive or dead at a particular time when she was run over.

19 R.R. 19.

The medical examiner testified that, in her opinion, George suffered blunt-force injuries. *See, e.g.*, 20 R.R. 208 ("Her head was crushed."); 20 R.R. 226 (discussing how George's injuries were consistent with somebody being hit or impacting with a blunt object, such as a tire or vehicle). She included alongside her theory of strangulation that George died as a result of blunt-force trauma or impacting with a blunt object in some fashion—opining that she could not tell which (strangulation or blunt-force trauma) actually caused George's death. 20 R.R. 221. In her opinion, blunt-force injuries alone were sufficient to cause George's death:

> Q: Can you tell me whether or not the blunt force injuries in and of themselves were sufficient to cause the death of Marquetta George?
>
> A: They would be consistent with death themselves.

20 R.R. 220; *see also* 20 R.R. 233 ("blunt force injuries which were severe enough to cause her death").

In his closing argument, the prosecutor followed up on the blunt-force-injury theory of murder: "There's different ways you can find that he committed this offense: By strangulation; by the blunt force injuries, the trauma injuries; or, by a combination of both. It doesn't matter which one because the law covers all three." 23 R.R. 7; *see also* 23 R.R. 22 (referring to petitioner having run over George with his truck).

Finally, the court instructed the jury on murder by blunt-force injury, both in conjunction with strangulation and as a standalone theory. *See, e.g.* R.359 (standalone charge) (instructing the jurors that they may find petitioner guilty if they determine that he "intentionally caused the death of Marquetta Follis George by blunt force injury resulting from causing her to impact a blunt object, the exact nature of which is unknown to the grand jury").[17]

* * *

In sum, the district court correctly concluded that a reasonable jury would have convicted petitioner of capital murder, "on the theory of the indictment and as presented to the jury," of death by blunt-force trauma. *Acker*, 2016 WL 3268328, at *24; *see also Acker*, 693 F. App'x at 389, 393-96.

[17] At one point, petitioner also claims that the specific theory of petitioner having run over George with his truck was not presented to his jury. *See* Pet. 25. But as the court of appeals observed, "[t]he theory that Acker deliberately ran over George with his truck is neither new nor fanciful." *Acker*, 693 F. App'x at 396. The prosecutor stated in his opening argument that medical experts "cannot tell you that she was alive or dead at a particular time when she was run over." *Id.*; 19 R.R. 19. And the prosecutor returned to this theme in his closing argument. *Acker*, F. App'x at 396. Trial witness Brodie Young also testified that he saw petitioner "take a woman's limp body from the passenger side of the truck and place it on the side of the road." *Id.* The Texas Court of Criminal Appeals, in denying petitioner's direct appeal, referred to "the State's theory of the case" as including the proposition that he "ran over her body with the truck." R.433.

C. The Trial Court's Various Evidentiary Decisions Did Not Violate Petitioner's Right to Due Process.

Petitioner also points to a series of evidentiary rulings that he says impacted the fairness of his trial and deprived him of due process. *See* Pet. 15-19. Certiorari review is not warranted on any of these factbound, meritless claims.

1. As an initial matter, petitioner fails to address why any due-process violation that occurred as a result of the trial court's evidentiary rulings could not have been addressed in petitioner's first state habeas petition. In fact, his petition for certiorari makes clear that it could have been. For instance, regarding the exclusion of a hypothetical question the defense asked of the medical examiner, petitioner says that "[a]s this was the defense's theory of the case, it greatly hindered and prejudiced Acker." Pet. 16. Petitioner did not need to wait on new evidence uncovered in the course of his federal evidentiary hearing in order to challenge a ruling that, at the time of his direct appeal and initial state habeas petition just as much as now, upset "the defense's theory of the case." Pet. 16. Just the opposite: At the time his state habeas petition was filed, both the factual and legal bases of these claims were "available" to petitioner. *Murray v. Carrier*, 477 U.S. 478, 487 (1986).

Petitioner cannot circumvent this bar merely by saying that these alleged evidentiary errors somehow now have added significance in light of the new evidence tending to suggest that George was not strangled. *Cf.* Pet. 15. As this Court noted in the similar context of establishing cause and prejudice to overcome an abuse-of-the-writ determination in a subsequent federal habeas petition, "[i]f what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991). As a result, "[o]mission of

the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim." *Id.*

2. In any event, petitioner does not come close to showing how these various, unconnected trial-court rulings "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

This Court has consciously avoided establishing itself as a "rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967). In that vein, federal courts do not have authority to review the mine-run of evidentiary rulings of state trial courts. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *accord Marshall v. Longberger*, 459 U.S. 422, 438 n.6 (1983). The circuits agree that federal habeas review cannot entail second-guessing state-law evidentiary rulings unless they are so extreme as to deny constitutionally fair proceedings. *See, e.g.*, *Gonzalez v. Thaler*, 643 F.3d 425, 430-31 (5th Cir. 2011); *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000); *Sellers v. Ward*, 135 F.3d 1333, 1342 (10th Cir. 1998); *Clark v. Groose*, 16 F.3d 960, 963 (8th Cir. 1994); *Bueno v. Hallahan*, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam).

The evidentiary rulings of which petitioner complains do not meet that high bar. There was nothing "fundamental[ly]" unfair about these rulings. *Spencer*, 385 U.S. at 563-64. Far from being manifestations of the "trial court obstruct[ing the defense's] efforts," Pet. 8, each exclusion was grounded in longstanding state evidentiary rules.

Specifically, petitioner claims that "[c]rucial testimony from the medical examiner was excluded" because the trial court did not allow petitioner's counsel to ask the medical examiner a hypothetical question. Pet. 15. But, as petitioner observes, the trial court disallowed the hypothetical question because the factual predicate of that question—a fall from a vehicle—was not yet in evidence. *See* Pet. 16; 20 R.R. 259-60. The trial court's evidentiary ruling is entirely in keeping with Texas evidentiary procedure. *See, e.g.*, *J. Weingarten, Inc. v. Tripplett*, 530 S.W.2d 653, 655 (Tex. Ct. App. 1975) (noting that although the trial court has broad discretion, "hypothetical questions should be restricted to the facts in evidence; otherwise, they will be misleading and confusing and therefore prejudicial") (collecting cases) (quotations omitted). And in doing so, Texas's rule is no outlier; it mirrors federal practice. *See, e.g.*, *United States v. Stinson*, 647 F.3d 1196, 1214 (9th Cir. 2011) ("[Hypothetical] questions must not require the expert to assume facts that are not in evidence.") (quotations omitted). Petitioner avers that the hypothetical "was actually based on a reasonable conjecture about the evidence," but gives no explanation as to how. Pet. 16.

Petitioner also claims the "[e]rroneous exclusion of witness Sabrina Ball's testimony" as a contributing factor to his alleged deprivation of due process. Pet. 16. In deciding whether to allow any, some, or all of the proffered hearsay testimony under the excited-utterance exception, the trial court took account of the amount of time that had passed and whether the declarant's statements had been made in response to questioning.[18] Its evidentiary ruling was entirely proper. Excited utterances hinge on "whether the declarant was

[18] *See* Pet. 17; *see also* 21 R.R. 28 (observing that five to seven minutes had passed); 21 R.R. 28-29 (observing that the statement petitioner wanted in had been made in response to a question); 21 R.R. 30 (reasoning that an answer in response to a question "takes the

still dominated by the emotions, excitement, fear, or pain of the event or condition" when the statement is made. *Apolinar v. Texas*, 155 S.W. 3d 184, 186-87 (Tex. Crim. App. 2005). The *Apolinar* court specifically called out as relevant factors both "the length of time between the occurrence and the statement" and "whether the statement made is in response to a question"). *Id.* at 187. Petitioner's protestations to the contrary are simply attempts to rehash the trial court's application of state evidentiary law.

Petitioner points as well to the exclusion of testimony from two other witnesses "regarding Ms. Ball's statement two weeks prior to George's death" about trying to jump from petitioner's truck. Pet. 18. Petitioner fails to elaborate why this was an "[e]rroneous exclusion," but in fact that testimony was excluded because it was offered by the defense to prove that the unavailable declarant (George) had acted in conformity with a prior act. *See* 21 R.R. 37-40. Texas rules prohibit the use of evidence of a prior act to prove that the person acted in conformity with that act on a particular occasion. Tex. R. Evid. 404(b).

Petitioner then complains that the trial court excluded testimony from a defense investigator based on the investigator's experiment attempting to open the door to a truck while driving down the road. Pet. 18-19; *see* 21 R.R. 142-43. But it is entirely proper for a trial court to perform a gatekeeping role and determine, before presentation to the jury, whether a proposed experimental method is reliable and its techniques valid. *See, e.g.*, *Coble v. Texas*, 330 S.W.3d 253, 273 (Tex. Crim. App. 2010); *Kelly v. Texas*, 824 S.W.2d 568, 572-73 (Tex. Crim. App. 1992) (en banc). The purpose of the testimony "was to show that it was not possible for petitioner to reach across and open the door while he was driving." *Acker*,

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spontaneity" out of the statement). The court did not go "to great lengths to keep out this evidence." Pet. 17.

693 F. App'x at 391. The methods employed by the expert were rudimentary. *See, e.g.*, R.2144 ("I just found a flatbed that I thought was similar [to petitioner's] and just wanted to see what it would be like."). The expert performed the impromptu experiment himself despite the fact that petitioner was several inches taller than him. R.2146. The expert also did not consider that a difference in arm length could account for an easier or harder reach. R.2148-49. Nor did he make any effort to measure petitioner's arm length or ability to reach. R.2149.

Along the way, petitioner paints the picture of a miserly trial court that denied funds necessary for the defense to present experts. *See* Pet. 18. Absent from petitioner's telling is the fact that the defense *had* an accident reconstruction expert—they just chose not to use him. *See Acker*, 693 F. App'x at 396. Petitioner's trial counsel testified at the state evidentiary hearing that the defense elected not to call their accident reconstruction expert as a witness because the expert had concluded that the "front tire [of petitioner's truck] ran over the lady's head." *Id.* That testimony would have conflicted with petitioner's story that he never ran over George. *See, e.g.*, *id.* ("Acker testified at trial: 'I did not run over her when I backed up or when I drove away.").

3. Finally, though petitioner neglects to mention it, the district court considered—and even explicitly addressed—each piece of excluded evidence in assessing his gateway claim of actual innocence to excuse his procedural default. *Acker*, 2016 WL 3268328, at *16-20; *see also Acker*, 693 F. App'x 390 (discussing this evidence). That is because petitioner reoffered this evidence at his federal evidentiary hearing. *See generally* R.2058-2219. In keeping with the *Schlup* standard, the district court considered this evidence in reaching its probabilistic determination that a reasonable jury presented with all the evidence would

still find petitioner guilty of capital murder. *Acker*, 2016 WL 3268328, at *24. These evidentiary issues call for no more scrutiny than that. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 112-13 (1976) ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.").

III. PETITIONER'S CLAIM THAT THE STATE INTRODUCED FALSE EVIDENCE AT HIS TRIAL IS UNFOUNDED.

The central theory of petitioner's procedurally defaulted due-process claim is the flawed notion that the State introduced "false evidence" because the State's expert witness at the federal habeas evidentiary hearing disagreed with one of the conclusions of the medical examiner who testified at petitioner's trial. *See* Pet. 19-32. Petitioner then seeks to shoehorn his case into a longstanding and oft-denied circuit split over whether prosecutors must know that they are eliciting false testimony from a witness for there to be a denial of due process. *See* Pet. 32-36.

A. The Medical Examiner's Expert Opinion Testimony Was Not Retroactively Rendered "False" Because Other Experts Later Disagreed with Part of That Testimony.

This is not a false-evidence case. Although the court of appeals did not reach the issue, it nonetheless correctly observed that the federal habeas experts' disagreement with one part of the medical examiner's expert opinion testimony at trial does render that earlier testimony "false."[19] *Acker*, 693 F. App'x at 397; *accord* ROA.1978, 1988-89. Petitioner points

[19] The same result would hold for petitioner's claim, mentioned within his discussion of "false testimony," Pet. 28-32, that the new evidence introduced at the federal hearing warrants a new trial because it affected the "fundamental fairness" of his trial, Pet 30. Take, for instance, *Lee v. Houtzdale SCI*, where the State conceded that post-conviction "retesting of surviving materials from the crime scene . . . undermined the reliability of [a trial expert's] testimony." 798 F.3d 159, 167 (3d Cir. 2015). The proper standard, it held, was

to no evidence, new or old, suggesting that the medical examiner lied or fabricated results, intentionally or unintentionally. Petitioner does not, for instance, claim that the medical examiner misled anyone about her qualifications or falsified her credentials, thus possibly rendering the "basis for [her] testimony as an expert witness" false. *Bonar v. Dean Witter Reynolds Inc.*, 835 F.2d 1378, 1381, 1385 (11th Cir. 1988). All the medical examiner did was testify to her medical opinion of how Marquetta George died.[20]

Specifically, the medical examiner (Dr. Gonsoulin) testified at petitioner's trial that George had "extensive injuries, including blunt force injuries to all parts of her body, particularly her head and neck." *Acker*, 693 F. App'x at 387. She testified that George appeared to have a lacerated heart and lungs, a pulpified liver, and a deep laceration on her leg. *Id.* She also observed neck injuries indicating "that a significant amount of pressure was applied around the neck." *Id.* The injuries to George's face and skull suggested to the exam-

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whether the admission of that testimony "undermined the fundamental fairness of the entire trial" because its probative value was "greatly outweighed by the prejudice to the accused from its admission," *id.* at 166, as well as whether there was "ample other evidence of guilt," *id.* at 162. On the latter point, the court cast aside the offending aspects of the trial expert's testimony and assessed whether the remaining evidence, in light of the new evidence, was sufficient to support the habeas petitioner's guilt. *Id.* at 167. That is to say, the court in *Lee* engaged in functionally the same inquiry the district court already did here in assessing petitioner's actual-innocence gateway claim under the *Schlup* standard. *See, e.g.*, ROA.1978; *see also supra* Part I.B. Petitioner tacitly recognizes as much by couching his new-evidence fundamental-fairness argument in similar terms. *See* Pet. 32 ("In Acker's case, the totality of the false strangulation evidence and the wrongfully excluded evidence makes it more likely than not that a reasonable doubt about his guilt would be created in the minds of the jury.").

[20] At one point, even petitioner seemed to recognize that this case could not plausibly be thought of as involving false evidence. *See* COA Application 21 (referring to the medical-examiner's trial testimony as "faulty evidence" and conceding that that testimony "does not specifically qualify as 'false testimony'").

iner that "her head was crushed, consistent with being struck with some type of blunt instrument." *Id.* Dr. Gonsoulin's opinion as to cause of death was strangulation "as well as blunt force injury." *Id.* She "could not determine whether strangulation or blunt force caused George's death." *Id.*

At the evidentiary hearing, the State's new expert (Dr. Di Maio) as well as petitioner's (Dr. Larkin) "agreed that George's injuries were inconsistent with strangulation." *Id.* at 390. Dr. Di Maio testified that, in his opinion, based on George's eyes showing evidence of only a few petechiae hemorrhages, R.2106, strangulation was unlikely. *Acker*, 693 F. App'x at 390. Instead, he concluded that she likely died of blunt-force injury and it was "his opinion that George had been run over by a vehicle, because her injuries . . . were too extensive to have been caused by jumping from or being pushed out of a truck." *Id.*; *see also* R.2106 ("[S]he's been run over.") He observed that George's "head [was] squashed," that "parts of the brain [were] literally torn apart," R.2108, that "two chambers of the heart [had] blown out," that her lungs were lacerated, and that she had suffered liver injuries, R.2109. In his opinion, the evidence of "violent compression of the chest," along with the various "bursting-type injuries" and marks on George's body, meant that there "had to have been, based on the circumstance, a tire going over." R.2109.

Meanwhile, Dr. Larkin opined that George's injuries were consistent with falling from a vehicle. *Acker*, 693 F. App'x at 390. He, "concede[d], though, "that it is possible that George was run over and that, from the medical evidence alone, it is impossible to say whether George jumped or was pushed from the vehicle." *Id.*

In other words, three medical experts all looking at the same evidence of George's autopsy reached conclusions that overlapped in some respects, and diverged as to others. *See*

generally id. at 387, 390. It is hardly uncommon for trained experts, bringing their knowledge to bear on the same issue, to reach diverging opinions. *See, e.g.*, *United States v. McBride*, 786 F.2d 45, 51 (2d Cir. 1986); *United States v. Hall*, 664 F.3d 456, 463-67 (4th Cir. 2012).

That one expert opinion conflicts to some degree with another has never been held to render one or the other false. *See, e.g.*, *Harris v. Vasquez*, 949 F.2d 1497, 1524 (9th Cir. 1990) (holding that new expert opinions "that are not entirely consistent" with previous expert testimony does not make that previous testimony "'false' or 'materially inaccurate'"); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989) ("mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony"); *cf. Campbell v. Gregory*, 867 F.2d 1146, 1148 (8th Cir. 1989) (observing that testimony of an expert is not perjury merely because it differed from opinions of other experts); *In re Schwab*, 531 F.3d 1365, 1366-67 (11th Cir. 2008) (per curiam) (holding, in a case in which a "clinical psychologist who testified for the State at the sentencing hearing" changed his opinion after trial and agreed with the defense, that the habeas petitioner "does not assert a constitutional error, just a change in the opinion of an expert witness"). As one state court put it, "[i]f the expert's opinion is contradicted by the opinion of another expert, it merely suggests the first expert may have reasoned incorrectly; it does not suggest his general untruthfulness as a witness." *Kennemur v. California*, 133 Cal. App. 3d 907, 923-24 (Cal. Ct. App. 1982).

This accords with more general notions of what it means to take some action that can be deemed false. For instance, cases brought under the False Claims Act routinely deal with the issue of falsity: The operative issue there is whether false claims were presented

to the government for payment or approval. 31 U.S.C. § 3729(a)(1). In that context, courts have made the intuitive observation that unlike "expressions of fact," which are subject to determinations of falsity, "[e]xpressions of opinion are not actionable." *Harrison v. Westinghouse Savannah R. Co.*, 176 F.3d 776, 792 (4th Cir. 1999). And that is because, as is commonly understood, "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." *United States ex rel. Roby v. Boeing Co.*, 100 F. Supp. 2d 619, 625 (S.D. Ohio 2000).

The important distinction between expert *opinion* testimony and fact-witness *fact* testimony when it comes to stating a viable false-testimony due-process claim is perhaps made clearest in a recent case out of the Ninth Circuit, *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016), *cert. denied* 137 S. Ct. 503. There, the habeas petitioner pointed to newly discovered expert medical testimony that allegedly conflicted with the expert testimony presented at trial. *Id.* at 1140, 1142-43. And he claimed that this new, conflicting testimony rendered that earlier testimony against him false, violating his right to due process. *Id.* at 1142-43.

The *Gimenez* court assumed for purposes of argument that the testimony conflicted. *Id.* Even then, though, the court observed that "[t]o the extent that this new testimony contradicts the prosecution's expert testimony, it's simply a difference in opinion—not false testimony." *Id.* at 1142. The court observed that courts "have found due process violations from the introduction of false testimony only where a *fact* witness told lies . . . or the prosecution relied on phony documents." *Id.* at 1142-43. By contrast, conflicting expert opinions represented simply a disagreement among "experts who have different opinions about how [the victim] died." *Id.* at 1143. Finally, the court held that the petitioner could not "obtain [habeas] relief . . . on the theory that the prosecution introduced false testimony at trial"

because "[i]ntroducing expert testimony that is contradicted by other experts, whether at trial *or at a later date*, doesn't amount to suborning perjury or falsifying documents; it's standard litigation." *Id.* (emphasis added).[21]

It is no surprise, then, that petitioner fails to mention even a single case where a court granted a habeas petitioner relief on a due-process theory of false testimony based on conflicting expert opinion testimony—or even considered such a claim. *See* Pet. 27-36. Instead, he cites case after case where *fact witnesses lied* about matters of *fact*. *See* Pet. 28, 32-34. For example, take *Maxwell v. Roe*, 628 F.3d 486, 506-07 (9th Cir. 2010). *See* Pet. 28 n.24, 33. That case involved a purported jailhouse informant who testified for the prosecution as a fact witness and lied about the defendant confessing. *Maxwell*, 628 F.3d at 506-07.[22] Petitioner also points to *United States v. Monteleone* (Pet. 28 n.24), which concerned accomplices acting as fact witnesses pursuant to cooperation agreements who allegedly lied about their fugitive status and criminal histories during their testimony. 257 F.3d 210, 219 (2d Cir. 2001). Similarly, *United States v. Wallach* (Pet. 33) featured a fact witness testifying for the government pursuant to a cooperation agreement who allegedly lied about never gambling

[21] That the Ninth Circuit notes this important distinction between testimony on matters of fact and opinion is especially relevant here because petitioner urges this Court to adopt the Ninth Circuit's position on his purportedly relevant circuit split. *See* Pet. 32-35 (urging the Court to adopt the Ninth Circuit's laxer standard on whether the government needed to know a witness was presenting false testimony); *see also infra* Part III.B (discussing how that circuit split is not implicated in this case). Thus, even in his preferred jurisdiction, petitioner's purported false-testimony claim would be unsuccessful.

[22] The Ninth Circuit in *Gimenez* expressly distinguished *Maxwell* because *Maxwell* concerned matters of fact, which can be rendered false. *See Gimenez*, 821 F.3d at 1142-43; *cf.* Pet. 28 n.24 (claiming that his false-evidence "argument is based on the analys[is]" in *Maxwell*).

with ill-gotten funds; there, the government conceded that the witness "committed perjury." 935 F.2d 445, 456 (2d Cir. 1991). Turning to trial-court decisions, *Thornton v. Smith*—from which petitioner block quotes, *see* Pet. 33—involved yet another would-be-codefendant testifying as a fact witness pursuant to a cooperation agreement who allegedly lied based on inconsistencies in the story she told police. No. 14-CV-3787, 2015 WL 9581820, at *11 (E.D.N.Y. Dec. 30, 2015). And *Pierre v. Vannoy* (Pet. 28 n.24) also involved a fact witness—this time the purported victim—whose factual "[t]estimony was the only *direct* evidence of criminal activity introduced against [the defendant]" and who later recanted her allegation of sexual abuse. No. 16-CV-1336, 2016 WL 9024952, at *4 (E.D. La. Oct. 31, 2016).

B. The Oft-Denied Circuit Split Petitioner Identifies Is Not Implicated Here.

It is uncontestable that there is a circuit split on the question whether a due-process false-testimony claim requires proof that the prosecution knowingly elicited false testimony. Several courts have observed that the Second and Ninth Circuits long ago adopted outlier positions on this issue, holding that prosecutorial knowledge was not required to bring a due-process claim of eliciting false testimony.[23] But this question is oft-denied. *See, e.g.*, *Cash v. Maxwell*, 565 U.S. 1138 (2012); *Del Vecchio v. Ill. Dep't of Corr.*, 514 U.S. 1037 (1995); *Shore v. Warden, Stateville Prison*, 504 U.S. 922 (1992); *O'Dell v. United States*, 484

[23] *See, e.g.*, *Smith v. Black*, 904 F.2d 950, 962 (5th Cir. 1990) ("As [the Second Circuit] itself notes, its pronouncement differs from the rule adhered to in the Fifth Circuit."), *cert. granted, judgment vacated on other grounds*, 503 U.S. 930 (1992); *Reddick v. Haws,* 120 F.3d 714, 718 (7th Cir. 1997) (noting that "[s]ome circuits have not required that contemporaneous knowledge of the perjury be shown," and citing 30-year-old Second Circuit case); *see also Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., joined by Alito, J., dissenting from denial of certiorari) ("[T]he Ninth Circuit . . . stretched the Constitution, holding that the use of [the witness's] false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity.").

U.S. 859 (1987); *United States ex rel. Burnett v. Illinois*, 449 U.S. 880 (1980); *Jones v. United States*, 446 U.S. 945 (1980); *Burks v. Egeler*, 423 U.S. 937 (1975). And certiorari is not warranted here on this issue, for many reasons.

1. The circuit split is not close to being properly implicated here. For several reasons, this would be a bad vehicle for addressing this issue.

First, the Texas Court of Criminal Appeals held petitioner's due-process claim procedurally defaulted, so petitioner would have to show actual innocence under *Schlup* to overcome that procedural default. *Acker*, 693 F. App'x at 398; *Acker*, 2016 WL 3268328, at *6; *see also* Part I.A., *supra*. This Court would have to decide (1) that the district court misapplied the *Schlup* gateway actual-innocence standard; (2) that the court of appeals erroneously determined that no reasonable jurist would debate the district court's conclusion; and (3) that petitioner's claim is that "extremely rare" case where the petitioner has proven that more likely than not "no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt," *Schlup*, 513 U.S. at 321, 329—all before the Court could possibly confront the alleged predicate underlying the prosecutorial-knowledge question.

Second, petitioner never raised the issue of "false" testimony or the need or lack thereof for prosecutorial knowledge of the testimony's falsity in state court. *See supra* Part II.A; *cf. Gray*, 518 U.S. at 162-63 (holding that a habeas petitioner must present his federal constitutional claim to the state court to satisfy the exhaustion requirement, particularly for claims alleging deprivation of due process).

Third, this prosecutorial-knowledge issue was first raised in petitioner's petition for certiorari. Petitioner never so much as mentioned the issue below, and it was never addressed *sua sponte*. He has thus forfeited the argument. This Court has held that it has "no

occasion to consider [an] argument" where a party "did not raise it below, and the [court of appeals] therefore did not address it." *United States v. Jones*, 565 U.S. 400, 413 (2012). And because petitioner never raised this issue in either the state or federal courts, there is no record evidence of what the government knew or did not know about this alleged "false" testimony at the time the declarant gave it. *Cf., e.g.*, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988) (declining to address a question presented without "the benefit of a well-developed record and a reasoned opinion on the merits").

Fourth, as the court of appeals correctly observed, 693 F. App'x at 397, this case does not involve false testimony. *See supra* Part III.A.

2. Although the issue is not implicated here, if the Court ever has occasion to grant certiorari on the question of whether showing prosecutorial knowledge is a required element of a due-process "false testimony" claim, it should reject the approaches of the Second and Ninth Circuits and adopt the approach taken by the majority of other circuits. For example, in the Fifth Circuit, a claimant cannot succeed unless he proves that "the prosecution actually knows or believes the testimony to be false." *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981). The Fifth Circuit's approach accords with the practice in the vast majority of circuits. *See Reddick v. Haws,* 120 F.3d 714, 718 (7th Cir. 1997) ("[T]his circuit demands proof that the prosecution made knowing use of perjured testimony."); *accord Smith v. Roberts*, 115 F.3d 818, 821 (10th Cir. 1997); *United States v. Pandozzi*, 878 F.2d 1526, 1532 (1st Cir. 1989) (Breyer, J.); *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986); *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984). And this majority approach best accords with this Court's guidance on the issue. *See, e.g.*, *United States v.*

Bagley, 473 U.S. 667, 678 (1985) ("prosecutor's *knowing use* of perjured testimony") (emphasis added); *Agurs*, 427 U.S. at 103 ("conviction obtained by the *knowing use* of perjured testimony is fundamentally unfair") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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