No.

IN THE
Supreme Court of the United States

EDWARD THOMAS KENDRICK, III,
Petitioner,
v.
MIKE PARRIS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

State courts must appropriately apply the standards for counsel's performance outlined in *Strickland v. Washington*, 466 U.S. 668 (1984), to survive federal habeas review; federal courts must apply this Court's precedent when a habeas petitioner asserts innocence, *see McQuiggin v. Perkins*, 569 U.S. 383 (2013). Here, right after a longtime police officer picked up a gun and shot himself in the foot, he repeatedly said he did not touch the trigger. The State of Tennessee charged Edward Kendrick with shooting his wife with the same gun earlier that night, though Kendrick also said he did not touch the trigger. At trial, the state's firearm expert said that was "impossible," and Kendrick's lawyer offered no rebuttal expert; the officer could not remember where his hands were, and Kendrick's lawyer failed to admit the officer's prior statements. In state post-conviction, an expert showed the trigger mechanism had a history of accidental discharges, and counsel admitted his uninformed choices. One court vacated the conviction, but, relying on 28 U.S.C. § 2254, the Sixth Circuit affirmed another court's conclusion that Kendrick received constitutionally sufficient representation. The habeas court also rejected this proof of innocence to overcome procedural default.

Was counsel's performance deficient, and did the courts below apply the right standard? Where the habeas court required "clear and convincing" proof of innocence rather than the applicable "more likely than not" showing, is Kendrick owed relief?

PARTIES TO THE PROCEEDINGS

Edward Thomas Kendrick, III, petitioner on review, was the petitioner-appellant below.

Mike Parris, the warden at the Morgan County Correctional Complex in Tennessee where Mr. Kendrick was being held in custody when the petition for writ of habeas corpus was filed, is the respondent on review and was the respondent-appellee below.

RELATED PROCEEDINGS

- *State v. Kendricks*, No. 201138, Hamilton County Criminal Court, Tennessee. Judgment entered November 10, 1994.
- *State v. Kendricks*, No. 03C01-9510-CR-00336, Tennessee Court of Criminal Appeals. Judgment entered September 25, 1996.
- *State v. Kendricks*, No. N/A, Tennessee Supreme Court. Opinion issued May 5, 1997.
- *Kendricks v. State*, No. 03C01-9806-CR-00205, Tennessee Court of Criminal Appeals. Opinion issued August 27, 1999.
- *Kendricks v. State*, No. 220622, Hamilton County Criminal Court, Tennessee. Opinion issued October 13, 2011.
- *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, Tennessee Court of Criminal Appeals. Opinion issued June 27, 2013.
- *Kendrick v. State*, No. E2011-02367-SC-R11-PC, Tennessee Supreme Court. Opinion issued January 16, 2015.

- *Kendrick v. Tennessee*, No. 15-5772, Supreme Court. Opinion issued October 13, 2015.
- *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, Tennessee Court of Criminal Appeals. Opinion issued November 5, 2015.
- *Kendrick v. State*, No. E2011-02367-SC-R11-PC, Tennessee Supreme Court. Opinion issued May 5, 2016.
- *Kendricks v. Phillips*, No. 1:16-CV-00350-JRG-SKL, U.S. District Court for the Eastern District of Tennessee. Judgment entered September 30, 2019.
- *Kendrick v. Parris*, No. 19-6226, U.S. Court of Appeals for the Sixth Circuit. Opinion and Judgment entered March 2, 2021.

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Edward Thomas Kendrick, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion affirming the denial of habeas relief, App.1a–35a, is reported at 989 F.3d 459. The district court's opinion denying habeas relief, App.47a–140a, is unreported but available at 2019 U.S. Dist. LEXIS 167865. The Tennessee Supreme Court's order denying permission to appeal is unreported but available at 2016 Tenn. LEXIS 339. The Tennessee Court of Criminal Appeals' opinion affirming the post-conviction court's denial of relief is unreported but available at 2015 Tenn. Crim. App.

LEXIS 887. This Court's opinion denying Kendrick's petition for a writ of certiorari is reported at 577 U.S. 930. The Tennessee Supreme Court's opinion reversing post-conviction relief, App.142a–206a, is reported at 454 S.W.3d 450; that court's order granting the state permission to appeal, is unreported but available at 2013 Tenn. LEXIS 970. The Tennessee Court of Criminal Appeals' opinion vacating the conviction, App.207a–247a, is unreported but available at 2013 Tenn. Crim. App. LEXIS 539. The post-conviction court's order denying relief, App.248a–249a, is unreported but available at App.250a–327a. The Tennessee Court of Criminal Appeals' reversal of the post-conviction court's dismissal is reported at 13 S.W.3d 401. The Tennessee Supreme Court's order denying permission to appeal on direct appeal is unreported but available at 1997 Tenn. LEXIS 248. The Tennessee Court of Criminal Appeals opinion affirming Kendrick's conviction is reported at 947 S.W.2d 875.

JURISDICTION

The Sixth Circuit issued its decision on March 2, 2021. This petition is being filed within 150 days of that date. *See* 589 U.S. __, 2020 U.S. LEXIS 1643. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution provides, "No person shall…be deprived of life, liberty, or property, without due process of law…."

The Sixth Amendment to the U.S. Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to…have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d).

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255 [28 U.S.C. § 2255].

Id. § 2253(c)(1)(A).

STATEMENT OF THE CASE

The fundamental question before the jury in Kendrick's trial was whether his gun was fired intentionally or went off accidentally. To make this decision, the jury had limited information. No one saw the gun go off, and so no witness testified they saw Kendrick pull the trigger. The state's case was circumstantial but offered expert testimony to the jury on the critical issue: whether the gun could discharge accidentally. The state's expert concluded that was impossible. The jury heard no countervailing expert evidence, which would have informed them that similar guns have a faulty trigger mechanism and are known to discharge accidentally.

In addition, the evidence Kendrick's trial counsel was relying on to establish his innocence—that the police officer who shot himself with Kendrick's gun said his "finger wasn't near the trigger" and Kendrick's gun "just went off"—was not put squarely before the jury. When the officer changed his story and said he could not remember whether his hands

were near the trigger, trial counsel (unsuccessfully) tried to shift the officer back to his initial reports. However, trial counsel did not use the Rules of Evidence, which should have admitted the prior statements as substantive evidence. No explanation has been offered for why trial counsel did not avail himself of this solution, other than that he did not think of it during the "heat of the trial." App.12a.

The trial judge found the case "awfully close." App.175a. The post-conviction court described being "less certain of premeditation now than the prosecutor, the jury, or the Court of Criminal Appeals were at or after the trial." App.325a. However, after state courts granted but then denied relief, federal courts concluded AEDPA "forecloses" relief. App.19a.

As in *Hinton v. Alabama*, 571 U.S. 263 (2014), expert testimony was critical—not simply useful—to the defense. And unlike *Harrington v. Richter*, 562 U.S. 86 (2011), forgoing an expert was not a reasonable strategic choice to avoid "activities that appear 'distractive from more important duties.'" *Id.* at 107 (citation omitted). Even under AEDPA's deferential standard, Kendrick is entitled to relief.

Instead, regarding Kendrick's claim of actual innocence, the district court required "clear and convincing" evidence pursuant to *Sawyer v. Whitley*, 505 U.S. 333 (1992), despite this Court's rejection of that standard in *Schlup v. Delo*, 513 U.S. 298 (1995), and later cases.

I. The Incident and Trial.

A. Kendrick's gun fires, killing Lisa.

In March 1994, Edward Kendrick left some food simmering on the stove, then drove with his children in the backseat to the gas station where his wife, Lisa Kendrick, worked. App.3a; 196a;131a.[1] Once there, Kendrick asked Lisa to come outside. App.3a.

Their daughter said Lisa asked Kendrick to move his rifle from where it lay on the passenger floorboard to the back of the car. App.5a;50a. Lisa "carried a handgun" and Kendrick "often kept a rifle with him" because the couple "had a side job cleaning apartments at night in an area [of their Tennessee community] where they felt unsafe." App.163a. That night, "there was a gun in [Lisa's] purse in the shop." App.286a. Kendrick later explained that he "bought the gun for her and, because of their interracial marriage and the conditions of their work, they both carried guns." *Id*. As Kendrick moved the rifle to the back of the car, the gun suddenly went off. App.8a.

A fatal bullet struck Lisa in the chest. App.50a. After seeing Lisa had died, Kendrick drove to the nearby airport where minutes later he called 9-1-1. App.5a. On the way, he tossed the rifle to the side of the road—he would testify later that he just wanted to get it out of the car. App.163a.

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[1] Though divorcing, Lisa and Kendrick still "lived together and shared vehicles."App.258a.

B. Kendrick's gun fires, wounding officer.

Police officer Steve Miller's job was to collect evidence at crime scenes. App.60a. He retrieved Kendrick's gun from the roadside, placing it into his police car. App.6a. When Miller went to remove the gun and carry it into the police station, it discharged, and a bullet struck Miller's foot. App.6a. According to a report created that night, "Miller states that he picked [Kendrick's gun] up with both hands and his finger was not near the trigger." App.63a. Another report generated that night states Miller told the officer who heard the shot from inside the station that Kendrick's rifle "just went off." *Id.*

C. Trial.

Kendrick was charged with first-degree murder and tried in November 1994. App.68a;2a. His trial counsel immediately focused the jury on Kendrick's sole defense in his opening statement: "Lisa Kendrick was killed by a faulty rifle…." App.137a;153a.

Expert Testimony. A firearms examiner from the Georgia Bureau of Investigation gave an expert opinion for the state: "The only way that you can fire this [Kendrick's] rifle without breaking it is by pulling the trigger." App.161a. *See also* App.192a. ("no one could fire the rifle without pulling the trigger or breaking it"). Kendrick's counsel did not call an expert witness to counter this testimony. App.233a.

Injured Police Officer. At trial, Miller explained that, after he recovered Kendrick's gun the night of the incident, "the weapon discharged and it struck

[him] in the left foot." App.156a. He had "no recollection of how the weapon discharged." *Id.* He did not "have a memory as to whether or not [his] finger was on the trigger or not on the trigger." *State v. Kendricks*, 947 S.W.2d 875, 881 (Tenn. Crim. App. 1996). He did not recall stating that his finger was not on the trigger. App.157a. He confirmed it is "drilled into you at the police academy" that you "don't ever put your hand on the trigger unless you're going to shoot the gun," App.6a, but refused to opine whether the gun went off "accidentally." App.158a–160a. Miller also said he did not remember speaking to other officers about the incident and never before saw the incident reports. App.162a.[2] The jury never saw the incident report where Miller said his finger had not been near the trigger. *Id.*

Lay Testimony. A gas station customer who saw the aftermath of Lisa's death through his car's side window later agreed that how he saw Kendrick holding the gun was a "safe" way to hold one that had just gone off accidentally, (D.14-3, PageID#635),[3] merely confirming the undisputed fact that Kendrick was handling the gun when it fired. Another witness offered a trial revelation that he heard Kendrick repeat, "I told you so," while standing over Lisa, App.4a, but his statement suffered from credibility

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[2] Kendrick's counsel called the report's author to impeach Miller, but the state's objection was sustained. App.7a.

[3] Citations to "D." are to district court records, "R." to the Sixth Circuit docket.

issues, including that it was first recorded the week before trial. App.116a.

The jury ultimately found Kendrick guilty, and he was sentenced to life in prison. App.8a.[4] The trial court observed that the case presented "an awfully close question" but ultimately denied Kendrick's motion for a new trial. App.245a.

II. Direct Appeal.

The Tennessee Court of Criminal Appeals affirmed his conviction on appeal. App.48a. The Tennessee Supreme Court declined review. *Id*.

III. State Post-Conviction Proceedings.

In April 1998, Kendrick sought state post-conviction relief. App.146a. The post-conviction court initially found that Kendrick's issues were either waived or previously determined. *Id.* However, the Tennessee Court of Criminal Appeals remanded for further proceedings. *Id.* Kendrick's petition alleged ineffectiveness of his trial and appellate counsel (*e.g.*, that trial counsel should have introduced Miller's statement and hired a firearm expert), that the prosecution did not disclose favorable evidence, and that "there is new scientific evidence of his actual innocence." App.252a; 304a; 308a.

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[4] Kendrick was in prison when his habeas petition was filed. App.16a. In March 2020, Kendrick was released on parole and so remains "in custody" for purposes of federal habeas. *Id.*

A. Evidentiary hearing.

"[M]ore than a dozen witnesses testified over the course of ten days of evidentiary hearings." App.9a.

Expert Testimony. Henry Belk testified for Kendrick; he received no compensation other than payment for his travel. App.254a. Belk, a gunsmith, explained that Kendrick's rifle contained a defective trigger mechanism. App.10a. It had the "Common Fire Control" trigger mechanism, used in 23 million firearms, App.54a, in which "the safety only blocks the trigger, it does not block the action of the sear or the hammer," App.56a; if debris gathers,[5] it "can cause an insecure engagement." App.10a. Even with the safety "on or off" and "[w]ithout a pull of the trigger," a firearm like Kendrick's can still fire. App.11a. Belk also testified that the Common Fire Control had a "history of firing under outside influences other than a manual pull of the trigger." App.10a. The state's expert's tests could have dislodged any of the debris that had previously been interfering and did "nothing whatsoever to analyze the [trigger] mechanism and how it can fail." App.58a. Belk "first identified the problem with the Remington Common Fire Control in 1970." App.10a. There were numerous cases involving the Remington Common

[5] Belk identified multiple potential weak points where debris could gather and explained that only 1/18,000th inch of debris in parts can cause a discharge. App.56a. Belk described Kendrick's gun as not having been cleaned and having a "sticky" spring. App.55a.

Fire Control and he had "been consulted on probably two dozen," including one in 1994. App.10a.

Injured Police Officer. Officer Holbrook testified that the night Miller shot himself, he was called to the hospital to document Miller's injury. App.9a. Holbrook confirmed Miller said his finger was not on the trigger when the gun went off. *Id.* His report informed: "Miller states that he picked it [Kendrick's rifle] up with both hands and his finger was not near the trigger." App.63a. Another report stated Miller told the first officer on the scene that the gun "just went off." App.9a.

Kendrick's trial counsel testified that he "presumed" he would be able to get Miller's testimony in, and he thought Miller would "testify consistently with what I knew to be his statements, and I thought…I could use that very effectively…. That was my whole line of reasoning in this case." App.11a;65a–66a. Trial counsel did not "recall [any] backup plans." App.12a. While the public defender's office sometimes informally consulted with a gunsmith, trial counsel "did not remember whether he spoke to him about this case," "did not move for and does not think that he looked for a firearms expert," and "agreed that he performed no research regarding the trigger mechanism in the Remington 7400 rifle." App.64a;223a.

Gunshot Residue. A gunshot residue test was not disclosed before trial, though its results were inconclusive. App.259a; 276a. At trial, an officer interpreted that result to not rule out that Kendrick

fired the gun. *Id.* Testimony later interpreted that to mean the results "were not at levels [one] would expect to find on a shooter's hands…." D.14-31,PageID#3236.

The court dismissed Kendrick's post-conviction claims in 2011. App.248a. Regarding Kendrick's innocence claim, the court rejected it because "evidence that accidental discharge is possible is not equivalent to evidence that a particular discharge was accidental…." App.325a. Despite these conclusions, the court explained, "[E]ven now, the evidence that most strongly casts doubt on the premeditated nature of the petitioner's act is that both the petitioner and the victim were carrying weapons on the day of the victim's death and, apparently, because of their interracial marriage or the conditions of their work, believed that they had reason to do so. In such circumstances, that the petitioner was carrying a weapon on the occasion of the victim's death loses some significance." App.326a–327a.

B. Tennessee Criminal Court of Appeals grants Kendrick a new trial.

On appeal, the Tennessee Court of Criminal Appeals "held that counsel was constitutionally deficient in his 'failure to adduce expert proof about the Common Fire Control and his failure to adduce Sgt. Miller's excited utterances.' The court vacated Kendrick's conviction and declined to address the remaining issues." App.14a. Expert testimony, it found, "was absolutely crucial" to whether Kendrick's

rifle had accidentally discharged—it was the "key question" in Kendrick's case. App.172a;236a. The court agreed counsel was constitutionally deficient in failing to admit, as substantive evidence, Miller's pretrial statements. App.246a. The court found Kendrick's counsel deficient for failing to "anticipate[] a forgetful witness and be[] prepared to adduce the proof, of which he was aware, in another manner." App.238a. These deficiencies prejudiced Kendrick "in a number of ways." App.243a. "[I]t is reasonably likely that the jury would have accredited [Kendrick's] version of events" if his counsel had "put on expert proof" and "elicited admissible substantive evidence" from Miller. App.246a.

C. Tennessee Supreme Court reverses.

The Tennessee Supreme Court granted the State's appeal, then reversed the grant of relief. App.311a;309a. First, the court found trial counsel "made a reasonable tactical decision to construct his 'accidental firing' defense around Sergeant Miller's mishap[.]" App.299a. The court identified *Harrington*, 562 U.S. 86,[6] and *Hinton*, 571 U.S. 263, as "germane to the question of whether Mr. Kendrick's counsel's decision not to seek and retain a firearms expert warrants post-conviction relief." App.176a;185a.

After discussing *Harrington* and *Hinton*, the court concluded Kendrick's trial counsel was not ineffective in failing to hire an expert, and he made a "reasonable

[6] Of course, *Harrington* was decided under AEDPA's deferential rubric. *See Harrington*, 562 U.S. at 105.

tactical decision" because, in pertinent part, (1) "it is doubtful that Mr. Kendrick's trial counsel would have obtained permission to hire a firearms expert in 1994," (2) "it remains entirely uncertain" that trial counsel could have located an expert in 1994 because the expert at Kendrick's post-conviction hearing "first testified about the trigger mechanisms in 1994" and the "record does not indicate the existence of any other such experts who were available at that date," and (3) the expert at Kendrick's post-conviction hearing "would not have been able to testify" about other instances of Model 7400's malfunctioning. App.297a-299a. Further, the court concluded this "was not a case that hinged on expert testimony." App.193a–196a.

Second, the court concluded that, assuming Miller's statements were admissible as excited utterances (in which case they would not constitute hearsay), trial counsel was not ineffective. App.202a–205a. Because trial counsel did not attempt to introduce the statements, there was "no trial court ruling to review." App.202a. Therefore, the question was whether counsel's actions were "objectively unreasonable," according to *Strickland*, 466 U.S. 668. *Id.* The court found that "lack of familiarity with relevant court rules might in some cases provide grounds" for relief and that trial counsel "did not offer the statements as substantive evidence." App.307a-203a–204a. However, even though the Rules of Evidence "slipped [counsel's] mind," the court reasoned that the jury was provided "ample evidence

from which it could have concluded that Officer Miller's memory was faulty." App.204a.

Finally, the court concluded Kendrick was not prejudiced—even if counsel's performance was deficient—because other evidence pointed to Kendrick's guilt. App.205a;105a. The court did not address that the "other evidence" was variously suspect and unsupported by the more complete record developed during post-conviction proceedings. The opinion did not discuss Kendrick's claim of innocence. The case was remanded back to the appellate court, App.206a, where Kendrick's remaining pretermitted claims were dismissed, App.15a, and not subjected to additional review. App.49a.

IV. Federal Habeas Corpus Proceedings.

A. District court denies petition.

In 2016, Kendrick filed a timely pro se petition for a writ of habeas corpus. (D.1); App.15a. "Kendrick[] enumerated forty-eight issues: numerous claims of ineffective assistance of trial counsel, several claims of ineffective assistance of appellate counsel, several claims of prosecutorial misconduct, a claim of new evidence of innocence, a claim that post-conviction proceedings in Tennessee do not provide equal protection for African Americans, and a claim that the Antiterrorism and Effective Death Penalty Act is unconstitutional." App.38a–39a.

The district court found "Petitioner's claims raised only in his pro se briefs were abandoned on appeal and have been procedurally barred." App.74a.

Kendrick asserted actual innocence to overcome the bar, citing *McQuiggin*, 569 U.S. 383, but the court rejected that path to review. App.92a. The court first determined Kendrick was required to prove his actual innocence by "clear and convincing evidence." App.93a. It then determined Kendrick raised new evidence and there "are no issues alleged regarding [its] reliability," but concluded that it "will not now speculate that no reasonable juror could have found the State's evidence more credible than the testimony of Mr. Belk." App.93a–94a. The court did not analyze the new evidence in light of other evidence presented in post-conviction proceedings, including Miller's contemporaneous statements or additional evidence undermining trial witnesses' testimony. *Id.*

Regarding counsel's failure to hire an expert, the court found that the Tennessee Supreme Court reasonably determined Kendrick's counsel "had a reasonable strategy to introduce proof regarding Petitioner's rifle's capacity for accidental discharge and did attempt to undermine the expert proof presented by the State." App.100a. Further, Kendrick had "not demonstrated by clear and convincing evidence that Mr. Belk's testimony could have been found at the time of his trial." App.101a.

As for counsel's failure to introduce Miller's statements, the court found the state court's decision reasonable because "counsel took painstaking measures to introduce this importance defense evidence to the jury[.]" App.106a.

The court denied each of Kendrick's claims and declined to issue a certificate of appealability. App.140a. Kendrick filed a notice of appeal. App.37a.

B. Sixth Circuit grants review and amici support Kendrick.

In March 2020, the Sixth Circuit granted a certificate of appealability on "the two claims of ineffective assistance of counsel regarding the failure to call a weapons expert and the failure to seek to admit Officer Miller's statements to other officers under the excited utterance exception to the hearsay rule." App.46a. Regarding claims deemed procedurally defaulted, the court briefly stated that Kendrick's claim of actual innocence would not overcome that bar because "evidence of problems with the firing mechanism in the murder weapon was cumulative to evidence presented at trial and rejected by the jury." App.41a.

The Tennessee Innocence Project, the National Association of Criminal Defense Lawyers, and the Tennessee Association of Criminal Defense Lawyers filed a brief as amici curiae, taking the position that (1) "Kendrick was deprived of constitutionally mandated effective assistance of counsel because his counsel did not retain an expert to rebut the prosecution's expert and advance his only defense," and (2) trial counsel failed to investigate and "failed to even recognize that he could use the law of hearsay and its exceptions—the same doctrine that has been drilled into every law student since time

immemorial—to admit [the witness'] statements." (R.13, at *14, *18).

C. Sixth Circuit affirms denial.

A panel of the Sixth Circuit affirmed the district court's denial of Kendrick's habeas petition. The panel first acknowledged Kendrick raised seventy-seven issues in his state post-conviction petition and forty-eight issues in his federal habeas petition. App.2a. However, the panel only reviewed the two issues identified in the Certificate of Appealability. *Id.*

The panel identified the only relevant provision of AEDPA as 28 U.S.C. § 2254(d)(1), and only evaluated whether the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law." App.16a.

Regarding Kendrick's claim that trial counsel was ineffective for failing to call an expert, the panel concluded the state court reasonably determined counsel "could follow a strategy that did not require the use of experts." App.25a. The panel cited the Tennessee Supreme Court's statement that the "'best evidence" that the "Model 7400 was capable of misfiring' would have been 'the undisputed fact that Sergeant Miller was shot in the foot by the very same rifle.'" *Id.* The panel discussed the strategy as having been based on (1) Miller's "expected testimony," though Miller disputed at trial whether the gun discharged on its own or he mistakenly pulled the trigger, and (2) trial counsel's review of the prosecution's expert report, though prepared by a

witness whose "position is his position and he's not very easily swayed from that position." App.25a;13a. The panel concluded that no Supreme Court precedent "clearly forecloses" the view that it was not unreasonable for counsel's strategy to not include an expert. App.26a.

Next, the panel found it uncertain counsel would have found an expert. App.26a. "[A]s counsel observed, 'you couldn't Google Remington trigger mechanisms back then.'" *Id.* The panel pointed out that the expert in state post-conviction (Belk, a gunsmith) first testified about faulty Remington trigger mechanisms the same year as Kendrick's trial and did not testify about problems with the specific trigger mechanism until later. *Id.* The panel did not acknowledge that Belk's knowledge of the trigger defect began in the 1970s or the widespread knowledge of Remington trigger defects. The panel did not address the availability of other gunsmiths who might be consulted. Instead, the panel distinguished the pre-1994 cases cited by Kendrick dealing with defective Remington firearms. App.27a.

Finally, the panel agreed with the Tennessee Supreme Court's distinction of *Hinton*, concluding that it does not "clearly establish that an attorney must hire an expert when, as here, he reasonably expects to be able to rebut the prosecution's expert effectively with a lay witness's testimony." App.29a. Further, the panel concluded that the Tennessee Supreme Court did not err in its factual determination that trial counsel could not have

located an expert because, under AEDPA, the court's factual determinations are "presumed" correct and there was nothing "else in the record to suggest why Kendrick's counsel should have reasonably found this lone expert that Kendrick claims was so readily available." App.32a;33a. The panel was also "skeptical" that Kendrick "would have been permitted to hire an expert in 1994." App.33a.

Regarding Kendrick's claim that trial counsel was ineffective for failing to introduce Miller's statements as substantive evidence, the panel concluded "AEDPA forecloses us from granting Kendrick's petition." App.19a. The panel emphasized that trial counsel "elicited answers strongly suggesting…Miller would not have picked up the rifle with his finger on the trigger." App.20a. However, the panel acknowledged Miller "remained firm in his purported lack of memory" about where his hands were when he shot himself. App.21a. In sum, the panel concluded that because trial counsel tried various routes (albeit unsuccessfully), such efforts were enough.

The opinion confirmed that *Strickland* requires counsel to make reasonable investigations or to make reasonable decisions that make particular investigations unnecessary. App.22a–23a. However, the panel reasoned it was not ineffective assistance for trial counsel to fail to investigate because "counsel didn't have any reason to believe [Miller] was 'a dishonest person.'" App.24a. The panel did not explain why counsel's lack of investigation prevented his use of a hearsay exception to introduce Miller's

statements that contradicted trial testimony on the critical fact supporting Kendrick's defense.

This petition followed.

REASONS FOR GRANTING THE PETITION

Mr. Kendrick had one—and only one—defense to establish his actual innocence at trial. But his counsel's failures turned his accidental-discharge defense into a desperate, unsupported theory. One state appellate court during Kendrick's post-conviction proceedings correctly found that his counsel failed him twice on the "key question" at trial—whether the gun accidentally discharged when Kendrick's wife was killed. Indeed, trial counsel "presumed" the key witness for his defense would not change his testimony and had "no backup plan." He also did not recall looking for an expert and did no research regarding the trigger mechanism. Ultimately, though, the Tennessee Supreme Court concluded Kendrick received effective assistance of counsel, and the federal courts below deferred to that conclusion. The Sixth Circuit therefore decided important federal questions concerning the scope of meaning of the Fifth, Sixth, and Fourteenth Amendments in a way that conflicts with this Court's decisions. *See Strickland*, 466 U.S. at 684–85.

First, it has long been "clearly established that constitutionally effective counsel must thoroughly investigate the defense he chooses to present." *Elmore v. Holbrook*, 137 S. Ct. 3, 7 (2016) (Sotomayor, J., dissenting) (citing *Wiggins v. Smith*, 539 U.S. 510

(2003)). Second, this Court has "said time and again that while 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,]…strategic choices made after less than complete investigation are only reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Id.* at 8 (quoting *Strickland*, 466 U.S. at 690–91). Third, it is "clearly established that the key inquiry for prejudice purposes is the difference between what was actually presented at trial and what competent counsel could have presented." *Id.* at 9 (citing *Rompilla v. Beard*, 545 U.S. 374, 393 (2005)). Fourth, "an inquiry to prejudice should not presume that an expert opinion is rendered meaningless by the State's introduction of a contrary opinion." *Id.* at 10 (citing *Porter v. McCollum*, 558 U.S. 30, 36 (2009)).

A constitutionally competent lawyer would have recognized that any reasonable strategy required a firearms expert. Counsel arrived at trial with no strategy to support his opening promise to the jury that Kendrick's gun was "faulty," forcing him to alter that claim as trial unfolded to Kendrick's detriment. This was deficient performance, directly resulting from counsel's failure to retain an expert.

Unfortunately, the courts reviewing these claims variously applied the wrong standard or came to unreasonable conclusions, including with respect to Kendrick's post-conviction proof supporting actual innocence. Further, the courts reviewing these claims

did not analyze counsel's deficient conduct in a holistic fashion. Finally, because of AEDPA, the federal courts reviewing Kendrick's claims abdicated their independent responsibility to review the constitutionality of Kendrick's conviction.

The petition should be granted.

I. The Courts Below Applied the Wrong Standard for Assessing Ineffective Assistance of Counsel, Contrary to this Court's Precedent.

The state court and Sixth Circuit decisions denying relief were objectively unreasonable. 28 U.S.C. § 2254(d).

A. Standards and considerations governing review.

The Anti-terrorism and Effective Death Penalty Act makes habeas corpus relief unavailable unless a state court's decision on the merits was (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). Answering these questions "requires the federal habeas court to 'train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018).

Deference is given to state courts, but "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Federal courts owe no deference to "state-court decision[s] that correctly identif[y] the governing legal rule but appl[y] it unreasonably to the facts of a particular prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). Further, if the state court never made any specific finding, the claim is reviewed *de novo*. *See Cone v. Bell*, 556 U.S. 449, 472 (2009).

Traditionally, this Court does not grant certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Here, Kendrick appealed the entirety of the issues raised in his habeas petition. *See* App.37a. Although the Sixth Circuit granted review on only two, a certificate of appealability is not jurisdictional, such that additional issues raised below should remain ripe for review. *See Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) (holding "failure to obtain a COA is jurisdictional, while a COA's failure to indicate an issue is not"); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (filing notice of appeal "presumes that the petitioner is requesting that the issues which were not certified by the district court be evaluated"); *Gadomski v. Renico*, 258 F. App'x 781, 782 (6th Cir. 2007) ("'all arguments relevant'" to certified question properly before court) (citations omitted); *see also* Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c)(1)(A).

B. Tennessee Supreme Court and Sixth Circuit required proof a particular expert was available at trial, contrary to this Court's precedent.

Nearly a century ago, Justice Cardozo emphasized that: "[U]pon the trial of certain issues…experts are often necessary both for prosecution and for defense….[A] defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929). It is now widely understood that an imbalance in resources leads to wrongful convictions, especially when unreliable "expert" testimony offered by the prosecution goes unchallenged; the "threat to fair criminal trials posed by…incompetent or fraudulent prosecution forensics experts….is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses…." *Hinton*, 571 U.S. at 276 (discussing study of exonerations finding invalid forensic testimony contributed to 60% of those convictions). *Cf. Ceasor v. Ocwieja*, 655 F. App'x 263, 286 (6th Cir. 2016) (acknowledging that "where there is 'no victim who can provide an account, no eyewitness, no corroborative physical evidence and no apparent motive to [harm],' the expert 'is the case'") (citation omitted).

Kendrick was erroneously denied relief on his claim that trial counsel should have called an expert to establish his central defense that his gun fired

accidentally because the courts below required him to prove that either the expert who testified during state post-conviction proceedings or another identifiable expert would have been available at trial.

More specifically, the Tennessee Supreme Court denied Kendrick relief because "it remains entirely uncertain" trial counsel could have located an expert in 1994, and the "record does not indicate the existence of any other such experts who were available at that date." App.194a. The district court endorsed that reasoning, concluding Kendrick had "not demonstrated by clear and convincing evidence that Belk's testimony could have been found at the time of his trial." App.101a. The Sixth Circuit stretched this logic further, stating, "[A]s counsel observed, 'you couldn't Google Remington trigger mechanisms back then.'" App.26a. "Nor is there anything else in the record to suggest why Kendrick's counsel should have reasonably found this *lone expert* that Kendrick claims was so readily available." App.33a (emphasis added).

Here, Kendrick had *no* expert at trial, and that constitutional deprivation cannot be excused because 1994 was pre-"Google." *See* App.236a (noting testimony that trial counsel could have found Belk with research). Lawyers found experts in the 1990s by different avenues, but the "prevailing professional norms" required by *Strickland* were the same:

> The American Bar Association standards in effect in 1993 stated that "[d]efense counsel should conduct a prompt investigation of the

> circumstances of the case and explore all avenues leading to facts relevant to the merits of the case."

Rivas v. Fischer, 780 F.3d 529, 548 n.28 (2d Cir. 2015) (citations omitted) (granting habeas relief).

The conclusions of the courts below are therefore wrong for several reasons.

First, the record shows experts would have been available. In addition to references to an expert sometimes consulted by the public defender's office, Kendrick offered expert testimony in post-conviction from a gunsmith who identified the trigger issue decades before Kendrick's trial, who served in a leadership position with a firearm organization, and who consulted on dozens of cases starting in the 1990s. It is unreasonable to conclude that because Kendrick offered one expert, he was the "lone expert." Experts need not be professional, paid "experts," but often come from organizations with specialized knowledge, academia, or the private sector. There is no reason to think some expert would not have been available, especially because working with gunsmiths like Belk has a long history in Tennessee litigation. *Cf. Miller v. Ins. Co.*, 21 S.W. 39, 39 (Tenn. 1892) (noting that after gun accidentally discharged, defect discovered and "remedied by a gunsmith"); *Kirby v. State*, 22 Tenn. 289, 290 (1842).

Second, although some authority suggests habeas review requires proof of an expert's identity, that heightened standard should not have been applied by

the state courts. *See Williams v. Thaler*, 684 F.3d 597, 604 (5th Cir. 2012) (failure to obtain independent ballistics or forensics experts rendered counsel unable to offer meaningful challenge to findings and conclusions of state's experts, "many of which proved to be incorrect"). *Cf. Anderson v. United States*, 981 F.3d 565, 578 (7th Cir. 2020) (where counsel could not interpret toxicology reports, issue whether counsel consulted with defendant regarding "need to hire an expert").

Recently, the Seventh Circuit concluded that where "the only issue was whether the death was intentional," "[b]y not reaching out to an expert to review or challenge [the prosecution expert's] findings, counsel acquiesced to the state's strongest evidence of intent despite its perceivable flaws." *Thomas v. Clements*, 789 F.3d 760, 771, 769 (7th Cir. 2015). "To not even contact an expert…was to accept [the] finding of intentional death without challenge and basically doom defense's theory of the case." *Id.* at 769. And, cross-examination could not make up "for the lack of [an] expert," such that—like in Kendrick's case—"the best defense counsel could do was ask the state's expert whether she disagreed with her own diagnosis and thought the death could be an accident. This line of questioning fell flat…." *Id.* at 769–70. *Accord id.* at 771, 773 (citing *Dugas v. Coplan*, 428 F.3d 317, 329–30 (1st Cir. 2005) (finding counsel ineffective for not consulting expert when "defense...depended on [counsel's] ability to convince the jurors that the State's experts might be wrong"); *Showers v. Beard*, 635 F.3d 625, 631–34 (3d Cir. 2011)

(finding counsel's performance deficient and prejudicial when defense failed to hire expert)). *But see id.* at 772 n.2 (citing *Ellison v. Acevedo*, 593 F.3d 625, 634 (7th Cir. 2010) ("defendant must demonstrate that an expert capable of supporting the defense was reasonably available at the time of trial")); *Day v. Quarterman*, 566 F.3d 527, 538–39 (5th Cir. 2009) (requiring petitioner to demonstrate availability).

The Sixth Circuit cited no basis for assuming one expert existed and concluding his availability was insufficiently established. The issue here is that trial counsel recalled consulting *no* experts, but traditional investigation techniques and basic research would have identified the firearm defect. *See Harrington*, 562 U.S. at 106 (establishing that in some criminal cases strategy "requires consultation with experts or introduction of expert evidence" and discussing experts offered post-conviction but not their specific identity or availability).

C. Tennessee Supreme Court and Sixth Circuit analyzed the reasonableness of trial counsel's conduct, but this Court's precedent and other Courts of Appeals recognize *per se* deficient performance.

The Tennessee Supreme Court and the Sixth Circuit examined Kendrick's claims of ineffective assistance of counsel according to *Strickland*'s "reasonableness" analysis, according to which a petitioner must prove counsel's performance was deficient (*i.e.*, it "fell below an objective standard of

reasonableness") and prejudicial. *See* App.17a;147a. This was the wrong standard to apply where counsel's conduct was, effectively, *per se* deficient. *See Strickland*, 466 U.S. at 692 (explaining "[i]n certain Sixth Amendment contexts, prejudice is presumed"). Under either test, though, Kendrick is entitled to relief.

When an attorney's actions are motivated by a clearly erroneous or even "startingly ignorant" understanding of the law, rather than a strategic concern, a conclusive presumption of deficient performance follows. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (pre-AEDPA but finding "justifications" offered for omission to "betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation"); *accord* Eve Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1629 (2020).

In *Kimmelman*, petitioner's counsel did not file a timely suppression motion. 477 U.S. at 385. That failure was "not due to strategic considerations, but because…he was unaware of the search and of the State's intention to introduce [seized material]." *Id.* Therefore, in part, the deficient conduct was due to his failure to investigate. *Id.* Consequently, this Court instructed that while it will "generally be appropriate for a reviewing court to assess counsel's overall performance," counsel was constitutionally deficient based on the particular failure to conduct an investigation. *Id.* at 386–87. Further, the Court

rejected efforts to "minimize the seriousness of counsel's errors by asserting that the State's case turned far more on the credibility of witnesses," and found that "their use of hindsight to evaluate the relative importance of various components of the State's case" was "flawed." *Id.* at 385–86.

In *Hinton*, the only evidence connecting the petitioner to multiple homicides was expert ballistics testimony, but the defense attorney never retained a reputable expert because he mistakenly thought expert funding was capped. 571 U.S. at 266–68. This Court concluded that "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.* at 274.

Applying either *Strickland*'s "reasonableness" standard or this Court's conclusion that some defects are so fundamental they cannot be excused, Kendrick's second claim regarding "excited utterance" evidence should entitle him to relief because it is based on a clear error of law: "lack of familiarity with relevant court rules." App.203a No investigation other than, perhaps, "basic research," was needed to assert that a rule of evidence made the officer's repeated statements on the night he accidentally shot himself admissible. Second, even when framed as a failure to investigate, a rebuttable presumption of deficient performance should apply. *See, e.g.*, A*ndrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (per curiam) ("counsel's investigation…was an empty exercise").

Here, the Sixth Circuit reasoned that it was not ineffective assistance for trial counsel to fail to investigate because, in part, "counsel didn't have any reason to believe [Miller] was 'a dishonest person.'" App.24a. Counsel's failure to investigate despite knowing the state would use an expert to prove the essential element means that no reasonable strategic decision followed, and Kendrick should have been granted relief.

Therefore, the Sixth Circuit's decision conflicts with those circuits where counsel's failure to perform basic research constitutes deficient performance. *E.g.*, *Bridges v. United States*, 991 F.3d 793, 805 (7th Cir. 2021) ("failure to compare statutory definitions in resolving a guideline question"); *United States v. Sepling*, 944 F.3d 138, 146–50 (3d Cir. 2019) (failure to investigate related to Sentencing Commission recommendation); *United States v. Cuthbertson*, 833 F. App'x 727 (10th Cir. 2020) (non-precedential) (failing to recognize Hobbs Act robbery not crime of violence); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) (failing to raise argument against career offender guideline).

D. Tennessee Supreme Court and Sixth Circuit did not analyze whether trial counsel's deficient conduct rendered the trial fundamentally unfair, contrary to this Court's precedent.

Among the issues Kendrick raised in his habeas petition was whether "the cumulative effect of trial counsel's deficient performance was sufficiently

prejudicial." App.76a. The courts below did not undertake a cumulative analysis of counsel's errors, though this Court cautioned in *Strickland* against applying the prejudice inquiry in a "mechanical" fashion, because "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding" and whether the proceeding produced "just results." *Strickland*, 466 U.S. at 696. *See also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (not deciding but assuming fundamentally unfair trial violates *Strickland* even when no showing of reasonable probability of different result).

The Tennessee Supreme Court and the Sixth Circuit analyzed the two claims of ineffective assistance of counsel separately and then concluded that, for each, Kendrick was required to show that "but for counsel's errors, the result of the proceeding would have been different." *See* App.17a;152a. The Tennessee Supreme Court then concluded (1) failure to offer expert proof was not deficient representation because the "bulk of the State's case consisted of eyewitnesses," App.196a, and (2) failure to introduce Miller's prior statements was not prejudicial due to "the other 'ample evidence.'" App.205a. The Sixth Circuit also failed to address the impact of the confluence of counsel's failures on the trial's fairness. The Tennessee Supreme Court and the Sixth Circuit should have analyzed the errors together to determine whether they (and the other issues identified by Kendrick) rendered the proceeding fundamentally unfair.

After all, trial counsel's errors were necessarily tied to the fundamental unfairness of the proceedings. For example, Kendrick's trial counsel was the only public defender in his criminal court division, and as he later explained, "I will concede I didn't put nearly as much time in on [Kendrick's] case or any other cases that I tried as I do now in private practice…. My average caseload every Thursday for settlement day was between 20 and 30 defendants. My average month included at least 2 if not 3 trial[s]. So I wasn't aware of the issue with the trigger pull." (D.14-31,PageID#3292).

This Court has previously recognized that the criminal legal system depends on "overworked and underpaid public defenders," which is a fact inextricably tied to whether the Sixth Amendment right to counsel is being effectuated. *See Luis v. United States*, 136 S. Ct. 1083, 1095 (2016) (citing Department of Justice statistics finding "only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards"). *Cf.* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. Pa. L. Rev. 1161, 1233 (2019) (raising question that "[e]ither appointed counsel are presumptively effective notwithstanding the constraints under which they operate—in which case the fairness theory cannot explain the outcome in *Luis*—or they're not, in which case *Luis* is correct but implicitly acknowledges a constitutional crisis") (citation omitted).

By not analyzing Kendrick's case within the context of the system in which trial counsel was operating or, at minimum, by not analyzing counsel's errors' impact on his trial together, the courts below applied the wrong precedent from this Court.

II. The Courts Below Applied the Wrong Standard When Considering Kendrick's "Actual Innocence" Claim to Overcome AEDPA's Procedural Bar.

In his habeas petition, Kendrick requested the District Court hear his procedurally defaulted issues pursuant to equitable principles, including his assertion of actual innocence based on the new scientific evidence of the firearm defect that would have supported his accidental-shooting defense. *See* App.93a.[7] The courts below erroneously declined this request.

This Court recognizes a "fundamental miscarriage of justice exception" to AEDPA's strict prohibition on considering procedurally defaulted claims, an exception "grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.'" *McQuiggin*, 569

[7] The Sixth Circuit accepted the district court's procedural default determination. App.39a. The district court conceded the state courts "offered no explanation" for "finding of abandonment" of the issues Kendrick raised and conceded that its post-hoc rationalization was undermined because Kendrick's pro se "brief was filed first and counsel's as a supplement." App.80a; App.81a.

U.S. at 392 (citation omitted). This so-called "gateway" to overcome procedural default is "demanding" but available "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 nonharmless constitutional error.'" *Id.* at 401. *See also Schlup*, 513 U.S. at 301 (concluding "clear and convincing" standard did not provide adequate protection against miscarriage of justice). "To invoke the miscarriage of justice exception to AEDPA's statute of limitations," this Court has long held that "a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327).

According to the district court, its role was to "determine whether Petitioner has shown actual innocence, by clear and convincing evidence, such that his conviction represents a 'fundamental miscarriage of justice.'" App.93a (citation omitted). Therefore, although the court acknowledged that the firearm trigger defect testimony offered in state post-conviction proceedings was new evidence "which was not raised at trial" and that its reliability was not at issue, the court concluded Kendrick could not "show that no reasonable juror would have found him guilty beyond a reasonable doubt if provided with Mr. Belk's testimony," since it did not "definitively establish" that the gun fired without a trigger pull, just that an accidental shooting was "possible." *Id.* The court compared the new evidence to the state's expert's

trial testimony, ultimately reasoning that the impact of the new evidence was beyond the court's reach because "credibility determinations and determinations of value are questions for the jury and this Court will not now speculate that no reasonable juror could have found the State's evidence more credible than the testimony of Mr. Belk." App.94a.

In denying a certificate of appealability based on Kendrick's claim of new evidence of actual innocence, the Sixth Circuit only explained that "his evidence of problems with the firing mechanism in the murder weapon was cumulative to evidence presented at trial and rejected by the jury." App.41a. While trial counsel *attempted* to get substantive information about the trigger defect before the jury in the form of Miller's statements, counsel's unsuccessful attempts meant the source of information was effectively limited to counsel's insinuating questions to witnesses on cross-examination. *See* App.21a (referencing trial counsel's cross-examinations and noting trial court's error preventing admission of reports); *see also* App.245a (noting erroneous exclusion of testimony about Miller's prior inconsistent statements). *Cf. Long v. Hooks*, 972 F.3d 442, 463 (4th Cir. 2020) ("The State argues the evidence it withheld was merely cumulative of defense counsel's arguments at trial. But surely the State is aware (or at least should be) that it is elemental that counsel's arguments are not evidence in a case. It is literally black letter law."). What evidence is put before a jury matters because,

according to scholars, jurors "use a coherence-based reasoning method" such that, "[c]ritically, evidence is not independent: it is related, and thus the exclusion of evidence of innocence can make an entire case against a defendant seem far more compelling than it is." *Id.* at 463–64 (quoting amici curiae brief of professors and scholars).

Therefore, the courts below applied the wrong gateway-innocence standard in three critical respects.

First, the district court erroneously required "clear and convincing" and "definitive" proof, which heightened an already-high standard. *Accord Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013) ("definitive, affirmative proof of innocence is not strictly required" and "a petitioner's new evidence must be sufficient to undermine a court's confidence in his conviction, but not to erase any possibility of guilt"). Fifteen years ago, this Court specifically "rejected the…argument that AEDPA replaced the standard for actual-innocence gateway claims" for initial federal habeas petitions seeking consideration of defaulted claims, as prescribed in *Schlup*. *See McQuiggin*, 569 U.S. at 396 n.1 (citing *House*, 547 U.S. at 539).

Second, both the district court and Sixth Circuit failed to review all evidence "old and new," whether or not admissible. *House*, 547 U.S. at 538 ("holistic judgment about 'all the evidence'"); *Schlup*, 513 U.S. at 327–28. Had the courts done so, Kendrick would have met the threshold test. Indeed, the trial court

was skeptical of Kendrick's conviction even *before* Kendrick was able to present expert testimony in support of his accidental-discharge defense. *See* App.245a ("It was a remarkable case. I've never had another case quite like it where the evidence… seesawed back and forth."); *see also id.* ("awfully close question"). After all, no one saw the gun go off. Kendrick's new evidence of innocence was not cumulative of other evidence at trial since there was no supporting expert testimony at his trial. Considered along with the constitutional errors at his trial and all other evidence, including the evidence previously excluded or deemed inadmissible under the Rules of Evidence at trial such as Miller's statements, *see Schlup*, 513 U.S. at 327–28, the federal habeas courts should have opened the actual-innocence gateway.

Third, the district court's refusal to consider credibility is contrary to *Schlup*, in which this Court distinguished the standard for innocence gateway claims from the standard for insufficient evidence claims per *Jackson v. Virginia*, 443 U.S. 307 (1979). "[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard…the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schlup*, 513 U.S. at 330. By refusing to consider credibility, the district court erred.

The correct standard for gateway-innocence claims when you "remove the double negative" is whether it is "more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. Applying that standard here when viewing *all* of the evidence "holistically" leads to the inescapable conclusion that Kendrick should be excused of procedural default and have his constitutional claims heard. A "conclusive exoneration" is not required to open the gateway, *id.* at 553, but Kendrick's is a rare case that meets the heightened standard to avoid AEDPA's provisions that would close the doors on his claim of innocence.

When the gateway opens, in addition to the two issues reviewed by the Sixth Circuit, a habeas court would be forced to contend with the dozens of other constitutional defects identified in the petition calling Kendrick's conviction into doubt. *See* (D.1) (specifying additional instances of ineffective assistance of counsel and suppression); *e.g.*, App.119a (defaulted claim that prosecution's open file discovery did not include firearm "schematic").

CONCLUSION

The petition for a writ of certiorari should be granted. Counsel's failure to call an expert on the central issue in the case and inability to admit substantive proof of a second accidental shooting was constitutionally deficient representation. AEDPA does not foreclose that conclusion, nor should it have been used to shut the door on Kendrick's expert proof of innocence.

Respectfully submitted,

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Dated: JULY 2021