No. 21-107

In the Supreme Court of the United States

EDWARD THOMAS KENDRICK, III,
Petitioner,

v.

MIKE PARRIS, WARDEN,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

On the habeas corpus petitioner's allegations of ineffective assistance of trial counsel involving counsel's decisions not to investigate or retain a firearms expert or to seek admission of a law enforcement officer's prior statements as excited utterances, did the Tennessee Supreme Court reasonably apply clearly established federal law when rejecting the claims, as both the district court and the Sixth Circuit concluded?

II

Can the petitioner overcome the procedural default of other federal claims due to his alleged actual innocence?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

The Hamilton County Grand jury indicted the petitioner, Edward Kendrick, for the March 1994 first-degree premediated murder of his wife, Lisa Kendrick. The case proceeded to a jury trial in November 1994, at which time the jury convicted the petitioner as charged and the trial court imposed a sentence of life imprisonment. As noted in the petition for writ of certiorari, the petitioner has been on parole since 2020. (Pet. 9, n. 4.)

I. Trial Evidence

Around 10:00 p.m. on March 6, 1994, the petitioner drove to the BP gas station on Lee Highway in Chattanooga, Tennessee, where his wife, Lisa Kendrick, worked. *Kendrick v. Parris*, 989 F.3d 459, 462 (6th Cir. 2021). Their four-year-old daughter and three-year-old son were also in the car. According to Lennell Shepheard, the victim's friend who was inside the store that night, the petitioner walked into the store and asked the victim to step outside and talk. She completed her transactions and walked outside, and to Shepheard, it appeared that the two argued. Shortly thereafter, Shepheard heard a "boom," and when he opened the door and looked outside, he saw the victim lying on the ground and the petitioner standing over her. Likewise, Charles Mowrer, who lived across the street, heard the same sound, ran outside, and saw the petitioner looking over the victim. A departing store patron, Timothy Benton, heard the sound, and when he looked back, he saw the petitioner pointing a rifle "straight up in the air," with his right

hand "on the pistol grip area around the trigger and his left hand . . . up near the stock." *Id.*

According to Shepheard, the petitioner stated "I told you so" about six times while looking at the victim on the ground. The petitioner turned, made eye-contact with Shepheard, and reached at least three times for the car door without opening it. Ultimately, the petitioner ran around the car, jumped in it, and fled toward the nearby airport. Benton followed him while Shepheard called 911. Once at the airport, the petitioner made his own 911 call and stated that he had just shot his wife. After the petitioner was placed into a patrol car, he said, "I hope this is only a dream." He made no suggestion that the shooting was accidental. *Id.* at 462-63.

An officer at the airport approached the petitioner's and the victim's four-year-old daughter, Endia Kendrick, who "was very upset, was crying, [and] seemed to be very scared." Another officer testified that Endia—who was "hysterical"—stated that "she had told daddy not to shoot mommy but he did and she fell." Endia testified at trial that she saw the petitioner shoot the victim and that the victim's hands were up, although she acknowledged that she previously told defense counsel that she did not see the shooting. *Id.*

This testimony matched the forensic evidence of stippling on the victim's forearms. *Id.* The medical examiner found stipple injury only on the backs of the victim's forearms. (R.E. 14-5, PageID# 815, 818.) He opined that, for stippling to occur on the backs of the forearms and not on the hands, upper arms, or chest, the forearms had to be up and facing the barrel of the

gun, with the hands bent back. (R.E. 14-5, PageID# 819.) "In addition, her forearm[s] would have to be drawn in on either side of where the projectile came into the body." (R.E. 14-5, PageID# 819.)

Officer Steve Miller, an identification officer for the Chattanooga Police Department, collected a Remington 7400 rifle from the side of the airport road, which he placed in his trunk and transported to the police station. *Kendrick*, 989 F.3d at 463. Around 1:45 a.m., in the police station parking lot, Miller gathered evidence to take inside. As the rifle was pointed downward, it discharged and struck Miller in the left foot. *Id.*

At trial, Miller testified that he had no recollection of the position of his hand when the rifle discharged even though police incident reports recorded Miller as having said that the rifle fired without Miller touching the trigger. Defense counsel pursued vigorous cross-examination to challenge this lack of memory:

> Miller admitted that he had been a police officer for twenty-two years, that he had never accidentally discharged a firearm, and that it is "drilled into you at the police academy don't ever put your hand on the trigger unless you're going to shoot the gun." He also confirmed that he would "[n]ever" otherwise "knowingly" place his finger on the trigger of a loaded gun. And Miller conceded that he "presumed [the gun] was loaded" at the time. Counsel next pointed out that when Miller reenacted the incident for the jury, he hadn't "put [his] finger on the trigger." Miller insisted that he could not "say for sure in th[e] courtroom how [his] hand was that night,"

> but counsel wouldn't let Miller off the hook so easily. Eventually, counsel's questioning caused Miller to admit that his reenactment for the jury—finger "not on the trigger"—was "to the best of [his] recollection how it happened[.]"

Id. After recalling Miller later in the trial, defense counsel questioned him about his prior statements, and after reviewing certain reports, Miller expressed no memory of those statements. The trial court declined defense counsel's attempts to admit the reports as impeaching prior inconsistent statements under Tenn. R. Evid. 613(b). *Id*. at 464.

Kelly Fite, the State's firearms expert, testified that he conducted a "drop test" on the rifle and examined it extensively to determine whether it would fire accidently without the trigger being pulled. From his testing, the only way that Fite could make this rifle discharge was by pulling the trigger. Consequently, he opined that the only way to fire this rifle without breaking it "is by pulling the trigger." *Id*. at 463-64.

The petitioner testified that he did not intentionally kill his wife and would not have done so. When he talked with her at the BP station, they were not arguing or having any problems. He explained that he carried the loaded rifle only for protection, as they both cleaned houses in an unsafe area. According to the petitioner, the victim told him to move the rifle from the front seat to the trunk. When he retrieved his keys from his pocket and moved the rifle to his right hand, it "went off" without him pulling the trigger. He fled after the shooting so as to remove his children from the

scene. He threw the weapon out of the car window because he was "scared." *Id*. at 464.

II. Direct Appeal

On direct appeal, the Tennessee Court of Criminal Appeals affirmed the petitioner's conviction. *State v. Kendricks*, 947 S.W.2d 875 (Tenn. Crim. App. 1996). In so doing, the court concluded that the trial court erred by excluding extrinsic evidence on Miller's prior inconsistent statements that his finger was not near the rifle's trigger when it discharged. But any error under Tenn. R. Evid. 613(b) was harmless because defense counsel's "thorough" cross-examination of Miller "provided the jury ample evidence from which it could have concluded that [his] memory was faulty and that he knew he had not caused the gun to fire by pulling the trigger." *Id*. at 881-82.

III. Post-Conviction Trial Proceedings

After the Tennessee Supreme Court denied discretionary review in the direct appeal of his conviction, the petitioner pursued post-conviction relief in state court, which the trial court denied. On appeal, the Tennessee Court of Criminal Appeals reversed and remanded for the appointment of counsel and for further proceedings on claims not waived or previously determined. *Kendricks v. State*, 13 S.W.3d 401 (Tenn. Crim. App. 1999).

At the evidentiary hearing conducted on remand, Miller testified again about the events surrounding his own shooting while unloading the rifle from his vehicle. *Kendrick*, 989 F.3d at 464. He could not recall where his fingers were when the gun discharged, nor could he

"say with a hundred percent accuracy" that they were not near the trigger. But, consistent with his training, his fingers "shouldn't have been" near the trigger. Officer Michael Holbrook, who prepared the initial report on Miller's injury, testified that during a visit with Miller at the hospital, Miller said that his finger was not around the trigger when the rifle fired. Officer Glen Sims identified a supplemental incident report that recorded Miller telling Officer James Gann that the rifle "just went off." Officer Gann, the first officer responding to the incident and assisting Miller, explained that Miller was in a lot of pain, was bleeding, and was starting to go into shock. When Gann was shown Sims's report about Miller's statement, the report did not refresh Gann's memory about what Miller said to him about the shooting. *Id*. at 465.

Jack Belk, a firearms expert who testified for the petitioner, explained that this Remington Model 7400 rifle had "a common trigger mechanism" and that generally "all pumps and automatics manufactured after 1948 by Remington" contain this trigger mechanism. According to Belk, Remington firearms with this trigger mechanism have "a history of firing under outside influences other than a manual pull of the trigger." A build-up of debris in the trigger mechanism can cause an "insecure engagement between the hammer and the sear itself," meaning that the gun can fire without pulling the trigger and with the safety engaged. *Id*.

Belk first identified a problem with the common trigger mechanism on a Remington firearm in the 1970s. His first case with the common trigger

mechanism was in 1994, involving a Remington 700 rifle. However, he did not handle a case involving a Remington 7400 rifle until 1997 or 1998. He opined that someone could have potentially found and retained him in 1994. *Id*.

Prior to his hearing testimony, Belk looked at the rifle, and from his visual inspection, the rifle showed the normal dirty condition of a gun that had not been cleaned. He could not manipulate the gun to fire without pulling the trigger. *Id*. He could not opine that this gun had misfired because he did not "have that information," and the gun "hasn't done that with [him]." (R.E. 14-30, PageID# 3147.) He acknowledged that he had never reproduced an inadvertent fire from debris in an operational Remington 7400 rifle. (R.E. 14-30, PageID# 3158-60.) Nevertheless, he opined that the rifle "is capable of firing without a pull of the trigger, whether the safety is on or off." *Kendrick*, 989 F.3d at 465.

Trial counsel, Hank Hill, testified that, once he learned that Miller said his hand was not near the trigger during his own shooting, he believed that this "ought to prove our case." Hill knew Miller not to be a dishonest person, and he believed that Miller would testify consistently with his prior statements that his finger was not on the trigger. Hill thought that the defense "could use that very effectively." *Id*. at 465-66.

Once Miller testified to not recalling where his hand was on the rifle when it discharged, Hill felt "sandbagged." He sought to admit Miller's prior statements as inconsistent statements. He acknowledged that he could have, but did not, seek

their admission under Tenn. R. Evid. 803(2), the excited-utterance exception to the hearsay rule. He knew the difference between the two, but "[i]n the heat of the trial, [he] didn't see that." *Id.* at 466.

Regarding firearm expert testimony, members of the defense team talked to Fite and reviewed his report prior to trial. In view of Fite's expected expert testimony, Hill believed that Miller's shooting "trump[ed] anything Kelly Fite can say." "Mr. Miller shooting himself in the foot accidentally, without his hands near the trigger, was enough for a reasonable doubt as to anything." *Id*.

Hill—who had a "fundamental knowledge of firearms"—did not look for an expert witness to testify for the defense regarding the gun's discharging, and he could not recall if he consulted with a gunsmith whom he routinely used. When asked if he believed expert testimony from a witness who examined the trigger mechanism would have been beneficial, he said that he did, "especially with the knowledge now that there have been so many problems with the Remington trigger mechanism." But at that time, Hill did not recognize the significance because he knew of no "discussion in the industry about the trigger mechanism on the Remington being potentially able to malfunction." "[Y]ou couldn't Google Remington trigger mechanisms back then." *Id*.

IV. Post-Conviction Appeal

Upon consideration of the proof presented, the trial court denied the post-conviction petition, but on appeal, the Tennessee Court of Criminal Appeals reversed and

remanded for a new trial, concluding that trial counsel rendered ineffective assistance of counsel by failing (1) to secure expert opinion testimony on faulty trigger mechanisms in Remington 7400 rifles, and (2) to seek the admission of Miller's pretrial statements—that his finger was not on or near the rifle's trigger when it discharged—as excited utterances under Tenn. R. Evid. 803(2). *Kendrick v. State*, E2011-02367-CCA-R3-PC, 2013 WL 3306655, at *13-18 (Tenn. Crim. App. Jun. 27, 2013). The court declined to address the remaining issues raised by the petitioner. *Id.* at *18.

Upon further review, the Tennessee Supreme Court reversed and reinstated the petitioner's conviction. *Kendrick v. State*, 454 S.W.3d 450 (Tenn. 2015), On the expert-witness issue, the court found no deficient performance because counsel was not compelled to seek the appointment of a defense expert. *Id.* at 468-77. On the evidentiary issue, in view of counsel's other efforts to convey to the jury that Miller's fingers were not near the trigger when the rifle discharged, the court found neither deficient performance nor prejudice in counsel's failure to seek admission of Miller's statements under the excited-utterance exception to the hearsay rule. *Id.* at 477-81. The Tennessee Supreme Court remanded for the Tennessee Court of Criminal Appeals to consider the petitioner's remaining claims, *id.* at 481, and this Court denied certiorari, *Kendrick v. Tennessee*, 136 S. Ct. 335 (2015).

On remand, the Tennessee Court of Criminal Appeals rejected the petitioner's other claims and affirmed the conviction, and the Tennessee Supreme Court denied discretionary review. *Kendrick v. State*,

E2011-02367-CCA-R3-PC, 2015 WL 6755004 (Tenn. Crim. App. Nov. 5, 2015), *perm. app. denied* (Tenn. May 5, 2016).

V. Federal Habeas Corpus Review

The petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee, which denied relief on all claims. *Kendricks v. Phillips*, No. 1:16-cv-00350, 2019 WL 4757813 (E.D. Tenn. Sep. 30, 2019). On the expert witness issue, the district court concluded that the state supreme court did not unreasonably apply federal law when rejecting the claim of ineffective assistance of counsel in declining to develop expert opinion testimony on the rifle's firing. *Id.* at *19-20. In the district court's view, while expert opinion testimony comparable to Belk's post-conviction hearing testimony would have been useful, it was not unreasonable for the Tennessee Supreme Court to conclude that counsel was not ineffective for declining to hire an expert. *Id.* at *20. "Because the case here did not rely solely on expert testimony where the State presented much additional evidence, including eyewitness testimony, counsel was not ineffective for failing to hire an expert." *Id.*

Likewise, the district court found no unreasonable application of federal law in the Tennessee Supreme Court's rejection of the claim of ineffective assistance of counsel in failing to rely on the excited utterance exception to the hearsay rule. *Id.* at *21-22. On the petitioner's assertion that Belk's testimony constitutes proof of actual innocence sufficient to excuse a procedural default, the district court concluded that the

petitioner cannot make the requisite showing "that no reasonable juror would have found him guilty beyond a reasonable doubt if provided with Mr. Belk's testimony." *Id*. at *17.

On appeal, the Sixth Circuit granted a certificate of appealability on the two ineffectiveness claims rejected by the Tennessee Supreme Court, and it affirmed the district court's denial of the habeas corpus petition. On the expert witness issue, the court concluded that "a fairminded jurist could agree with the Tennessee Supreme Court that counsel's pre-trial strategy for rebutting the State's firearms expert was reasonable." *Kendrick*, 989 F.3d at 472. But even if defense counsel should have sought an expert, "a fairminded jurist could agree that it was 'entirely uncertain' whether counsel would have found one in 1994 with a reasonable investigation." *Id*. (quoting *Kendrick*, 454 S.W.3d at 476.)

On the excited-utterance issue, the Sixth Circuit likewise concluded that a fairminded jurist could agree with the state court's determination that defense counsel's extensive efforts to inform the jury of Miller's own shooting did not qualify as deficient performance. *Id*. at 470. Relatedly, the Sixth Circuit found no deficient performance in counsel not personally interviewing Miller pretrial and in counsel relying on information provided by his investigator and on the results of the defense's pretrial investigation. *Id*. at 470-71. Because it resolved the claim on deficiency grounds, the Sixth Circuit did not reach or consider whether the Tennessee Supreme Court unreasonably

applied federal law when finding no prejudice. *Id.* at 471 n.2.

ARGUMENT

The petitioner challenges the Sixth Circuit's decision denying habeas corpus relief on his two allegations of ineffective assistance of counsel. He seeks review on three grounds: (1) defense counsel could have found and procured a useful firearms expert, despite the state court's factual finding to the contrary, (2) deficient performance should be presumed, an issue not raised in the Sixth Circuit, and (3) relief should be granted due to cumulative error by defense counsel on both allegations, an issue not squarely raised in federal court and separately rejected in state court. He further asserts that he can overcome the procedural default of other federal claims due to his alleged actual innocence.

In effect, the petitioner asks this Court to engage in error correction and grant relief, a request that the Court should decline because there is no error to correct. The lower federal courts rightly applied the deferential review required by 28 U.S.C. § 2254(d) when rejecting the petitioner's ineffectiveness claims, and the petitioner cannot prove actual innocence to excuse procedural default of his other claims.

I. Further Review Is Unwarranted Because the Sixth Circuit Rightly Determined That the Tennessee Supreme Court Did Not Unreasonably Apply Federal Law in Rejecting the Petitioner's Allegations of Ineffective Assistance of Counsel.

A. The Tennessee Supreme Court did not unreasonably apply federal law when rejecting the ineffectiveness claims, as persuasively explained by the Sixth Circuit.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas corpus relief on a federal claim adjudicated in state court unless, as relevant here, the state-court decision involved an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). An unreasonable application "identifies the correct governing legal principle in existence at the time" but "unreasonably applies that principle to the facts of the prisoner's case." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (internal quotation marks and citation omitted). The relevant question "is not whether a federal court believes the state court's determination . . . was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal quotation marks omitted).

A state court's application of federal law qualifies as unreasonable only if it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility

for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Thus, "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas corpus relief is unavailable. *Id*. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Here, a fairminded jurist could agree with the Tennessee Supreme Court's resolution of the petitioner's claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that he prove both deficient performance and prejudice. For deficient performance, the petitioner must show that counsel's representation fell below an objective standard of reasonableness, "outside the wide range of professionally competent assistance," to the extent that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687-688, 690. For prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

When a federal court reviews a state-court adjudication on an ineffectiveness claim, the court's analysis is "doubly deferential," *Mirzayance*, 556 U.S. at 123, asking "not whether counsel's actions were reasonable" but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard," *Richter*, 562 U.S. at 105. "A state court must be granted a deference and latitude that are not in operation when the case involves review under

the *Strickland* standard itself." *Richter*, 562 U.S. at 101.

As both the district court and the Sixth Circuit correctly decided, the petitioner simply cannot satisfy this high standard under the facts and circumstances of this case. On the expert-witness issue, the Tennessee Supreme Court extensively reviewed this Court's then-recent decisions in *Richter* and *Hinton v. Alabama*, 571 U.S. 263 (2014), and found a number of barriers to defense counsel's ability to locate and present his own expert. First, state law did not yet authorize the provision of this kind of expert service to indigent criminal defendants in 1994. *Kendrick*, 454 S.W.3d at 476. Second, the record did not establish that defense counsel could have located and hired an expert who could testify about potential defects in the trigger mechanism of a Remington Model 7400 rifle, comparable to the testimony provided by Belk during the post-conviction proceedings. *Id.* Third, Belk himself could not have provided pertinent expert opinion testimony in 1994 because he had not yet become involved with cases involving the Model 7400 rifle. *Id.*

Regardless, even if those challenges had not existed, trial counsel was not deficient by pursuing his chosen defense strategy and not seeking a firearms expert for the defense. "[T]he undisputed fact that [Officer] Miller was shot in the foot by the very same rifle" amounted to "[t]he best evidence that Mr. Kendrick's Model 7400 was capable of misfiring." *Id.* at 477. Mindful of the evidence available to him, defense counsel made a reasonable calculation that Miller's shooting would "trump" anything that Fite could say. The case did not

"hinge[] on expert testimony," and the "bulk of the State's case consisted of eyewitnesses." *Id*. While it would have been "best practices" for trial counsel to consult a firearms expert before trial, electing not to do so was not objectively unreasonable. *Id*.

As the Sixth Circuit rightly concluded, a fairminded jurist could agree with the state court's decision that defense counsel's reliance on Miller's shooting to rebut the State's expert was reasonable. But even if further expert investigation were required, a fairminded jurist could agree that it was "entirely uncertain" that an appropriate expert could have been found in 1994 by reasonable investigation. *Kendrick*, 989 F.3d at 472-73 (quoting *Kendrick*, 454 S.W.3d at 476). The petitioner "failed to present any evidence that counsel should have known that Belk might have been an available witness." *Id*. at 473. "'It was at least arguable that a reasonable attorney could decide to forgo inquiry' into a firearms expert in these circumstances." *Id*. at 473 (quoting *Richter*, 562 U.S. at 106).

On the excited-utterance issue, the Tennessee Supreme Court first assumed without deciding that Miller's prior statements to Gann and Holbrook qualified as excited utterances under state law. But it did not necessarily follow "that Mr. Kendrick's trial counsel was ineffective because he did not seek to admit them under Tenn. R. Evid. 803(2)." *Id*. at 480. Defense counsel "labored to convince the jury" that Miller's finger "was not on the trigger of the rifle when it fired into his foot." *Id*. Counsel "closely" cross-examined Miller about the incident and the officer's memory loss, and he attempted to refresh the officer's

recollection with the incident reports. "In short, trial counsel did almost everything at his disposal to prove that [Officer] Miller had not pulled the trigger, with the exception that he did not offer the statements as substantive evidence under Tenn. R. Evid. 803(2)." *Id.* at 481. And the fact that counsel "failed to go one step further by pursuing the excited utterance exception" does not overcome the presumption under *Strickland* that counsel provided adequate representation. *Id.*

The Sixth Circuit rightly found that a fairminded jurist could reach the same decision. Defense counsel "put on a thorough and 'skilled cross-examination' challenging the credibility of Miller's unexpected lack of memory." *Kendrick*, 989 F.3d at 469. His effort to secure admission of the statements as prior inconsistent statements "provides at least a 'reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Id.* at 470 (quoting *Richter*, 562 U.S. at 105). And his pretrial reliance on information otherwise provided to him about Miller's prior statements and expected testimony was reasonable, such that counsel's election not to speak with Miller personally is an insufficient basis to overcome AEDPA deference. *Id.* at 471.

B. The Tennessee Supreme Court did not unreasonably determine the facts when it concluded that an expert useful to the defense was not available at the time of the petitioner's trial.

The petitioner claims that the lower courts erroneously "required proof a particular expert was available at trial" in 1994. In his view, "[t]here 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." Thus, he surmises that "the record shows experts would have been available." (Pet., 25-27.)

To this, the Sixth Circuit rightly explained that the availability of an expert particularly useful to the defense in showing a defect in the petitioner's Remington 7400 rifle was an issue of fact that the Tennessee Supreme Court found "entirely uncertain." *Kendrick*, 989 F.3d at 475. In the post-conviction proceedings, the only proof presented on this point was Belk's testimony that he had testified in 1994 about a different Remington model and that he did not handle a Remington 7400 case until the late 1990s. In its review of the record, the Tennessee Supreme Court found no indication of "the existence [in 1994] of any other such experts who were available." *Kendrick*, 454 S.W.3d at 476. Defense counsel, who "considered himself knowledgeable about firearms," stated that he was "unaware of any discussion in the industry concerning defective Remington trigger mechanisms." *Id.*

Under 28 U.S.C. 2254(d)(2), habeas corpus relief may be available when the state-court adjudication "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." A state court's factual determination is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (internal

quotation marks and citation omitted). The reviewing federal court must accord the state court "substantial deference." *Brumfield v. Cain*. 576 U.S. 305, 314 (2015). The record must "compel the conclusion" that the state court had "no permissible alternative but to" make a contrary factual finding. *Rice v. Collins*, 546 U.S. 333, 341 (2006).

From the state-court record developed on this issue, the petitioner cannot show that the Tennessee Supreme Court unreasonably determined the unavailability of a viable expert witness on alleged design defects in the Remington Model 7400 rifle and other firearms using the common trigger mechanism. That is the type of expert that the petitioner has consistently alleged defense counsel should have presented. And under the state-court factual findings made here, the Tennessee Supreme Court did not unreasonably apply *Strickland* when rejecting the petitioner's challenge to counsel's conduct in this regard. Further review is not warranted on the factual issue now proffered.[1]

C. The petitioner's new assertion of presumed, per se deficient performance does not merit consideration.

Relying on *Kimmelman v. Morrison*, 477 U.S. 365 (1986), and *Hinton*, the petitioner argues for the first

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1 In its review, the Sixth Circuit considered this factual issue under 28 U.S.C. § 2254(e)(1) and aptly concluded that the petitioner could not overcome, by clear and convincing evidence, the presumption of correction that attaches to state-court factual findings. *Kendrick*, 989 F.3d at 475.

time that deficient performance must be presumed and recognized on the excited-utterance issue due to defense counsel's mistake of law. Petitioner's contention is that although defense counsel vigorously attempted to inform the jury that Miller's hand was not near the trigger when it discharged on him—including counsel's unsuccessful efforts to admit extrinsic evidence of Miller's prior inconsistent statements under a different evidentiary rule—defense counsel's omission of an additional request to admit this extrinsic evidence as excited utterances was per se deficient performance. Under this view, all that matters is that counsel made a mistake of law.

But as the petitioner notes elsewhere in his petition, the Court traditionally declines to grant certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Before the Sixth Circuit, the petitioner did not advance an argument of per se deficient performance on the excited utterance issue due to a mistake of law, and the court did not consider this argument. The petitioner's belated invocation is reason enough to deny review of it now.

Furthermore, neither *Kimmelman* nor *Hinton* supports the position that the petitioner now advances. In each of those cases, the Court considered under *Strickland* whether trial counsel provided ineffective assistance of counsel, under the particular facts and circumstances of each respective case. In *Kimmelman*, the Court actually rejected the petitioner's assertion that the failure to file a timely suppression motion was per se deficient performance. 477 U.S. at 385. Instead,

applying *Strickland*, the Court determined that counsel performed deficiently in his investigation. *Id.* There, counsel's weak explanations for his poor conduct, including apparently his erroneous belief that he had no obligation to request discovery, may have "betray[ed] a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation." *Id.* But the Court did not grant relief due to per se deficiency predicated solely on a mistake of law. *Id.*

In *Hinton*, the Court found deficient performance in counsel's failure to secure a different expert witness specifically because of counsel's mistaken belief that a monetary cap applied to an appointed expert. 571 U.S. at 274-75. As in *Kimmelman*, the Court applied *Strickland* and considered, under a totality of the circumstances, whether counsel performed deficiently. *Id.*

In neither case did the Court apply a per se deficient performance test due to a mistake of law akin to what the petitioner advances in this case. To be sure, a mistake of law in a given case might qualify as deficient performance, but that is not the case here. For the reasons already stated, a fairminded jurist could agree with the Tennessee Supreme Court's decision that defense counsel's failure to lodge a second, excited-utterance evidentiary request was not a mistake of law qualifying as deficient performance. And the petitioner offers no decision by this Court that "clearly established" by the time of the Tennessee Supreme Court's decision a per se deficient performance test for a mistake of law, disavowing consideration of any other facts and circumstances. *See Greene v. Fisher*, 565 U.S.

34, 38-40 (2011) (concluding that "clearly established" federal law implicated by AEDPA deference is law in effect at time of state-court adjudication). Certainly, *Kimmelman* and *Hinton* do not so hold.

D. The petitioner can show no unreasonable application of *Strickland* in the state-court rejection of his claim of cumulative ineffectiveness.

The petitioner claims that review is warranted due to the cumulative effect of defense counsel's deficient performance. He appears to challenge the Tennessee Supreme Court's and the Sixth Circuit's failure to aggregate counsel's conduct relevant to both issues before those courts and find cumulative deficiency therefrom.

The petitioner did not assert a cumulative-effect claim in his habeas corpus petition. That is reason enough to decline review at this juncture. Furthermore, the petitioner's cumulative-effect claim was separately rejected by the Tennessee Court of Criminal Appeals on post-conviction review, upon remand from the Tennessee Supreme Court, on the basis that the petitioner had not proven multiple instances of deficient performance. *Kendrick*, 2015 WL 6755004, at *38. Even if consideration of that state-court adjudication were now available, the petitioner cannot overcome the deferential review required by 28 U.S.C. § 2254(d), in view of his failure to establish multiple instances of deficient performance. As already shown, he failed to prove deficient performance under AEDPA deference on both issues considered and rejected by the Sixth Circuit below.

II. The petitioner cannot overcome procedural default of his other claims due to his alleged actual innocence.

Relying on Belk's post-conviction hearing testimony, the petitioner argues that the procedural default of his other federal claims should be excused under the fundamental-miscarriage-of-justice exception due to his alleged actual innocence. The lower courts appropriately declined to excuse procedural default on this basis, and further review is not warranted.

The fundamental-miscarriage-of-justice exception to the procedural-default doctrine is a narrow exception reserved for the extraordinary case in which the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense. *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). A claim of actual innocence "requires [the] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Actual innocence in this context "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

This "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 513 U.S. at 327 (quoting *Carrier*, 477 U.S. at 496). "To establish the requisite probability, the 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." *Id*. A petitioner does not meet the threshold requirement unless he persuades the court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id*. at 329. This standard "is demanding and permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 327).

The petitioner challenges the district court's citation to the clear-and-convincing-evidence standard in *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992), but a review of the district court's full analysis shows that it appropriately applied the *Schlup* standard to reject his assertion of actual innocence. *Kendricks*, 2019 WL 4757813, at *17. And despite the petitioner's indication to the contrary, the district court considered and reviewed all of the evidence—"old and new"—from the trial and the post-conviction hearing when finding that the petitioner could not meet this standard. Regardless, even if Belk's testimony were accredited, the petitioner cannot show that his is an "extraordinary" case meriting further consideration due to actual innocence. As the trial court aptly noted when it found no *Strickland* prejudice on the expert witness issue,

> Even if one disregards Mr. Fite's trial testimony suggesting that accidental discharge was impossible and accepts Mr. Belk's testimony indicating that, because of the trigger mechanism in the gun, accidental discharge was possible, significant weaknesses in the theory of the defense, specifically, unfavorable eyewitness

> evidence and the petitioner's own ambiguous action in leaving the scene and discarding the gun, still remain.

(Pet. 308a-309a.)

Endia Kendrick testified that her father shot her mother while her mother was standing with her hands up, demonstrating at trial how the two were standing. *Kendrick*, 989 F.3d at 463. This matched the forensic evidence of stippling on the victim's forearms but not on her hands, upper arms, or chest. *Id.*; (R.E. 14-5, PageID# 815, 818-19.) At the airport, Endia said that she told the petitioner not to shoot the victim, but he did and the victim fell. *Kendrick*, 989 F.3d at 463. The petitioner fled and discarded the rifle. *Id.* at 464. He later acknowledged shooting the victim and did not report an accidental discharge. *Id.*

Immediately after the shooting, Lennell Shepheard and Charles Mowrer saw the petitioner looking over the victim's body, and Shepheard heard the petitioner repeatedly say, "I told you so." *Id.* at 462. Timothy Benton saw the petitioner pointing the rifle straight up in the air—consistent with the natural upward recoil of a fired weapon—with the petitioner's right hand on the pistol grip area around the trigger and left hand near the stock. *Id.*

When the trial evidence of the petitioner's guilt is placed alongside Belk's testimony on which the petitioner now relies to show actual innocence—including Belk's admissions that he never before produced a discharge from debris in an operational Remington 7400 rifle and that he could not

opine that this rifle misfired, *id.* at 465; (R.E. 14-30, PageID# 3147, 3158-60)—and in view of Fite's testimony that he could not manipulate a misfire in the petitioner's rifle despite his best efforts to do so, *Kendrick*, 989 F.3d at 463-64, the petitioner cannot show that it is more likely than not that no reasonable juror would have convicted him, had Belk's post-conviction hearing testimony been considered. As the district court recognized, "Mr. Belk's testimony that the common fire mechanism was defective in design did not definitively establish that Petitioner's gun discharged without a trigger pull; he merely suggested it was possible." *Kendricks*, 2019 WL 4757813, at *17. Relatedly, the trial court rejected the petitioner's state-law actual-innocence claim on post-conviction review precisely because "evidence that accidental discharge is possible is not equivalent to evidence that a particular discharge was accidental." (Pet. 325a.) Under the full record, Belk's testimony fails to meet the *Schlup* standard for actual innocence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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