PETITION

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 20-4039

VON LESTER TAYLOR,
Petitioner - Appellee,

v.

ROBERT POWELL, Warden,
Respondent - Appellant.

[Filed July 30, 2021]

OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VON LESTER TAYLOR, Petitioner - Appellee, v. ROBERT POWELL, Warden, Utah State Prison, Respondent - Appellant.	No. 20-4039

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. NO. 2:07-CV-00194-TC)

Andrew F. Peterson, Assistant Solicitor General (Erin Riley, Assistant Solicitor General, and Sean D. Reyes, Utah Attorney General, with him on the briefs), Office of the Utah Attorney General, Salt Lake City, Utah, for Appellant.

Brian M. Pomerantz (Kenneth F. Murray, Phoenix, Arizona, with him on the brief), Law Office of Brian M. Pomerantz, Carrboro, North Carolina, for Appellee.

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge.

Von Lester Taylor and an accomplice, Edward Deli, murdered two unarmed women who tragically encountered them burglarizing a mountain cabin in December 1990.

Linae Tiede, Kaye Tiede (her mother), and Beth Potts (her grandmother), returned to the cabin after a day of shopping in Salt Lake City. When Mr. Taylor and Mr. Deli encountered the three women, they held them at gunpoint. Linae then watched Mr. Taylor shoot her mother and heard the shots that killed her grandmother. When Linae's father later arrived with her sister, Mr. Taylor shot him in the head. They left him in the cabin, believing him to be dead. Mr. Taylor and Mr. Deli then set the cabin on fire and kidnapped Linae and Tricia. Before more violence could occur, law enforcement stopped the two men following a 911 call from Linae's father, who survived the shooting.

Mr. Taylor subsequently confessed to shooting both Kaye and Beth. To this day, Mr. Taylor has never denied that he fired the first shot in the brutal attack that led to the deaths of the two unarmed women.

Mr. Taylor pleaded guilty to two counts of first degree murder and was sentenced to death by a jury in Utah state court. He now challenges his convictions through a petition for federal habeas corpus relief, contending missteps by his trial attorney caused him to enter a defective guilty plea. But Mr. Taylor failed to adequately present this claim to Utah's state courts.

Generally, such a procedural default would prevent us from considering the claim. And yet Mr. Taylor argues we should excuse his procedural default lest we commit a fundamental miscarriage of justice. Despite re-affirming time and again that he participated in the murders, Mr. Taylor now argues he is "actually innocent" of them. Thus, he contends we should consider his underlying claims for habeas relief. But, given these facts, how can he be actually innocent?

Below, Mr. Taylor provided the district court with new ballistics evidence that calls into question whether he fired the fatal shots in the two murders, even if he fired *some* of the shots. Instead, the ballistics evidence indicates the fatal shots were fired by his accomplice. Based on this evidence, the district court credited Mr. Taylor's claim that he was actually innocent of first degree murder and set aside the procedural bar on considering his claims for relief. In reaching the merits of Mr. Taylor's claims for habeas relief, the district court concluded that his guilty plea was defective due to his trial counsel's failure to adequately investigate a possible defense theory that he was culpable only of crimes less serious than first degree murder. The court therefore granted his petition for habeas corpus, undoing Mr. Taylor's thirty-year-old conviction and sentence.

We disagree with the district court's assessment of Mr. Taylor's actual innocence claim. The district court concluded the evidence was inconclusive about whether Mr. Taylor fired the fatal bullets and he therefore was potentially

innocent as the principal triggerman. But under Utah law, an accomplice to a violent felony can be equally liable for first degree murder. The district court concluded that Mr. Taylor could evade this problem because he did not plead guilty to "capital murder as an accomplice." Aplt. App., Vol. XIX at 4812 (Order and Mem. Decision Granting Evid. Hr'g). Under Utah law, however, principal and accomplice liability are theories of guilt, not distinct crimes. Mr. Taylor pleaded guilty to two counts of capital murder thus, evidence that he committed the crimes as either a principal or an accomplice would have been adequate to prove his guilt. And no doubt exists that he would have been convicted of the murders under at least one of these theories at trial.

Mr. Taylor does not deny he actively participated in the murders. To answer the question of whether he can be actually innocent of the crime: He cannot. Mr. Taylor "is not innocent, in any sense of the word." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). We therefore reverse the district court's grant of habeas relief and remand for further proceedings consistent with this opinion.

I. Background

The meaning of "actual innocence" in the habeas context is very different from what this phrase means in popular parlance. When invoked as part of a habeas petition, actual innocence has a very specific meaning and purpose. Thus,

before describing the facts and proceedings that have led to Mr. Taylor's current habeas petition, we provide a brief overview of how a claim of actual innocence operates within the larger context of federal habeas corpus.

A. The Structure of Habeas Corpus

Contemporary habeas corpus doctrine strikes a delicate balance between justice and finality. *See House v. Bell*, 547 U.S. 518, 536 (2006). Habeas corpus is the tool by which federal courts can correct unjust incarcerations. A combination of statutory law under the Antiterrorism and Effective Death Penalty Act and judge-made law, federal habeas corpus serves as the path for prisoners to challenge both state and federal convictions. But the law makes this pathway narrow. For instance, we will not consider a petitioner's claims for relief that were not adequately presented to state courts. *See id.*; *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). This narrowing function is "based on the comity and respect that must be accorded to state-court judgments." *House*, 547 U.S. at 536.

Yet, recognizing the justice concerns that also underlie habeas corpus, the Supreme Court has concluded the door to habeas relief is not always closed because a petitioner procedurally defaulted his claims. Rather, the Supreme Court has allowed courts to consider such claims when it is necessary to avoid a miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) ("[T]he fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."). Courts apply this miscarriage-of-justice exception when a petitioner can demonstrate that he is actually innocent of the crime of conviction. In these cases, the petitioner's claim of actual innocence does not serve as the basis for granting habeas relief.[1]

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[1] Actual innocence can serve at least three functions in a habeas petition. First, it can be invoked to overcome AEDPA's statute of limitations. *See Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014) ("If petitioner does have a substantial actual innocence claim, . . . the existence of such a claim will serve as an exception to the AEDPA statute of limitations[.]"). Second, and as is the case here, actual innocence can be invoked to overcome other procedural bars to a claim. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("[A] credible claim of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief."). Third, the Supreme Court has not foreclosed the possibility that actual innocence could be invoked as the substantive constitutional claim for habeas relief. *See Herrera*, 506 U.S. at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." (internal quotation marks omitted)).

Instead, the claim of actual innocence is joined with a procedurally defaulted claim to serve as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (internal quotation marks omitted). This exception "is intended for those rare situations where the State has convicted the wrong person of the crime or where it is evident that the law has made a mistake." *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000) (internal quotation marks omitted; alterations incorporated).

To qualify for the actual innocence exception, the petitioner need not conclusively demonstrate his innocence. *See House*, 547 U.S. at 538 ("The *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence."). Rather, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence." *Schlup*, 513 U.S. at 327. Or, "to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. This standard requires courts to engage in a counterfactual analysis, determining whether a jury confronted with all the evidence now known would still have convicted the petitioner of the crime charged. *See Schlup*, 513 U.S. at 329 ("[T]he standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."). "The court's function is not to make an independent factual determination about

what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538.

An actual innocence claim must be based on more than the petitioner's speculations and conjectures. The gateway claim must "be credible" and requires "new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." *Id.* at 537 (internal quotation marks omitted). To be "new," the evidence need only be evidence that was not considered by the fact-finder in the original proceedings. *See Fontenot v. Crow*, __ F.4th __, 2021 WL 2933220, at *36 (10th Cir. July 13, 2021) (explaining that, under *Schlup*, "new evidence" means evidence "newly presented" rather than evidence "newly discovered through diligence"). When determining whether a petitioner qualifies for the exception, courts are not "bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327. Instead, we may "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327 28.

B. Factual and Procedural Background

Mr. Taylor procedurally defaulted his underlying constitutional claim that his guilty plea was constitutionally defective based on ineffective assistance of his trial counsel. He did so by failing to raise the claim in the proper manner before the Utah state courts. He now attempts to overcome this procedural

default by arguing he is actually innocent of capital murder based on new ballistics evidence.

To explain why his claim is procedurally defaulted, we next recount the relevant factual and procedural history that led to Mr. Taylor's initial conviction and efforts to obtain post-conviction relief.

1. The Murders

In December of 1990, the Tiede family was vacationing in a family cabin in Summit County, Utah, for the holidays. On December 21, the family took an overnight trip to Salt Lake City to do some Christmas shopping. While the family was gone, Mr. Taylor and his accomplice Edward Deli broke into the cabin as part of a series of burglaries. They stayed the night at the cabin.

The family returned the next day. The cabin was located a distance from the nearest road and recent snow forced the family to use snowmobiles to get from the road to the cabin. Kaye Tiede, her twenty-year-old daughter Linae, and Kaye's elderly mother, Beth Potts, took the snowmobiles from the road and arrived at the cabin first. Linae was the first to enter the cabin. Mr. Taylor approached her at gunpoint and asked who else was with her. Linae indicated Kaye and Beth were. Once Kaye and Beth entered, Mr. Taylor and Mr. Deli held them at gunpoint. After a short exchange, Linae witnessed Mr. Taylor shoot Kaye and heard her mother say "I've been shot." Aplt. App., Vol. I at 97. Linae then

turned away from the violence and did not see what happened next but she heard the shooting continue. When the shooting ended, Kaye and Beth lay dead on the floor. Kaye had been shot three times (twice with bullets that went through her chest and upper torso and once with bird shot pellets that caused small wounds around her left arm and neck), as had Beth (twice in the chest and once in the head). It is well-established that on the day of the murders, Mr. Taylor possessed a .38 special revolver and Mr. Deli a .44 magnum revolver, the bullets from which were recovered at the scene.

After shooting Kaye and Beth, Mr. Taylor and Mr. Deli tied Linae up and brought her to one of the cabin's bedrooms. They told Linae that she would be coming with them when they left. Linae also testified that Mr. Deli told Mr. Taylor at one point "we need to reload." *Id.*, Vol. I at 135. She later overheard Mr. Taylor telling Mr. Deli that "he needed help with the bodies" to "throw them over the balcony." *Id.* at 101. Finally, she heard Mr. Taylor tell Mr. Deli that "he had to shoot [one of the women] in the head twice." *Id.* Beth died of a gunshot wound to the head.

About two hours after the initial shooting, Linae's sister (Tricia) and her father (Rolf) arrived at the house. Mr. Taylor instructed Mr. Deli to shoot Rolf. When Mr. Deli hesitated, Mr. Taylor shot Rolf twice in the head and left him in the cabin, believing him to be dead.

Mr. Taylor and Mr. Deli then spread gasoline around the cabin and attempted to set fire to it. The two men then used the family's snowmobiles to drive themselves, Linae, and Tricia down to the road to the family's car. Despite the two gun shot wounds, Rolf survived. He then made his way down to the road where he encountered his half brother. The men then contacted the Summit County Sheriff's Department. Following a high-speed chase, officers apprehended Mr. Taylor and Mr. Deli. Linae and Tricia were released unharmed. Police found the bodies of Kaye and Beth on the cabin's balcony, covered by a blanket.

2. The Information and Plea

Mr. Taylor and Mr. Deli were each charged with two counts of capital homicide,[2] attempted homicide, aggravated arson, two counts of aggravated kidnapping, aggravated robbery, theft, failure to respond to an officer's signal to stop, and aggravated assault. For the capital murder charges, the Information stated that "VON LESTER TAYLOR and EDWARD STEVEN DELI, did

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[2] In Utah, a homicide "constitutes aggravated murder if the actor intentionally or knowingly causes the death of another" in one of several enumerated circumstances. Utah Stat. Ann. § 76-5-202(1). Here, "the homicide[s] [were] committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed[.]" *Id.* at § 76-5-202(1)(b). Alternatively, the homicides were committed "incident to . . . [a] criminal episode during which the actor committed . . . burglary[.]" Id. at § 76-5-202(1)(d). Aggravated murder is a death-penalty-eligible crime. *Id.* at § 76-5-202(3)(a).

intentionally or knowingly, cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons, to wit: Beth Potts and Kaye Tiede, were killed." Aplt. App., Vol. I at 1. The Information contained an identical second count for the death of Kaye Tiede.

The state held a preliminary hearing to determine whether probable cause existed to bind the men over for arraignment and trial. At this hearing, attorneys for Mr. Taylor and Mr. Deli both argued it was not clear who had fired the fatal shots that killed Kaye and Beth. Nonetheless, the state court concluded that probable cause existed as to both men. The court believed the evidence was adequate to show "that each to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information." *Id.*, Vol. III at 552.

Mr. Taylor initially pursued insanity as a defense. During his mental evaluation, he told the psychiatrist he had committed both murders. *See id.*, Vol. XIX at 4803 (Order and Mem. Decision Granting Evid. Hr'g) (When asked whether he believed himself to be insane, Mr. Taylor responded, "No, but how can you determine? I shot two people with no motive, out of cold blood, with my

gun, then with Ed's."). After the interview, the examining doctors concluded Mr. Taylor was legally sane.

The state then offered Mr. Taylor a guilty plea he would plead guilty to the two counts of capital murder and, in exchange, the remainder of the charges against him would be dropped. Although Mr. Taylor's attorney told Mr. Taylor that the state's case against him was strong, his attorney still encouraged him to proceed to trial. At a hearing on his performance, Mr. Taylor's counsel provided his reasons for giving this advice: "This is a capital homicide case. His options are worst option is death penalty. As far as I was concerned, it was going to trial. You didn't have an option." *Id.*, Vol. VI at 1244 45. Despite this advice from his attorney, Mr. Taylor accepted the state's offer. According to the Utah Supreme Court, Mr. Taylor chose to plead guilty "because he did not want to put his family and the victims through a trial and he did not want to testify against Deli." *State v. Taylor* (*Taylor I*), 947 P.2d 681, 684 (Utah 1997).

The plea agreement listed the crimes as "Criminal Homicide, Murder in the First Degree as charged in Count[s] I . . . and II." Aplt. App., Vol I at 18. The plea then provided a description of each count: "the defendant, Von Lester Taylor, did intentionally or knowingly cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons . . . were killed." *Id.* at 19.

The second count was the same, simply replacing Beth with Kaye. The plea then stated, "My conduct, and the conduct of other persons for which I am criminally liable, that constitute the elements of the crime charged are as follows[,]" and then described that conduct in the following manner:

> On the 22nd day of December, 1990, in Summit County, State of Utah, I, Von Lester Taylor, in conjunction with Edward Steven Deli unlawfully entered the cabin belonging to Rolf Tiede. When Kaye Tiede and Beth Potts returned to the cabin, I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts by shooting them with firearms.

Id.

Having pleaded guilty, Mr. Taylor then proceeded to the penalty phase of his proceedings. After hearing testimony and arguments, a jury ultimately sentenced Mr. Taylor to death for the murders.[3]

3. Direct Appeal and State Collateral Review

After his sentencing, Mr. Taylor appealed both his guilty plea and sentence in state court. Mr. Taylor argued his attorney had failed him in two ways: by misinforming him about what evidence could be used against him at the sentencing phase and by suffering from conflicts of interest. The trial court held

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[3] Unlike Mr. Taylor, Mr. Deli elected to proceed to trial. His trial started after Mr. Taylor had pleaded guilty and ended prior to the start of Mr. Taylor's penalty phase. A jury convicted Mr. Deli of second degree murder and sentenced him to life in prison for his participation in the crimes.

a hearing at which Mr. Taylor's attorney testified regarding his representation of Mr. Taylor. Based on the attorney's testimony and records of Mr. Taylor's proceedings, the Utah Supreme Court affirmed the convictions. *See Taylor I*, 947 P.2d at 690 ("Taylor cannot show prejudice related to [his attorney's] performance . . . [and] Taylor failed to show an actual conflict.").

Mr. Taylor subsequently sought post-conviction relief in state court. *See Taylor v. State* (*Taylor II*), 156 P.3d 739 (Utah 2007). In his first petition, he argued that both his trial counsel and appellate counsel had been constitutionally ineffective. The Utah Supreme Court rejected relief on the ineffective-assistance-of-trial-counsel claim, reasoning that "[b]ecause Taylor has already challenged the effectiveness of his trial counsel on appeal, his post-conviction claims that his trial counsel was ineffective are procedurally barred." *Id.* at 746 (citing Utah Stat. Ann. § 78-35a-106(1)(c) (2002), for the proposition that "[a] defendant is not eligible for post-conviction relief on any ground that was raised on appeal or that could have been raised on appeal"). The Utah Supreme Court then rejected Mr. Taylor's arguments about his appellate counsel on the merits.

Mr. Taylor then brought a petition for federal habeas corpus relief under 28 U.S.C. § 2254. But, because Mr. Taylor had failed to exhaust a number of his federal habeas claims before the state court, the federal district court stayed proceedings for him to return to state court. To cure this defect, Mr. Taylor

brought a second petition in state court for post-conviction relief asserting thirty claims for relief. *See Taylor v. State* (*Taylor III*), 270 P.3d 471 (Utah 2012). The Utah Supreme Court denied this petition, treating all of Mr. Taylor's claims as procedurally barred.

4. Federal Habeas Proceedings

Having finally exhausted all of his claims for relief in state court, Mr. Taylor returned to federal court. In 2012, he filed a Second Amended Petition for habeas relief, raising twenty-six claims. Mr. Taylor invoked actual innocence as a gateway to overcome the fact that a number of his claims were procedurally defaulted. To support his actual innocence claim, he moved for an evidentiary hearing to develop evidence about the circumstances of the murders. Specifically, he sought to elicit evidence that Mr. Deli had fired the fatal shots that killed Beth and Kaye. The state opposed this motion, arguing that it was irrelevant whether Mr. Taylor had fired the fatal bullets. Under the state's reasoning, he was guilty of capital murder at least as an accomplice and thus could not establish his actual innocence.

The district court granted the evidentiary hearing. It rejected the state's contention that Mr. Taylor had to establish actual innocence as an accomplice to qualify for the actual innocence exception. According to the district court, Mr. Taylor did not have actual notice that he was charged as and pleading guilty

to "capital murder as an accomplice," so accomplice liability was beyond the scope of the actual innocence inquiry. Instead, "[t]he question must be whether Mr. Taylor can advance his claims that he is actually innocent of the crime to which he pleaded capital murder as a principal not any crime to which he could have been convicted of had he gone to trial and been put on notice." Aplt. App., Vol. XIX at 4812 (Order and Mem. Decision Granting Evid. Hr'g).

At the evidentiary hearing, the parties presented ballistics and medical forensics evidence. Based on this evidence, the district court concluded that Mr. Taylor had met his burden of showing actual innocence. Specifically, the district court found that Mr. Deli had been in possession of the .44 magnum revolver throughout the shootings.[4] And the district court further concluded it was likely the bullets that killed Kaye and Beth were fired from that gun. Based on these two facts, the court concluded that "no reasonable juror, conscientiously following the appropriate instructions requiring proof beyond a reasonable doubt, would have voted to convict Mr. Taylor of the charges to which he pleaded, capital murder as a principal." *Id.*, Vol. XX at 4907 (Findings of Fact and Conclusions of Law Regarding Claim of Actual Innocence).

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[4] The district court discounted Mr. Taylor's confession to the court-appointed psychiatrist that he had used Mr. Deli's gun to shoot both victims. The court determined this confession was "not credible" given Mr. Taylor's incentive to convince the psychiatrist he was insane. Aplt. App., Vol. XIII at 4868 (Findings of Fact and Conclusions of Law Regarding Claim of Actual Innocence).

Having overcome the procedural bar on Mr. Taylor's constitutional arguments, the district court proceeded to Mr. Taylor's substantive argument that his trial counsel was constitutionally ineffective in advising him about the guilty plea, rendering his plea constitutionally defective. Mr. Taylor specifically claimed that his attorney failed to adequately investigate the "no-fatal-shot theory" and thus failed to advise him of the possibility that Mr. Deli had fired the shots that killed Kaye and Beth. Thus, Mr. Taylor insisted he forwent trial and entered the guilty plea without valuable knowledge regarding his actual liability for the murders. According to Mr. Taylor, his counsel's failure to advise him on this theory of innocence was objectively unreasonable and fell below the constitutional floor for effective assistance of counsel. Mr. Taylor maintains that had he been provided with the ballistics information, he would have taken his chances at trial.

The district court granted Mr. Taylor's habeas petition based on this claim. It concluded Mr. Taylor's trial counsel was constitutionally ineffective for failing to investigate whether Mr. Taylor fired the fatal shots. The court then determined this failure prejudiced Mr. Taylor because there was a reasonable probability that he would have chosen to proceed to trial if he had known the strength of the state's evidence against him as the principal to the murders. Based on this

constitutional violation, the district court granted Mr. Taylor's habeas petition and overturned his thirty-year-old murder convictions.

II. Analysis

On appeal, the state does not challenge Mr. Taylor's new evidence. The state concedes for the sake of argument that Mr. Taylor did not fire the fatal shots. Rather, the state argues the district court erred as a matter of law in confining the actual innocence inquiry to Mr. Taylor's guilt of capital murder *as a principal*. According to the state, Mr. Taylor pleaded guilty to the two counts of capital murder generally, not under a specific theory of liability. Thus, the state argues that because Mr. Taylor cannot establish actual innocence as both a principal and an accomplice, his claims for relief remain procedurally defaulted and we cannot consider them.

We agree with the state. As we explain below, under Utah's laws regarding accomplice liability, the state provided Mr. Taylor notice of what crime he was being charged with and pleading guilty to: capital murder. And Mr. Taylor has done nothing to prove a reasonable, properly instructed jury more likely than not would have reasonable doubt about his guilt as an accomplice to the murders. Thus, we need not reach Mr. Taylor's claim of ineffective assistance of counsel leading to a defective guilty plea because it remains procedurally barred.

Before reviewing the district court's application of actual innocence to Mr. Taylor, we address two threshold legal questions which inform our reasoning: (1) What should the scope of the actual innocence inquiry be in a case involving a plea bargain? and (2) What is accomplice liability under Utah's criminal law?

A. Standard of Review

Our review of habeas petitions is "governed by AEDPA's standards to the extent that the claims were adjudicated on the merits by [a] . . . state court." *Douglas v. Workman*, 560 F.3d 1156, 1170 (10th Cir. 2009). Under AEDPA, we may grant a habeas petition that a state court rejected on the merits only if the state court's adjudication of the petitioner's claims 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 "a decision that was 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). But "[t]he § 2254(d) standard does not apply to issues not decided on the merits by the state court." *Bland v. Sirmons*, 459 F.3d 999, 1010 (10th Cir. 2006).

Thus, "AEDPA's deferential standard of review for claims decided on the merits by a state court . . . has no application to a gateway innocence assertion." *Fontenot,* 2021 WL 2933220, at *38. Rather, an actual innocence gateway claim is a mixed question of law and fact that we review de novo. *See id.* Even in this

context, we presume the state court's finding of facts to be correct. *Id.* (citing 28 U.S.C. § 2254(e)(1)). "Therefore, when a state court has made a factual determination bearing on the resolution of a *Schlup* [actual innocence] issue, the petitioner bears the burden of rebutting this presumption by clear and convincing evidence." *Id.* (internal quotation marks omitted).

Our decision today also requires us to interpret and apply Utah's criminal law. We review de novo the district court's interpretation of state law. *See, e.g.*, *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020). In conducting this review, we are bound by the state courts' interpretation of the state's laws. *See, e.g.*, *Chapman v. LeMaster*, 302 F.3d 1189, 1196 (10th Cir. 2002) ("On habeas review, however, the New Mexico courts' interpretation of the state felony murder statute is a matter of state law binding on this court." (emphasis omitted)). "If the state's highest court has not decided an issue, our task is to predict how it would rule." *Jordan*, 950 F.3d at 730 31 (internal quotation marks omitted). "To guide our prediction, we may consult persuasive state authority, such as dictum by the state's highest court and precedential decisions by a state's intermediate appellate courts." *Id.* (internal quotation marks omitted; alterations incorporated).

B. Actual Innocence Based on a Guilty Plea

Mr. Taylor's convictions resulted from his guilty plea, not a trial. When a conviction is obtained through a trial, we limit the scope of the actual innocence inquiry to the crime of conviction. *See, e.g.*, *Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) ("This exception applies to those who are actually innocent of the *crime of conviction* and those 'actually innocent' of the death penalty (that is, not eligible for the death penalty under applicable law)." (emphasis added)).

Our analysis expands when reviewing an actual innocence claim by a petitioner who was not convicted by a jury, but who rather pleaded guilty before trial. The Supreme Court has made clear that a petitioner invoking actual innocence as to a guilty plea still has to prove his innocence of the charge to which he pleaded guilty namely, the crime of conviction. *Bousley v. United States*, 523 U.S. 614 (1998). Furthermore, "[i]n cases where the Government has foregone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624. The Supreme Court's holding in *Bousley* prevents a petitioner from artificially narrowing the scope of the actual innocence inquiry through plea bargaining.

Still, the Court in *Bousley* also made clear that the actual innocence inquiry does not extend to any conceivable crimes the state could have charged but decided not to. For example, in *Bousley*, the government charged Bousley with

using a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c). But when Bousley brought a habeas petition and invoked the actual innocence gateway to overcome a procedural default, the government argued he had to "demonstrate that he is actually innocent of both '*using*' and '*carrying*' a firearm[.]" *Id.* (emphasis added). The Court disagreed. It explained Bousley did not need to demonstrate actual innocence of carrying the firearm a separate crime under § 924(c) because his "indictment charged him only with 'using' firearms" and there was "no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." *Id.*

Here, the state did not forego any more serious charges in the midst of plea bargaining with Mr. Taylor. So, in assessing Mr. Taylor's actual innocence claim, the actual innocence inquiry is limited to his liability for the crime of conviction: two counts of capital murder.

C. Accomplice Liability Under Utah Law

Given that the actual innocence inquiry is limited to the capital murder charges, the crux of Mr. Taylor's actual innocence claim hinges on how Utah understands accomplice liability. Mr. Taylor contends the state had to specifically charge him, and he had to specifically plead guilty as, an accomplice for accomplice liability to be relevant in the *Schlup* actual innocence inquiry.

Under Utah law there are two different ways of committing the same substantive crime. First, the defendant could satisfy all the elements of the crime himself. This is principal liability. *See In re D.B.*, 289 P.3d 459, 465 (Utah 2012). Alternatively, the defendant could still be guilty of the substantive crime even if someone else directly commits the offense. Utah law makes it clear that "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Stat. Ann. § 76-2-202. This is accomplice liability. *See In re D.B.*, 289 P.3d at 465.

Accomplice liability applies when two conditions are met. First, the defendant must "have the intent that the underlying offense be committed." *State v. Briggs*, 197 P.3d 628, 632 (Utah 2008). Second, the defendant must have engaged in one of the enumerated acts from the accomplice liability statute that is, soliciting, requesting, commanding, encouraging, or intentionally aiding.

In Utah, accomplice liability is not a separate crime with different elements. *See State v. Gonzales*, 56 P.3d 969, 972 (Utah Ct. App. 2002) ("[C]onviction of accomplice and principal liability do not require proof of different elements or proof of different quality."). Rather, it is a separate theory

supporting liability of the charged crime. *See Briggs*, 197 P.3d at 632. Accomplice liability, to be sure, "requires conduct different from direct commission of an offense[.]" *In re D.B.*, 289 P.3d at 465. Although proving someone is liable as an accomplice may look quite different from proving he is liable as a principal, "[i]t is well settled that accomplices incur the same liability as principals." *Id.* at 471 (quoting *Gonzalez*, 56 P.3d at 972). Principal liability and accomplice liability are two means of committing the same substantive crime.[5]

Given that accomplice liability is a theory of guilt rather than a distinct crime, the state need not provide the same level of notice as when it charges a defendant with a substantive crime. The state does not have to identify all possible theories of guilt it intends to pursue at trial in the Information. *See Gonzales*, 56 P.3d at 972 ("We find it unreasonable to require the State to give

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[5] Another federal court recently denied a habeas petition involving a similar state accomplice liability law. *See Hallman v. Brittain*, No. 17-4604, 2020 WL 1875603, at *4 (E.D. Pa. April 15, 2020) ("Under [Pennsylvania's accomplice liability law], the prosecution here could have lawfully proven Petitioner's guilt on the robbery charge by showing that he was either the principal or an accomplice. It was not required to separately charge him as both principal and accomplice."). Under Pennsylvania law, a person is an accomplice if the state proves "(a) that the defendant had the intent of promoting or facilitating the commission of the offense, and (b) that the defendant solicited, commanded, encouraged, or requested the other person to commit it or aids/attempts to aid the other person in planning or committing it." *Id.* at *3 (quoting Pa. Suggested Standard Criminal Jury Instructions § 8.306(A)(1)).

notice, at a stage as early as the filing of an information, of all possible theories that might arise, including those that do not become part of the State's case."). In fact, a criminal defendant charged with a substantive crime already has notice that accomplice liability could be on the table at trial. *See In re D.B.*, 289 P.3d at 471 ("[A] person charged with a crime as a principal has adequate notice of the possibility of accomplice liability being raised at trial." (emphasis omitted; alteration incorporated) (quoting *Gonzales*, 56 P.3d at 972)).

Still, if the state intends to pursue a theory of accomplice liability, it must give the defendant notice of this intention sometime prior to the close of trial. *See In re D.B.*, 289 P.3d at 471. "Charging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *Id.* The state cannot simply spring a new theory of guilt on the defendant when instructing the jury at the end of trial. As the Utah Supreme Court has explained,

> a defendant may receive constitutionally adequate notice that he is facing accomplice liability in several ways. The simplest way for the State to provide adequate notice is by actually charging the defendant as an accomplice. The state may also notify a defendant of potential accomplice liability through presentation of adequate evidence at any time prior to the close of evidence at trial.

Id. But simply because the state *can* explain it is pursuing a theory of accomplice liability in the initial information does not mean it *must*. And it certainly does not

mean that accomplice liability is a separate crime which requires a specific, stand-alone charge. *See Gonzales*, 56 P.3d at 972 (explaining that accomplice liability is not a separate offense from principal liability); *see also Briggs*, 197 P.3d at 632 (explaining "the State relied upon accomplice liability as a theory for convicting [the defendant] of the crimes included in the information, and *not as a separate offense*" (emphasis added)).

D. Application

Here, Mr. Taylor claims his trial counsel was ineffective for failing to investigate and advise him on the "no-fatal-shot" defense. But Mr. Taylor failed to adequately present this claim in state court, meaning it is procedurally defaulted. So, we will not consider this constitutional claim unless Mr. Taylor can establish he qualifies for an exception to the bar on considering procedurally defaulted claims. Mr. Taylor argues, and the district court agreed, that Mr. Taylor overcame this procedural bar because he is actually innocent of his crime of conviction capital murder as a principal.

Our review begins and ends with Mr. Taylor's actual innocence claim. Mr. Taylor was charged with capital murder. Neither the Information nor the plea agreement specified a particular theory of liability, nor did they have to. The actual innocence inquiry extends beyond Mr. Taylor's guilt as a principal to his guilt as an accomplice. This puts an end to Mr. Taylor's actual innocence

argument because he has not argued that he is actually innocent as an accomplice to capital murder. Nor could he. The evidence clearly establishes that Mr. Taylor intended to cause the deaths of Kaye Tiede and Beth Potts and intentionally aided Mr. Deli to that end.

1. Accomplice Liability

The district court limited the actual innocence inquiry to Mr. Taylor's liability as a principal. The court reasoned that "[t]he Information did not charge Mr. Taylor with accomplice liability. Nothing in the Statement of Defendant or plea colloquy mentions accomplice liability. And, of course, no trial occurred." Aplt. App., Vol. XIX, at 4810 11 (Order and Mem. Decision Granting Evid. Hr'g). Thus, the district court concluded that "[a]s a matter of law, Mr. Taylor did not plead guilty to accomplice liability." *Id.* at 4811.

Mr. Taylor adopts the district court's reasoning and expands on it in responding to the state's appeal.

He first argues that extending the actual innocence inquiry to accomplice liability would raise constitutional concerns. The Sixth Amendment requires that all criminal defendants "be informed of the nature and cause of the accusation" against them. U.S. Const., amend. VI. Here, the state never specifically informed Mr. Taylor that he was being charged as an accomplice to the murders, and he never pleaded guilty to capital murder as an accomplice. Thus, he contends that

extending the actual innocence inquiry to accomplice liability now would violate the Sixth Amendment's guarantee of notice regarding charged crimes. Mr. Taylor argues that because the state did not charge him as an accomplice in the first instance, it missed its chance. All the state's arguments about accomplice liability exist in the realm of "would've, could've, should've." Aple. Resp. Br. at 35. Based on the limits of the charging documents and plea agreement, Mr. Taylor maintains we are required by the Constitution to limit our actual innocence inquiry to his liability as a principal to capital murder.

Second, Mr. Taylor insists that assessing his potential liability as an accomplice as part of the actual innocence inquiry would conflict with *Schlup*. According to Mr. Taylor, considering accomplice liability at this stage would require us to speculate about what theories of guilt the state would have pursued at trial if Mr. Taylor had not pleaded guilty. Mr. Taylor maintains that such speculation is inappropriate under *Schlup*. *See id.* at 34 ("Under *Schlup*, the mere existence of sufficient evidence that *could possibly* convict Taylor of a different offense than his offense of conviction is irrelevant." (emphasis in original)). So, forcing him to prove his actual innocence as an accomplice requires more than is necessary to qualify for the *Schlup* gateway.

In making both of these arguments, Mr. Taylor relies on his theory that "capital murder as an accomplice" is a separate crime under Utah law that must be

specifically charged in the information. But in doing so, he misconstrues Utah's law on accomplice liability. It is not a separate crime that needs to be charged separately. *See Gonzales*, 56 P.3d at 972. It is a different theory of liability available to the state leading up to and throughout trial to prove the defendant's guilt of the underlying substantive offense. Only the substantive crime, not the state's theory of the defendant's guilt, must be included in the information.

Utah argues in the alternative that the information and plea agreement contained specific language that gave Mr. Taylor adequate notice the state was charging him as an accomplice. Again, because accomplice liability is not a separate crime under Utah law, it is not necessary that Mr. Taylor had actual notice of the state's intention to treat him as an accomplice prior to trial.

In any event, the plea agreement and proceedings contained language indicating Mr. Taylor was being treated as both a principal and an accomplice to the murders. The plea agreement explicitly stated, "My conduct, *and the conduct of other persons for which I am criminally liable*, that constitute the elements of the crime charged are as follows[.]" Aplt. App., Vol. I at 19 (emphasis added). The plea then described the factual basis for the crime: "When Kaye Tiede and Beth Potts returned to the cabin, *I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts* by shooting them with firearms." *Id.* (emphasis added).

Furthermore, at the preliminary hearing, the judge explained that probable cause existed to continue holding Mr. Taylor based on accomplice liability. In doing so, his language reflected Utah's statute on accomplice liability: "each [defendant] to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information." *Id.*, Vol. III at 552.

Thus, applying the actual innocence inquiry to Mr. Taylor's guilt as an accomplice conflicts with neither the Constitution nor *Schlup*. Mr. Taylor was adequately and accurately "informed of the nature and the cause of the accusation" against him. U.S. Const., amend. VI; *see also Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than the notice of the *specific charge*, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (emphasis added)). And nothing about such an application of the actual innocence theory would conflict with *Schlup*, which requires proof that the defendant is innocent of the *crime of conviction*. *See Black*, 682 F.3d at 915 ("This exception applies to those who are actually innocent of the *crime of conviction*[.]" (emphasis added)).

Here, the Information charged Mr. Taylor with various crimes, including two counts of capital murder. Mr. Taylor pleaded guilty to these two charged crimes. Nothing more, nothing less.[6] To prove capital murder, the state must demonstrate Mr. Taylor intentionally or knowingly caused the death of another in certain circumstances here, that the homicide was committed incident to one criminal episode during which two or more persons were killed or a criminal episode during which the defendant committed burglary. *See* Utah Stat. Ann. § 76-5-202. Mr. Taylor must demonstrate his actual innocence as to this substantive crime to overcome the procedural bar on his underlying claims for relief. But, under Utah law, there are two different ways he could have been found guilty of the capital murders. The state could have established his guilt of these crimes either through evidence of his conduct as a principal or as an accomplice. The state therefore could prove he directly committed the murders or that he "solicit[ed], request[ed], command[ed], encourag[ed], or intentionally

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[6] Mr. Taylor also insists it is impossible to plead guilty to both principal and accomplice liability. He cites a Utah Supreme Court case, *State v. Loveless*, 232 P.3d 510 (Utah 2010), to support this argument. But *Loveless* does not stand for this proposition. In *Loveless*, the defendant was charged in a single count with two alternative substantive crimes. The charges were silent as to liability. In that instance, when a single count contains alternative substantive crimes, the prosecutor is "at risk that the defendant will plead guilty as charged to one of the offenses and thereby eliminate the alternative offense contained in the same count." *Id.* at 513. Again, accomplice liability is not a separate crime. Mr. Taylor pleaded guilty to a single crime, capital murder, which can be committed in different ways.

aid[ed] another person to" commit the act. *In re D.B.*, 289 P.3d at 465 (quoting Utah Code Ann. § 76-2-202). Mr. Taylor cannot side-step proving his actual innocence as an accomplice simply because he ended the process through a plea agreement.

Unlike the government in *Bousley*, the state of Utah is not asking Mr. Taylor to prove his innocence of an uncharged crime. Rather, the state correctly articulates what is necessary in all actual innocence cases: the petitioner must prove his innocence of the crime of conviction. Here, Mr. Taylor could have committed the capital murders as either a principal or an accomplice.[7] Thus, he must establish his actual innocence under both theories of liability to qualify for *Schlup*'s gateway for overcoming a procedural default.

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[7] We are not saying a habeas petitioner invoking the actual innocence exception must prove he is innocent of any possible offense he could have been charged with for his conduct. In *Bousley*, the Supreme Court clearly foreclosed this understanding of *Schlup*. *See Bousley*, 523 U.S. at 624 (explaining the petitioner needed to prove his actual innocence only as to crimes charged in the indictment and more serious charges the government forwent in plea bargaining). All we conclude here is that under Utah law, principal liability and accomplice liability are two theories of liability that can each be used to prove guilt of the same crime. When a criminal defendant pleads guilty to a substantive crime and later claims actual innocence, he must demonstrate his innocence under both theories.

2. Actual Innocence Counterfactual

Now that we have determined the scope of the actual innocence inquiry, we evaluate whether Mr. Taylor has demonstrated he is actually innocent of the two charged counts of capital murder. To do so, we must rewind the tape thirty years and imagine a counterfactual scenario about what would have happened if Mr. Taylor had gone to trial on the two capital murder charges. We must determine what "reasonable, properly instructed jurors" would have done in light of all the evidence including the petitioner's newly proffered evidence in this alternate universe. *Schlup*, 513 U.S. at 329. We will apply the actual innocence gateway only if it is "more likely than not" that these jurors "would have reasonable doubt" about whether Mr. Taylor committed capital murder. *House*, 547 U.S. at 538.

In undertaking *Schlup*'s probabilistic inquiry, we bear several things in mind. The question must be what a jury would do with the new evidence, not what we would do. *See House*, 547 U.S. at 538. While the court has a responsibility to confine the actual innocence inquiry to the relevant crimes, it must make the actual innocence determination based on what "reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. And because we look to this reasonable, properly instructed jury, we also will not speculate about whether Mr. Taylor may have drawn a particularly lenient jury.

Furthermore, in making the actual innocence assessment, we do not blind ourselves to what would have happened if the case had gone to trial. We will not limit the state's theories of guilt in the actual innocence inquiry because the state had not yet been forced to articulate what theories of guilt it would advance in trying the case. As long as the state is not seeking to force the petitioner to prove his innocence of crimes he was never charged with, we can now consider the state's various theories of the case when determining what a reasonable jury would do. We therefore determine how a reasonable, properly instructed jury would have viewed Mr. Taylor's two counts of capital murder, bearing in mind the different theories of guilt the state could have pursued at trial.

The state does not challenge any of the district court's factual findings regarding the ballistics evidence. The district court concluded, and the state concedes for the sake of this appeal, that Mr. Taylor has demonstrated his actual innocence as a principal to the capital murders. Thus, we focus our inquiry solely on whether Mr. Taylor has demonstrated his actual innocence to capital murder as an accomplice.

So, we ask: would any reasonable, properly instructed juror have had reasonable doubt as to Mr. Taylor's guilt for the capital murders as an accomplice? As a reminder, to prove accomplice liability the state must show the defendant intended that the crime be committed and also solicited, encouraged,

helped, or intentionally aided the principal in the commission of the crime. *See Briggs*, 197 P.3d at 632.

The state argues that Mr. Taylor's "guilt as an accomplice is well established by the overwhelming and uncontested evidence." Aplt. Op. Br. at 36. The state is correct. The parties do not dispute that Mr. Taylor intended the deaths of the two victims. And the record makes clear that he intentionally aided Mr. Deli in committing the crime. To be sure, it is not enough if Mr. Taylor simply "assist[ed] someone *who* committed murder[.]" *State v. Grunwald*, 478 P.3d 1, 16 (Utah 2020) (emphasis in original). He must have "assist[ed] someone *to* commit murder." *Id.* (emphasis in original). That is precisely what Mr. Taylor did here. The facts are well established. Linae witnessed and then testified that Mr. Taylor fired his gun first, shooting Kaye. Later, Mr. Deli told Mr. Taylor they needed to reload their guns, an indication that both guns had been emptied during the shooting. Mr. Taylor subsequently told Mr. Deli he had shot one of the victims in the head twice. Mr. Taylor then asked for Mr. Deli's help moving the bodies, and the men moved the bodies to the cabin's balcony, covering the bodies with a blanket. After Rolf Tiede arrived, Mr. Taylor instructed Mr. Deli to shoot Rolf. When Mr. Deli did not, Mr. Taylor shot him twice. Finally, Mr. Taylor attempted to set the house on fire while the bodies of the two women remained on the cabin's deck.

This is accomplice liability of the clearest kind. *See State v. Comish*, 560 P.2d 1134, 1136 (Utah 1977) ("[A]n 'accomplice' is one who participates in a crime in such a way that he could be charged and tried for the same offense."); *see also State v. Apodaca*, 448 P.3d 1255, 1269 (Utah 2019) (affirming conviction under accomplice liability theory where state presented evidence that the defendant "actively and intentionally planned, participated in, and attempted to cover up" a robbery). Mr. Taylor fired the first shot. He then fully participated in and tried to cover up the murders. No reasonable juror could have heard this evidence and harbored doubts about Mr. Taylor's liability as an accomplice to the two counts of capital murder.[8]

Because Mr. Taylor cannot establish his actual innocence of capital murder, our analysis ends. The constitutional claim on which the district court granted relief was procedurally defaulted, and Mr. Taylor has not provided us with any method to overcome the bar on considering such a claim.

III. Conclusion

Thirty years after participating in the murders of Kaye Tiede and Beth Potts, new ballistics evidence indicates Mr. Taylor may not have fired the fatal shots. Based

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[8] In prior cases, we have concluded that an actual innocence claim fails where the petitioner's argument goes "to legal innocence, as opposed to factual innocence." *Beavers*, 216 F.3d at 923. The parties did not brief, and so we do not decide, whether the distinction between principal and accomplice liability goes to legal innocence as opposed to factual innocence.

on this evidence, Mr. Taylor argues that this new evidence qualifies him for the actual innocence exception so that we can consider his underlying constitutional claims for habeas relief. But Mr. Taylor has not demonstrated that applying the well-established procedural default rules would result in a fundamental miscarriage of justice. Overturning the convictions now would be the fundamental miscarriage of justice. Mr. Taylor cannot qualify for the actual innocence exception based upon a technical parsing of the different theories of guilt a state could pursue. His actual innocence of capital murder as a principal does not absolve him of the substantive crime of capital murder under Utah law. He must also prove his actual innocence as an accomplice. Mr. Taylor failed to do so. We accordingly **REVERSE** the district court's grant of habeas corpus relief and **REMAND** for further proceedings consistent with this opinion.

No. 20-4039, *Taylor v. Powell*
BRISCOE, Circuit Judge, concurring.

I fully agree with the majority that Mr. Taylor's actual innocence gateway claim lacks merit. I write separately to emphasize three key points: (1) Taylor's actual innocence gateway claim is inconsistent with basic principles of Utah state criminal law; (2) the record establishes that Taylor received both constructive and actual notice of the possibility that the State could pursue a theory of accomplice liability on the two aggravated murder charges; and (3) the evidence overwhelmingly establishes that Taylor participated in, and was arguably the driving force behind, the two fatal shootings, and thus he is unquestionably subject to accomplice liability for the two murders.

Taylor's actual innocence gateway claim is inconsistent with basic principles of Utah state criminal law

Section 76-5-201 of the Utah Criminal Code states, in pertinent part, that "a person commits criminal homicide if the person intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being . . . ." Utah Code Ann. § 76-5-201(1)(a). Section 76-5-201 also sets out the following types of criminal homicide: "aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide." Utah Code Ann. § 76-5-201(2).

Taylor was charged by information with two counts of criminal homicide, specifically aggravated murder, in violation of Utah Code Ann. § 76-5-202(1)(b) and/or (d). Those statutory provisions state as follows:

> (1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:
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> * * *
>
> (b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;
>
> * * *
>
> (d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping . . . .

Utah Code Ann. § 76-5-202(1)(b), (d).

Chapter 2 of the Utah Criminal Code, entitled "Principles of Criminal Responsibility," expressly recognizes the concepts of principal liability and accomplice liability for criminal offenses. Specifically, § 76-2-202 of the Utah Criminal Code, entitled "Criminal responsibility for direct commission of offense or for conduct of another," states:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202.[1]

The Utah Supreme Court has held, based upon the language of § 76-2-202, that "[t]o show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense." *State v. Briggs*, 197 P.3d 628, 631-32 (Utah 2008). The Utah Supreme Court explained in *Briggs* that "[a]n accomplice will be held criminally responsible to the degree of his own mental state, not that of the principal." *Id*. at 632. Thus, an accomplice must have both "the intent that the underlying offense be committed" and "the intent to aid." *Id*. Notably, and key to our analysis in this case, the Utah Supreme Court stated "that the nature of accomplice liability makes it impossible for the State to charge an individual with accomplice

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[1] Chapter 2 also includes a "Definitions" section that states, in pertinent part:

> A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Utah Code Ann. § 76-2-103(1)-(2).

liability standing alone." *Id*. And the Utah Court of Appeals subsequently explained that "[a]ccomplice liability . . . is not an independent crime." *State v. Melancon*, 339 P.3d 151, 158 (Utah Ct. App. 2014).

In *State v. Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002), the Utah Court of Appeals rejected a defendant's claim "that due process required the State to provide notice in the information of the State's intention to pursue an accomplice liability theory at trial." *Id*. at 971. In doing so, the Utah Court of Appeals noted that "Rule 4(b) of the Utah Rules of Criminal Procedure requires only that an information 'charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge.'" *Id*. at 972 (quoting Utah R. Crim. P. 4(b)). The Utah Court of Appeals in turn rejected the notion "that accomplice liability is a separate offense from principal liability such that it would require specific notice." *Id*. The Utah Court of Appeals noted "[i]t [wa]s well settled that accomplices incur the same liability as principals," and, consequently, "a person charged with a crime has adequate notice of the possibility of accomplice liability being raised at trial because conviction of accomplice and principal liability do not require proof of different elements or proof of different quality." *Id*. (citing Utah Code Ann. § 76-2-202 and *State v. Comish*, 560 P.2d 1134, 1136 (Utah 1977)).

In *State v. Blair*, 868 P.2d 802 (Utah 1993), the Utah Supreme Court addressed the issue of accomplice liability in the course of addressing a defendant's appeal from the

denial of his motion to withdraw his guilty plea. The defendant and a codefendant were charged with first degree murder. Prior to and shortly after the preliminary hearing, the defendant told another inmate, a deputy county sheriff, and the prosecutor that he was the one who shot the victim in the course of robbing him. Not long after the preliminary hearing, the defendant changed his story and told the prosecutor that it was his codefendant who was actually responsible for shooting the victim, and that the defendant simply assisted in disposing of the victim's body after the shooting. Then, approximately three weeks later, the defendant changed course again, pleaded guilty to the charge and, in doing so, informed the trial court that he was responsible for shooting the victim. Eleven and a half years later, the defendant moved to withdraw his guilty plea, reverting again to his claim that he was not the shooter. The defendant asserted that his codefendant shot the victim and that he "agreed to stay with his plea because he falsely believed, based on his attorney's representations, that he could be held liable for the crime just by being at the crime scene even though he professed no prior knowledge that [the codefendant] intended to kill [the victim]." *Id*. at 806. The trial court denied his motion and the defendant appealed to the Utah Supreme Court. The Utah Supreme Court affirmed the trial court's ruling, noting "that a jury could have determined that" the defendant "was guilty of first degree murder as an accomplice even if he did not pull the trigger." *Id*. at 807. Consequently, the Court agreed with the trial judge's conclusion that

the defendant failed to establish "that he [wa]s an innocent man who . . . [pleaded] guilty to first degree murder."[2] *Id*.

In *State ex rel. D.B. v. State*, 289 P.3d 459 (Utah 2012), the Utah Supreme Court addressed the timing of the notice of potential accomplice liability when the defendant was originally charged solely as a principal but was later "adjudicated delinquent as an accomplice." *Id*. at 471. Quoting with approval from the Utah Court of Appeals' decision in *Gonzales*, the Utah Supreme Court noted that because "'accomplices incur the same liability as principals,'" even "'a person charged with a crime [as a principal] has adequate notice of the *possibility* of accomplice liability being raised a trial.'" *Id*. (quoting *Gonzales*, 56 P.3d at 969) (emphasis added by Utah Supreme Court). As for "the question of what notice is constitutionally sufficient before the State may *actually* pursue accomplice liability," the Utah Supreme Court held "that the Sixth Amendment is satisfied when a defendant (1) receives adequate notice that the State is pursuing accomplice liability and (2) the State has not affirmatively misled the defendant." *Id*. The Utah Supreme Court in turn held that "[c]harging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *Id*. "But," the Court held, "a defendant may receive constitutionally adequate notice that he is facing accomplice liability in several ways."

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[2] Taylor's claim of actual innocence is strikingly similar, not in a factual sense but rather in a legal sense, to the actual innocence claim asserted by the defendant in *Blair*.

Id. "The simplest way for the State to provide adequate notice," the Court held, "is by actually charging the defendant as an accomplice." *Id*. "The state may also," the Court held, "notify a defendant of potential accomplice liability through presentation of adequate evidence at any time prior to the close of evidence at trial."[3] *Id*. But, the Court held, "development of an accomplice liability theory *after* the close of evidence eliminates a defendant's ability to prepare his defense and present evidence relating to the accomplice liability theory" and "therefore fails to provide constitutionally adequate notice." *Id*. at 472 (emphasis in original).

Considering this recited Utah statutory and case law as a whole, the following conclusions can be drawn regarding Taylor's case and the actual innocence gateway claim that he now asserts. First, the State's information, at a minimum, effectively placed Taylor on notice that the State, at trial, could attempt to prove Taylor guilty of the two counts of aggravated murder as either an accomplice and/or as a principal. Second, had Taylor not pleaded guilty and instead proceeded to trial, the State almost certainly, based upon its arguments at the preliminary hearing, would have pursued both theories, at least if Taylor had actually pursued the defense he now asserts that his trial counsel should have pursued, i.e., that Taylor was not directly responsible for firing the fatal shots. Third, had Taylor presented evidence at trial suggesting that Deli, rather than he, fired the

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[3] The Utah Supreme Court cited with approval a New Jersey Supreme Court case that held a defendant received notice of potential accomplice liability through his own testimony. 289 P.3d at 471 (citing *State v. Mancine*, 590 A.2d 1107, 1120 (N.J. 1991)).

fatal shots, that evidence would have placed the issue of accomplice liability squarely at issue.

Constructive and actual notice of the accomplice theory

The district court, in its order granting Taylor's motion for evidentiary hearing, concluded that Taylor never received notice of the possibility that the State was pursuing or might pursue a theory of accomplice liability on the two capital murder charges. I reject this conclusion. In my view, the record firmly establishes that Taylor received both constructive and actual notice of the possibility that the State might pursue a theory of accomplice liability.

As discussed above, the State's information charging Taylor with two counts of aggravated murder in violation of Utah Code Ann. § 76-5-202(1)(b) and/or (d) effectively placed Taylor on notice that the State could, at any point prior to the close of evidence at trial, attempt to prove Taylor guilty of the two counts of aggravated murder either as an accomplice or as a principal. And, in fact, Taylor received actual notice of the possibility of accomplice liability at least as early as the preliminary hearing.

The preliminary hearing in the case was held on January 8, 1991, approximately two weeks after the information was filed against Taylor and Deli. Both Taylor and Deli were present along with their counsel. At the conclusion of the State's evidence, Taylor's counsel moved to dismiss Counts I and II of the information. In support of that request, Taylor's counsel, as an early preview of the same evidentiary issues that Taylor presently raises, noted that it was "very difficult to determine which defendant had which weapon,"

which caliber of bullets actually killed the two victims, and whether "the weapon that was fired" by Taylor "did in fact cause the death[s]." Aplt. App., Vol. III at 541-42. More specifically, Taylor's counsel conceded that the testimony of Linae Tiede established that Taylor fired his weapon "in the direction of" Kaye Tiede "and in the direction of" Beth Potts, but Taylor's counsel asserted that there had "been no evidence that in fact, the rounds from this weapon, if it was in fact fired, did in fact, kill these two victims." *Id*. at 543.

The prosecutor responded by citing to and quoting from Utah Code Ann. § 76-2-202 which, as previously discussed, outlines the concepts of principal and accomplice liability for criminal offenses. *Id*. at 545. The prosecutor in turn stated that "there should be no question in the Court's mind that these gentlemen were acting in concert with one another, this was a joint enterprise" and that, under § 76-2-202, "they [we]re both culpable."[4] *Id*. at 545–46. In addition, the prosecutor noted that the evidence established "that two different weapons were fired" and that Taylor told Deli after the shootings that

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[4] Taylor argues in his appellate response brief that the prosecutor's arguments were made solely in response to arguments made by Deli's counsel. Aple. Br. at 13-14. It is true that the prosecutor followed these arguments by stating: "[u]nder these circumstances, your Honor, I'd ask the Court to dismiss Mr. Gravis' motion on behalf of Mr. Deli." Aplt. App., Vol. III at 546. Nevertheless, it is undisputable that (a) the prosecutor was responding to arguments made both by Deli and Taylor, including Taylor's arguments about potentially not having fired any fatal shots, and (b) the prosecutor noted in his arguments that both defendants were liable under § 76-2-202. Thus, it is clear that by this exchange Taylor was placed on notice of the possibility of accomplice liability.

he (Taylor) "had reloaded his weapon." *Id*. at 546. At the conclusion of these arguments, the trial court denied Taylor's counsel's request to dismiss the charges and instead found that there was sufficient evidence to establish probable cause for those charges.

Thus, in sum, the evidence and arguments that were presented at the preliminary hearing provided Taylor with actual notice of the possibility that the State might seek to convict him on the basis of accomplice liability.

The uncontested evidence overwhelmingly establishes that Taylor is responsible for the two murders under a theory of accomplice liability

Because Taylor received both constructive and actual notice of the possibility of accomplice liability for the two murders, it was the district court's obligation under *Schlup v. Delo*, 513 U.S. 298 (1995), to consider not only the issue of principal liability, but also the issue of accomplice liability. Unfortunately, however, the district court focused solely on the issue of principal liability and, by doing so, failed to make a predictive judgment after examining available evidence whether a reasonable, properly instructed jury could have convicted Taylor of both murders as an accomplice. We could of course remand the case to the district court to conduct that analysis in the first instance. But, because it is a legal issue subject to de novo review, and given the importance of avoiding any additional delay in this case, the proper course for us is to conduct the analysis in the first instance.

Turning to the evidence in the record, including the evidence presented at the original sentencing proceeding *and* the new forensic evidence that was presented by

Taylor at the evidentiary hearing before the district court, it is apparent that Taylor cannot establish, in pertinent part, that it is more likely than not that no reasonable juror would have convicted him of the two aggravated murders under an accomplice theory of criminal liability. Even accepting the premise of Taylor's new forensic evidence as correct, i.e., that the fatal shots to the victims were caused by the .44 caliber handgun and that it was Deli who fired those shots, and in turn accepting that it is more likely than not that no reasonable juror would have convicted Taylor under a principal theory of criminal liability, the evidence nevertheless quite clearly establishes Taylor's guilt as an accomplice because Taylor both (a) intended for the victims to be killed or knew that the victims would die as a result of his and Deli's actions and (b) encouraged and/or intentionally aided Deli in the conduct that constituted the offense of aggravated murder (i.e., firing fatal shots into each victim with the .44 caliber handgun).

The undisputed evidence that supports Taylor's convictions as an accomplice in both murders includes the following: (a) Linae Tiede's eyewitness testimony that Taylor, within three to four minutes of Kaye Tiede and Beth Potts entering the cabin, and without either woman doing anything to provoke Taylor or Deli, raised his weapon, aimed it at Kaye Tiede, and shot and struck her with a bullet (notably, Taylor concedes that he was the first to shoot and that he shot and struck Kaye Tiede, Aplt. App., Vol. XIX at 4680), *id*., Vol. III at 94–97; (b) Taylor's admission under oath at the Rule 23B remand evidentiary hearing before the trial court that he emptied his .38 handgun while shooting at Kaye Tiede and Beth Potts, *id*., Vol. III at 608; (c) Linae Tiede's testimony that, after

Taylor and Deli discussed reloading their guns, Taylor said to Deli that he "needed help with the bodies" and that they "needed to throw them over the balcony" of the cabin, *id*., Vol. I at 101; (d) testimony from Brad Wilde, a local sheriff's deputy, who testified that he found the bodies of Kaye Tiede and Beth Potts on the outside balcony of the cabin, covered with both a blanket and snow on top of the blanket (suggesting that Taylor and Deli attempted to conceal the bodies), *id*. at 185; and (e) testimony from both Linae Tiede and Rolf Tiede describing how, after the shootings of Kaye Tiede and Beth Potts, Taylor robbed Rolf Tiede, directed Deli to then shoot Rolf Tiede, and, when Deli failed to comply, Taylor himself shot Rolf Tiede, *id*. at 110–13, 273–78.

It is inconceivable that any reasonable juror, properly instructed and considering all of this evidence, could have reached any other conclusion than that Taylor intended to kill, or at a minimum clearly knew that his actions would result in the deaths of, Kaye Tiede and Beth Potts (as well as Rolf Tiede), and that he both encouraged and assisted Deli in causing the deaths of Kaye Tiede and Beth Potts. In other words, it is inconceivable that a reasonable juror could not have found Taylor guilty beyond a reasonable doubt of the two aggravated murders at least on the basis of accomplice liability even assuming, as argued by Taylor, that none of the bullets he fired from his handgun caused the fatal wounds to Kaye Tiede and Beth Potts.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CASE NO. 2:07-CV-194-TC

VON LESTER TAYLOR,
Petitioner,

v.

SCOTT CROWTHER, Warden,
Defendant.

[Filed March 10, 2020]

**ORDER GRANTING
SECOND AMENDED PETITION
FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. § 2254**

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

VON LESTER TAYLOR, Petitioner, vs. SCOTT CROWTHER, Warden, Utah State Prison,[1] Respondent.	ORDER GRANTING SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 Case No. 2:07-CV-194-TC

Petitioner Von Lester Taylor has filed a petition under 28 U.S.C. § 2254 asking the court to vacate the death sentence he received after pleading guilty to two murders. For the reasons set forth below, the court GRANTS Mr. Taylor's Petition and VACATES his sentence.

INTRODUCTION

In December 1990, Mr. Taylor and his Co-Defendant Edward Deli broke into an empty mountain cabin owned by the Tiede family. On December 22, 1990, when Kaye Tiede, Linae Tiede and Beth Potts arrived, the men opened fire on Kaye Tiede and Ms. Potts with a .38 special revolver and a .44 magnum revolver. Both women died of multiple gunshot wounds. The men kidnapped Linae and her sister Tricia (who had arrived with her father, Rolf Tiede,

[1] Although Robert Powell is the current Warden of the Utah State Prison, he has not been officially substituted for Mr. Crowther.

soon after the shooting), shot Mr. Tiede with bird shot pellets, set the cabin on fire, and fled. They were arrested after a high-speed chase and charged with first degree murder.[2]

In May 1991, Mr. Taylor pled guilty to two charges of capital murder for causing the deaths of Ms. Tiede and Ms. Potts. He was sentenced to death and is currently incarcerated at the Utah State Prison awaiting execution. Edward Deli is serving a life sentence for his role in the murders.

In 2012, after Mr. Taylor's unsuccessful post-trial and post-conviction appeals to the State courts, he filed his Second Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (SAP)[3] in which he asks this court to vacate his sentence.[4] He raises twenty-six claims[5] to support his assertion that his sentence is invalid because it was imposed in violation of his constitutional rights.

Most compelling of those is Claim Four, in which he contends that he received ineffective assistance of trial counsel in connection with his guilty plea. Specifically, Mr. Taylor contends that his trial attorney failed to conduct the investigation necessary to properly advise him about whether to plead guilty. In fact, he says his attorney did not conduct any investigation. Mr. Taylor further asserts that an investigation would have uncovered forensic evidence casting significant doubt on the assumption that Mr. Taylor fired the bullets that killed

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[2] For a complete account of events surrounding the murders, the court refers the reader to two of this court's previous orders: the January 17, 2017 Order and Memorandum Decision Granting Evidentiary Hearing (ECF No. 264), and the February 25, 2019 Findings of Fact and Conclusions of Law Regarding Claim of Actual Innocence (ECF No. 399).

[3] ECF No. 94.

[4] He filed his original petition in 2007, but the case was remanded to state court for further post-conviction review. (See Sep. 4, 2007 Original Pet. Writ of Habeas Corpus, ECF No. 19; Nov. 2, 2007 First Am. Pet. Writ of Habeas Corpus, ECF No. 30; Feb. 14, 2008 Order Granting Mot. Stay Fed. Proceedings, ECF No. 45.) Upon return to this court, Mr. Taylor filed his Second Amended Petition (SAP).

[5] See SAP at i–xii.

Ms. Tiede and Ms. Potts. All of this, he says, resulted in a plea that was not knowing or intelligent and that had no factual basis to support it.

As discussed below, the court finds that Mr. Taylor's constitutional right to effective assistance of counsel was violated when he pleaded guilty to two capital murders based on inexcusably uninformed advice from counsel which then exposed him to the possibility of execution. The record shows there is a reasonable probability that, but for trial counsel's failure to investigate, Mr. Taylor would not have pleaded guilty to two capital murders and would have insisted on going to trial with evidence that Mr. Deli, not Mr. Taylor, caused the deaths of Kaye Tiede and Beth Potts.

PROCEDURAL BACKGROUND

On December 24, 1990, after Mr. Taylor was arrested, the State of Utah brought ten criminal charges against Mr. Taylor, including kidnapping, arson, robbery, attempted murder, and murder in the first degree (capital murder) for the deaths of Ms. Tiede and Ms. Potts. Mr. Deli was similarly charged.

At the time Mr. Taylor was charged, the elements of first degree murder were, in relevant part, as follows:

> Criminal homicide constitutes murder in the first degree if the actor intentionally or knowingly causes the death of another under any of the following circumstances: … (b) The homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons are killed; [or] (d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, … aggravated burglary, [or] burglary.

Utah Code Ann. § 76-5-202(1)(b), (1)(d) (West 1990) (emphasis added). The State did not charge Mr. Taylor or Mr. Deli with liability as an accomplice to murder, which is a different

crime with different elements.[6] (See Dec. 24, 1990 Information, contained in "Pleadings.pdf" at pp. 4–9, "Appendix of Appellate Records and Other Penalty Phase Documents" (disk filed conventionally; see ECF No. 398).)

Guilty Plea and Penalty Phase Trial

Summit County public defender Elliott Levine, who was paid a flat rate to represent indigent defendants, was appointed to represent Mr. Taylor. The State then held a preliminary hearing on January 8, 1991, during which Linae Tiede and investigating officers testified. At the conclusion of the preliminary hearing, the matter was set for trial.

The guilt phase of Mr. Taylor's trial was initially scheduled for March 19, 1991. That trial date was continued to May 7, 1991. But Mr. Taylor did not go to trial. Instead, on May 1, 1991, six days before trial, he pleaded guilty to the two capital homicide charges in exchange for dismissal of the lesser charges. During plea negotiations, the State refused to take the possibility of a death sentence off the table, so Mr. Taylor still faced a trial on the question of whether he should be sentenced to death. Two weeks later, on May 15, 1991, Mr. Taylor's penalty phase trial began.

In the meantime, Mr. Deli had gone to trial on the same counts. On May 14, 1991, the day before Mr. Taylor's penalty phase trial started, a jury found Mr. Deli guilty of second-degree murder.

During Mr. Taylor's penalty trial, the jury heard evidence from the State and Mr. Taylor. The State's evidence spanned two days and included Linae Tiede's testimony, ballistic

[6] The accomplice liability section of the Utah Code "requires conduct different from direct commission of an offense before a defendant incurs accomplice liability." D.B. v. State, 289 P.3d 459, 465 (Utah 2012). At the time Mr. Taylor was charged, Utah Code provided that an accomplice is one "who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense[.]" Utah Code Ann. § 76-2-202 (West 1990).

evidence, crime scene evidence, and the medical examiner's findings. Mr. Levine, on the other hand, presented limited evidence consisting of the testimony of three witnesses, one of whom was Mr. Levine's other capital client, James Holland. His evidence presentation began and ended on May 22, 1991, the same day the prosecution concluded its case. And on that day, the jury voted to impose a sentence of death.

Direct Appeal

Mr. Taylor appealed his sentence. His new attorney, Bruce Savage, filed an appellate brief asserting claims of ineffective assistance of trial counsel. He then filed a motion under Utah Rule of Appellate Procedure 23B seeking a hearing to develop evidence in support of those claims. Utah allows a "party to an appeal in a criminal case [to] move the court to remand the case to the trial court for entry of findings of fact necessary for the appellate court's determination of a claim of ineffective assistance of counsel." Utah R. App. P. 23B(a).

On July 20, 1994, the Utah Supreme Court granted the request and remanded the matter to the trial court, which held a Rule 23B hearing (the "23B Hearing") on the ineffective-assistance-of-counsel claims. The trial court issued findings of fact and concluded that Mr. Levine's representation of Mr. Taylor was not ineffective. (See June 9, 1995 Mem. Decision 23B Remand Hr'g (23B Decision), ECF No. 125-31.)

In its order, the trial court described the three theories Mr. Taylor raised:

> Defendant's first theory is that Levine's personal philosophy as to the role of defense counsel in a criminal case is at odds with the true role of defense counsel and therefore results in a conflict of interest. Secondly, Taylor asserts that Levine's advice to him during the guilty plea process was in error and that he relied upon that advice in entering his plea. Lastly Taylor argues that Levine's compensation from Summit County was so meager that Levine was not able to devote the time and attention necessary to this case and that a conflict of interest was thereby created between Levine's own personal interests and Taylor's interests, and further that Levine failed to follow certain courses of action that

> should have been followed if a reasonably professional defense had been provided Mr. Taylor.

(Id. at 4–5 (emphasis added).)

When discussing the claim about Mr. Levine's advice to Mr. Taylor during the guilty plea process, the 23B court limited its analysis to the claim that "Levine [incorrectly] advised [Mr. Taylor] prior to the entry of his guilty plea that in the penalty phase trial there would be no evidence relating to the charges that were to be dismissed." (Id. at 8.) The court found that Mr. Levine did not actually provide such advice, that Mr. Levine advised Mr. Taylor to go to trial, and that Mr. Taylor pled guilty against the advice of his attorney "primarily so as not to put Taylor's family and the victims through a guilty phase trial, and further Taylor did not want to 'snitch' on Deli." (Id. at 9.)

Although the 23B court concluded that Mr. Levine "was at all times prepared to go to trial and advised Taylor to go to trial," (id.), the court did not make any specific findings about Mr. Levine's level of readiness for trial. It did address evidence of Mr. Levine's "lack of investigation, failure to file motions, failure to interview witnesses, etc.," (id. at 10), but the court limited its discussion to the question of whether Mr. Levine's compensation hindered his ability to properly represent Mr. Taylor during the penalty phase. The court only briefly referred to Mr. Levine's actions during his representation of Mr. Taylor before Mr. Taylor pled guilty. (See id. at 15–16.) For the most part, the discussion concerned Mr. Levine's gathering and presentation of mitigation evidence, not evidence of guilt, and what prejudice, if any, Mr. Taylor suffered at the penalty phase. (See id. at 16 (noting Mr. Taylor's burden to show "a 'reasonable probability' that a different outcome at the penalty phase would have occurred had Levine done those things that Taylor claims he should have done.").)

Ultimately the court found that Mr. Taylor did not show by a preponderance of evidence that Mr. Levine's representation of Mr. Taylor at the penalty phase fell below "an objective standard of reasonable professional judgment," and it found that Mr. Taylor did not demonstrate that he was prejudiced by Mr. Levine's performance. (Id. at 10, 16–17.) The court cited, in particular, "overwhelming" evidence of Mr. Taylor's participation in the crime, which it described as "an eyewitness to the murders, eyewitnesses to the attempted murder of Rolph [*sic*] Tiede and the aggravated kidnapping, and [that] defendant was apprehended by a police officer as he fled the crime scene in the victims' vehicle, with hostages." (Id. at 16.) The 23B hearing did not, and was not designed to, develop or address evidence of Mr. Taylor's guilt.

After the trial court issued its findings, the matter went back to the Utah Supreme Court. On October 24, 1997, the Utah Supreme Court affirmed Mr. Taylor's conviction and sentence.[7] See State v. Taylor, 947 P.2d 681 (Utah 1997) ("Taylor I").

In Taylor I, the Utah Supreme Court addressed "whether Taylor's initial attorney, Levine, provided ineffective assistance of counsel and in doing so prejudiced the outcome" of the penalty trial. Id. at 684. The multiple grounds for that claim were those raised during the Rule 23B hearing as well as the ground that "the various errors by Levine resulted in cumulative error at the penalty phase[.]" Id. The court found that Taylor "failed to provide any evidence that if Levine had performed any of the suggested investigations, the outcome of the [penalty] trial would have differed. He does not even suggest what such investigation would have revealed and how the revelations would have improved his position with the jury." Id. at 685. The court characterized the issues as "misinformation about scope of penalty phase," "conflict in defense role," and "conflict of interest resulting from minimal compensation." Id. at 685–86, 688. The

[7] On October 5, 1998, the United States Supreme Court denied Mr. Taylor's Petition for Writ of Certiorari. Taylor v. Utah, 525 U.S. 833 (1998).

court expressed concern about Mr. Levine's "failure to pursue mitigation evidence." Id. at 686. But ultimately it found Mr. Levine's investigation, although "very limited," was "adequate." Id. at 687.[8] As for the cumulative error analysis, the court found that Mr. Taylor "failed to identify deficiencies in Levine's performance that had any apparent effect on the outcome of his penalty trial." Id. at 688.

The court commented on evidence of the murders. "We note that Taylor pled guilty to horrendous crimes and has never been able to suggest mitigating circumstances or undisclosed evidence which might have favorably influenced the jury. Fairness requires the observation that Levine did not have a lot to work with in his defense effort." Id. at 688 (emphasis added). While it concluded that Mr. Levine's representation was not "ideal," it also noted that Mr. Taylor "was not the ideal defendant." Id. at 689.

> Taylor voluntarily pled guilty to committing heinous crimes without provocation, and the State had irrefutable, detailed evidence of those crimes. The chances that Taylor would have fared any better had the best criminal defense attorney in the country made the perfect argument [to the penalty trial jury] are slim. For this reason, Taylor cannot show prejudice related to Levine's performance.

Id. at 689–90 (emphasis added).

First State Petition for Post-Conviction Relief

On February 26, 1999, Mr. Taylor filed a habeas petition in state court under Utah's Post-Conviction Remedies Act (PCRA).[9] Three years later, in 2002, Mr. Taylor filed his First Amended Petition for Post-Conviction Relief.

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[8] In dissent, Justice Stewart disagreed with the majority's conclusion that the mitigation investigation was "'very limited' but 'adequate.'" He concluded that Mr. Levine "did not conduct an in-depth investigation of defendant's psychological history and condition," that those factors "were simply not explored in any meaningful way," and that although nothing may have come from such an investigation, "it is not possible to know what might have been discovered had defense counsel done his job." Taylor I, 947 P.2d at 690 (Stewart, J., dissenting).

[9] Utah Code Ann. §§ 78B-9-101 to -405.

The centerpiece of his petition was a set of claims of ineffective assistance of trial and appellate counsel. In those claims, he focused on numerous grounds for relief, but none addressed the questions of whether Mr. Levine investigated evidence relating to Mr. Taylor's culpability and whether Mr. Taylor's plea was knowing and intelligent.

The State filed a motion for summary judgment, contending that Mr. Taylor's claims concerning trial counsel's performance were procedurally barred because they were raised, or could have been raised, on appeal. As for Mr. Taylor's assertion that his appellate counsel provided ineffective assistance by failing to raise certain issues on appeal, the State argued that Mr. Taylor "failed to show that any of [those issues presented] 'dead-bang' winning claims, i.e., they are obvious from the record and probably would have resulted in a reversal." (Mar. 1, 2004 Mem. Decision at 4–5, Taylor v. Galetka, Case No. 990902315 (Third Judicial District Court for the State of Utah).) The State district court granted the motion for summary judgment in March 2004. (See id.) That court agreed that all of Mr. Taylor's ineffective-assistance-of-trial-counsel claims were procedurally barred. Then, applying the two-part standard articulated in Strickland v. Washington, 466 U.S. 668 (1984), the court found that Mr. Levine's performance was not deficient and that, in any event, Mr. Taylor was not prejudiced by Mr. Levine's performance.

On January 26, 2007, the Utah Supreme Court affirmed the denial of Mr. Taylor's PCRA petition. See Taylor v. Utah, 156 P.3d 739 (Utah 2007) ("Taylor II"). But its findings did not track the reasoning of the trial court.

In particular, the court found that Mr. Levine's "performance was deficient because he failed to conduct an adequate mitigation investigation." Id. at 752. Notably, the court did not address whether Mr. Levine conducted an adequate investigation related to a guilty phase trial, because that issue was not before it.

In its decision, the court noted that "[a]n attorney 'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Id. (quoting Strickland, 466 U.S. at 691). Then, to determine whether Mr. Levine's mitigation "investigation fell within 'the wide range of reasonable professional assistance' in 1991," the court said

> we look to the information available to trial counsel. We also consider the prevailing professional norms at the time. In this case, we find evidence of the prevailing norms in [expert witness John Hill's] affidavit[10] as well as in the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases (the ABA Guidelines).

Id. at 753. Considering the standards, the court agreed that Mr. Levine was presented with enough information to justify an independent investigation to gather mitigation evidence and that his failure to undertake such an investigation under the circumstances "was inexcusable." Id. at 755. "[F]ailing to investigate because counsel does not think it will help does not constitute a strategic decision, 'but rather an abdication of advocacy.'" Id. at 754 (quoting Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005)).

Still, the Utah Supreme Court affirmed the lower court's decision because it found that Mr. Levine's deficient performance did not prejudice Mr. Taylor. In other words, the court, applying the second prong of Strickland, found there was no reasonable probability that, but for Mr. Levine's professional error, the result would have been different. The court considered the "totality of the evidence before" the sentencing jury. Id. at 755. "Given the horrendous circumstances of this crime, it is not at all likely that the jury would have concluded that the mitigating circumstances outweighed the aggravating circumstances." Id. at 756.

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[10] Mr. Hill was the director of the Salt Lake Legal Defender Association and testified at the 23B Hearing.

Second State Petition for Post-Conviction Relief ("Exhaustion Petition")

In September 2007, after the Utah Supreme Court denied his PCRA petition, Mr. Taylor filed his federal habeas petition with this court under 28 U.S.C. § 2254. In November 2007, he asked this court to stay the matter so he could pursue his second post-conviction petition in State court. (See Pet'r Mot. to Stay Fed. Habeas Action, ECF No. 32.) He needed a ruling from the state court on claims that were raised in his federal petition but had not been presented to the state court. This court granted his request and the matter was sent back to the Utah state courts so that Mr. Taylor could present unexhausted claims. (See Feb. 14, 2008 Order Granting Mot. to Stay Fed. Proceedings, ECF No. 45.)

In his successive post-conviction petition to the state court ("Exhaustion Petition") he asserted thirty claims for relief, including the claim that his death sentence is disproportionate to his culpability in light of Mr. Deli's life sentence and in light of "newly discovered evidence suggest[ing] that the shots that killed Beth and Kay [*sic*] came from Deli's .44 caliber gun and not from Taylor's .38 caliber gun, and therefore Taylor is innocent." Taylor v. State, 270 P.3d 471, 483 (Utah 2012) ("Taylor III"). In response, the State filed a motion to dismiss which the state district court granted in August 2009. Mr. Taylor appealed the dismissal of twelve claims.

The Utah Supreme Court issued a January 2012 opinion (Taylor III) affirming the district court's ruling that all of Mr. Taylor's claims were procedurally barred under the PCRA and that no statutory or common law exceptions to the procedural bar allowed review of the claims' merits. Responding to Mr. Taylor's claim that his sentence was disproportionate, the Utah Supreme Court expressed skepticism about Mr. Taylor's allegation that new evidence showed Mr. Deli killed Ms. Potts and Ms. Tiede:

> Taylor's argument does not meet the PCRA's requirement that the newly discovered evidence "demonstrate[] that no reasonable trier of fact could have

> found the petitioner guilty of the offense or subject to the sentence received." Utah Code § 78-35a-104(1)(e)(iv). Indeed, Taylor's argument is frivolous because there is ample evidence in the record to support Taylor's guilt.

Id. at 483 (alteration in original). The court then described the "ample evidence":

> Taylor admitted to Dr. Moench, a psychiatrist who examined him pursuant to a court order, that he was the shooter and had killed both victims. He also admitted to Dr. Moench that he emptied the .38 caliber gun into the victims and then grabbed the .44 caliber and also emptied that gun into the victims. Additionally, Linae testified that she heard Taylor say that he "had to shoot the bitch in the head twice." The medical examiner testified that the fatal wound to Kay [*sic*] was consistent with a .38 caliber and the other wound that could have been fatal was consistent with a .44 caliber. The medical examiner also testified that Beth had a .44 caliber wound to the head and a .38 caliber wound to the chest, both of which could have been fatal.

Id. None of that evidence was tested by Mr. Levine.

The court also emphasized that Mr. Taylor pled guilty to the murders, and "that by pleading guilty, the defendant is deemed to have admitted all of the essential elements of the crime charged and thereby waives all nonjurisdictional defects…. A defendant can be spared from the consequences of his plea only if he can demonstrate that the plea was not made knowingly and voluntarily." Id. (internal quotation marks and citation omitted). The court then noted that "[b]ecause Taylor has not claimed that his plea was not entered knowingly and voluntarily, and because he was aware of Deli's sentence before he filed his first petition for post-conviction relief, this claim is procedurally barred." Id. Finally, although Mr. Taylor contended that "his assertion of factual innocence is good cause for [the court] to examine his claims," the court declined to address that issue because Mr. Taylor failed to appeal the district court's dismissal of his factual innocence claim. Id. at 486 n.12.

Upon the Utah Supreme Court's denial of his Exhaustion Petition, Mr. Taylor returned to federal court.

Federal Habeas Petition and Actual Innocence Claim

At that point, Mr. Taylor's petition in this court was ripe for review. After amending his petition for the second time, Mr. Taylor conducted discovery necessary to pursue his first claim, "Actual Innocence." He then moved for an evidentiary hearing[11] to present evidence he had gathered during his investigation into the circumstances of the murders. That evidence, Mr. Taylor argued, would show that the bullets he fired did not cause the deaths of Ms. Potts and Ms. Tiede. In other words, he was "actually innocent" of the two capital murders to which he pled guilty because the evidence shows that the fatal shots came from the .44 magnum revolver fired by Mr. Deli.

Mr. Taylor requested that this court grant an evidentiary hearing on other claims as well. But the court focused only on the actual innocence claim, reasoning that a favorable ruling on that claim would moot the remaining claims.

In his motion, Mr. Taylor relied on the United States Supreme Court decision in Schlup v. Delo, 513 U.S. 298 (1995), which addressed a claim of "actual innocence." The Schlup Court held that a petitioner's otherwise procedurally-defaulted claim may, under limited circumstances, be heard on the merits if it is based on a contention that the ineffectiveness of his counsel "denied him the full panoply of protections afforded to criminal defendants by the Constitution." Id. at 315. Schlup allows the federal court to review the defaulted claim if it "falls within the 'narrow class of cases … implicating a fundamental miscarriage of justice.'" Id. (quoting McCleskey v. Zant, 499 U.S. 467, 493–94 (1991)). To satisfy this "gateway standard," a petitioner must present evidence that "it is more likely than not that no reasonable juror would

[11] See Pet'r's Mot. for Evidentiary Hr'g, ECF No. 217.

have found petitioner guilty beyond a reasonable doubt." Id. at 322. Mr. Taylor sought the chance to present his evidence of "actual innocence."

The State opposed the motion, arguing that Mr. Taylor had not met his burden under Schlup and that, in any event, Mr. Taylor was clearly guilty as an accomplice so he could not be "actually innocent." The court rejected the State's accomplice liability argument. Citing to Utah case law, the court reasoned that because Mr. Taylor was not charged with accomplice liability and did not plead guilty to accomplice liability, a denial of his motion on the basis of accomplice liability would contravene his due process rights. (See Jan. 17, 2017 Order & Mem. Decision Granting Evidentiary Hr'g at 1, 20–24, ECF No. 264 ("Schlup Order").)[12]

The court granted Mr. Taylor's request for an evidentiary hearing to establish actual innocence.[13] (See id. (finding that Mr. Taylor was entitled to an evidentiary hearing because he "established the potential to advance his claim of actual innocence").)

In March 2018, the court held a three-day evidentiary hearing (the Schlup Hearing), during which the parties presented ballistics and medical forensics evidence, along with supporting expert testimony. Based on that evidence, the court, on February 25, 2019, held that

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[12] The court notes that the Eighth Circuit Court of Appeals in Jones v. Delo rejected a similar argument, commenting on the nature of a petitioner who is "actually innocent":

> Although "[a] prototypical example of 'actual innocence' … is the case where the State has convicted the wrong person of the crime," [Sawyer v. Whitley, 505 U.S. 333, 340 (1992),] one is also actually innocent if the State has the "right" person but he is not guilty of the crime with which he is charged. See Schlup, 513 U.S. at 321 (noting prisoner interest in relief "'if he is innocent of the charge for which he was incarcerated'") (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (plurality opinion)).

Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995).

[13] Although Mr. Taylor requested a hearing on other claims as well, the court deferred ruling on that portion of Mr. Taylor's motion because of the potentially dispositive nature of his actual-innocence claim. (See Jan. 17, 2017 Order & Mem. Decision Granting Evidentiary Hr'g at 3, ECF No. 264.)

Mr. Taylor had satisfied his burden to show "actual innocence."

> Given the reliable physical evidence and the weight of the expert opinions, the court holds that no reasonable, properly instructed juror, viewing the record, would have concluded beyond a reasonable doubt that Mr. Taylor fired the fatal shots that caused the deaths of Beth Potts and Kaye Tiede. In other words, no reasonable juror, conscientiously following the appropriate instructions requiring proof beyond a reasonable doubt, would have voted to convict Mr. Taylor of the charges to which he pleaded, capital murder as a principal.
>
> For these reasons, the court concludes that Mr. Taylor is entitled to the gateway Schlup allows.

(Feb. 25, 2019 Findings of Fact & Conclusions of Law Re: Claim of Actual Innocence at 52–53, ECF No. 399 (the "Actual Innocence Order").)

The court's ruling allows Mr. Taylor to obtain review of the merits of his otherwise procedurally-defaulted claims. Claim Four is one of the defaulted claims and focuses on Mr. Taylor's guilty plea. At a May 6, 2019 status conference, the parties agreed that the court should limit its review of the SAP to Claim Four, which, if proven, provides the relief Mr. Taylor seeks. (See May 6, 2019 Min. Entry, ECF No. 406.) That is what the court addresses now.

CLAIM FOUR

In the Second Amended Petition (SAP), Claim Four asserts that "Mr. Taylor's Guilty Plea is Constitutionally Defective." (SAP at 70.) Mr. Taylor divides the claim into five subparts:

> 4.A. Prior to Mr. Taylor Entering a Guilty Plea to a Capital Crime, Trial Counsel Had Not Conducted the Investigation Necessary to Offer Him Any Reasonable Advice.
>
> 4.B. Trial Counsel Was Not Qualified to Represent Mr. Taylor at His Capital Trial.
>
> 4.C. Trial Counsel Wrongly Advised Mr. Taylor That Evidence of the Dismissed Charges Would Not Be Admitted in His Penalty Trial.
>
> 4.D. Guilty Pleas May Be Invalidated.

4.E. Mr. Taylor's Plea Colloquy Was Constitutionally Deficient.

(Id. at 70–85.)

Because Subparts 4A and 4D are sufficient reason to vacate Mr. Taylor's sentence, the court does not reach the merits of the remaining subparts of Claim Four or the other claims in the SAP.

STANDARD OF REVIEW

Generally, habeas relief is available under 28 U.S.C. § 2254 (AEDPA), in two circumstances. The court may grant a petition if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Alternatively, the habeas petitioner is entitled to relief if the state court ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id. § 2254(d)(2). These standards apply to claims that the state court decided on the merits.

Customarily, AEDPA bars review of procedurally-defaulted claims (that is, claims that were not decided on the merits). Subparts 4A and 4D of Mr. Taylor's Claim Four were procedurally defaulted. Under normal circumstances, Subparts 4A and 4D could not be a basis for granting Mr. Taylor's habeas petition.

But in the February 2019 Actual Innocence Order, this court held that Mr. Taylor is entitled to rely on the "fundamental miscarriage of justice" exception articulated in Schlup v. Delo, 513 U.S. at 314–15. That procedural-gateway exception—also known as the "actual innocence" procedural gateway—allows Mr. Taylor to present Claim Four to this court on the merits.

> In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing Schlup gateway showing "raise[s] sufficient doubt about [the

> petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "review of the merits of the constitutional claims" is justified.

House v. Bell, 547 U.S. 518, 537 (2006) (quoting Schlup, 513 U.S. at 317) (emphasis added).

The court's "actual innocence" ruling complicates what would otherwise be a straightforward application of the AEDPA standard of review. That statutory standard, which assumes the claim was not procedurally defaulted, is very deferential to the State court. See 28 U.S.C. § 2254(d). Also, normally the federal court may only consider evidence presented to the State court. See id. § 2254(e)(1) ("determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner must rebut "the presumption of correctness by clear and convincing evidence"); Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (holding that "review of a claim under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits").

But given the exceptional circumstances—that is, the court is in the unusual position of reviewing the merits of a procedurally-defaulted claim—the court finds that, in lieu of AEDPA's restrictive standard of review, a *de novo* standard of review (including consideration of record evidence developed in state and federal court) applies because Mr. Taylor is entitled to rely on the "miscarriage of justice" exception.

The court reaches this conclusion for two reasons. To begin, the limited standard of review set forth in § 2254(d) applies to "any claim that was adjudicated on the merits in State court proceedings[.]" By definition, the § 2254(d) standard of review does not apply to Subparts 4A and 4D of Mr. Taylor's Claim Four because those portions of the claim were not decided on the merits. See Taylor III at 483 ("Because Taylor has not claimed that his plea was not entered knowingly or voluntarily, and because he was aware of Deli's sentence before he filed his first petition for post-conviction relief, this claim is procedurally barred"). Second, fundamental

principles articulated in United States Supreme Court cases support use of the *de novo* standard of review. For example, in McQuiggin v. Perkins, the Court stated that "the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." 569 U.S. 383, 397 (2013) (emphasis added) (finding the petitioner could overcome AEDPA's due diligence barrier to consideration of an untimely petition because the petitioner asserted a credible claim of actual innocence). The McQuiggin court pointed to House v. Bell, 547 U.S. 518, 539 (2006). "In House, we rejected the analogous argument that AEDPA replaced the standard for actual-innocence gateway claims prescribed in Schlup with a 'clear and convincing' evidence requirement." Id. at 397 n.1. House held that the standard of review in AEDPA did not apply to "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." House, 547 U.S. at 539. See also Holland v. Florida, 560 U.S. 631, 646 (2010) (noting that "equitable principles have traditionally governed the substantive law of habeas corpus," and that the Court would "not construe [AEDPA] to displace courts' traditional equitable authority absent the clearest command") (internal citations and quotation marks omitted).

For the above reasons, the court will apply the *de novo* standard and decide the legal issues considering all record evidence, including evidence developed at the Schlup Hearing and the 23B Hearing, without the restrictions imposed by AEDPA.

FACTS

The facts central to this court's decision come from the 23B Hearing and the Schlup Hearing. The 23B facts concern Mr. Levine's failure to investigate, his uninformed assumption that Mr. Taylor was guilty of both crimes, his advice to Mr. Taylor based on that uninformed assumption, Mr. Taylor's understanding of the State's evidence based on discussions with Mr.

Levine, and Mr. Taylor's belief that he fired the shots that killed Ms. Tiede and Ms. Potts. The evidence presented during the Schlup Hearing focuses on the events relating to the murders themselves.

Evidence from the 23B Hearing

During the 23B Hearing, both Mr. Taylor and Mr. Levine testified about events leading up to the change of plea hearing.[14]

Review of the Prosecutor's Case File

Mr. Levine testified that it was his "practice to take advantage of the County Attorney's open-file policy." (23B Hr'g Tr. Vol. 3 at 104.)[15] "I was able to walk in there, take files and say, 'I'll bring it back later.'" (Id. at 133.) He said he saw what was in the County's file. (Id. at 133, 135.) That file contained "police reports; police narratives; witness statements; autopsy reports; investigative reports; police officer interviews; fire investigation reports; firearm, bullet, and laboratory reports; search warrant affidavit and warrant; an evidence list; and other miscellaneous items." (23B Hearing Order ¶ 79, ECF No. 125-32.)

Mr. Levine shared the contents of the file with Mr. Taylor and his "investigative paralegal" Robina Gillespie. (23B Hr'g Tr. Vol. 3 at 135.)

Failure to Hire an Investigator

Mr. Levine worked with Robina Gillespie (his then-girlfriend) on the case. She testified that she was appointed by Summit County to "assist Elliott Levine at trial." (23B Hr'g Tr. Vol. 7 at 17.) She was appointed around April 19, 1991. (See id. p. 22 lines 19-25, p. 23 line 1, p. 25

[14] Although much of the 23B Hearing focused on Mr. Levine's failure to conduct a mitigation investigation in preparation for the penalty phase, the hearing did elicit testimony about Mr. Levine's investigation before Mr. Taylor pled guilty.

[15] The seven volumes of the 23B Hearing transcripts were filed conventionally. (See Notice of Conventional Filing, ECF No. 397 (referring to Appendix of Appellate Records and Other Penalty Phase Documents, ECF No. 398).)

lines 10-12.) When Mr. Taylor's appellate attorney, Bruce Savage, referred to her as an "investigator," she corrected him and said she was hired as a paralegal. (Id. at 22.) She did the same later in her testimony:

> Q. (BY MR. SAVAGE) In between the time of April 19th, … to the change of Mr. Taylor's plea [on May 1, 1991], Ms. Gillespie, would you tell me what individuals, as an investigator, you investigated? What did you do, other than review the case file and read it…?
>
> A. You keep referring to me as an investigator. That was not my primary function.
>
> Q. Okay. How about paralegal. I'll use that phrase. Is that the primary function?
>
> A. Yes.

(Id. at 25; see also id. at 29 (she testified that she was not comfortable with the term "investigator" and that "paralegal" work was the best description of her duties).)

To the extent investigation was part of her duties, what little investigation she did was not meaningful. Between the time she was appointed, on April 19, 1991, and Mr. Taylor's plea on May 1, 1991, she talked to Mr. Levine, read the case file, talked to the County's investigator Joseph Offret (a detective assigned to the case), and attended Edward Deli's trial. She said "[t]he file included all the police reports, the witness statements, [sic] I read all the paperwork Elliott [Levine] had available in his office. I had spoken with, probably, the investigators at Park City." (Id. at 26.) Ms. Gillespie met Mr. Taylor for the first time on the day he pled guilty. (Id. at 28–29.)

She could not recall gathering any other information. Mr. Savage referred to the notes Ms. Gillespie took before Mr. Taylor pleaded guilty and asked:

> Q. Okay. So in addition to speaking with Mr. Levine for two and a half hours on the 19th of April, reading the file on the 25th, the 26th, the 30th, you talked to Joe Offret, and nothing else; it that a fair summary of what you just said?
>
> A. That's as much as I remember, yes.

(Id. at 27.)

Other than Ms. Gillespie, who for all intents and purposes was hired as a paralegal and whose investigative activities were minimal at best, Mr. Levine did not hire anyone to assist with the case.

Lack of Expert Witnesses

Mr. Levine was familiar with the need for experts and the method for obtaining them. He testified that he had used experts in other cases for Summit County, including experts in arson, ballistics, psychiatry, and handwriting. (23B Hr'g Tr. Vol. 3 at 71–72.) He also said he had no financial limitation on his ability to hire experts.

> I always bragged to other attorneys about how good I had it in Summit County because my clients had the best advantage of all because if I wanted to, I could get any expert I wanted to. I used to brag that I had an unlimited budget in Summit County. … It gave me a lot of room to do a lot of things that I … otherwise may have been restricted to.

(Id. at 108.)

Yet Mr. Levine did not arrange for any expert to review the evidence against Mr. Taylor. (23B Hr'g Tr. Vol. 1 at 179.) At best, he "may have discussed the matter, informally, possibly" with one person:

> Q. … Did you arrange to have anyone independent of the prosecutors, the witness, review any of this evidence?
>
> A. I can't say for sure, but I may have discussed the matter, informally, possibly, with somebody who I had used in a prior case.
>
> Q. Can you tell us who that is?
>
> A. I believe his name was – I can't remember his last name. I think his first name was Chuck or Charles, but at this time I can't recall his last name. But I had used him in a prior case.
>
> Q. Did you seek from the Court remuneration for this individual?
>
> A. No, because, to the best of my recollection, it was an informal type of discussion; maybe we went out to lunch or a phone call; just a very informal kind of discussion.

(Id. at 178–79.)

He did not use a ballistics expert, although he made a passing reference to a discussion with his "gun expert, ballistics expert":

> Q. Okay. In terms then of any evidence, whatsoever, the actual – the shell cartridges, the ballistics, the angles of trajectory, the autopsy report, virtually anything having to do with evidence of the State, did you seek to have any experts independently review that evidence?
>
> A. Other than talking with my gun expert, ballistics expert, other than that, in talking to the State's witnesses, other than that, nope. I can't recall offhand, but my best recollection would be no.

(Id. at 179–80.) Even if he had "talked" with a "gun expert," he testified that he did not hire that expert or seek any ballistic evidence. (Id. at 178.)

During the 23B Hearing, when the parties were discussing Mr. Levine's preparation of mitigation evidence, Mr. Levine expressed distaste for paid expert witnesses. He was asked why he did not consult with an expert if he knew he could hire one. He responded by saying:

> I don't – because the way I handle criminal cases, I just don't go around talking to and hiring experts merely because they are going to align with my position. In other words, "gun for hire"; is it that kind of expert? That's what I am referring to. … In my opinion, I don't think that's ethical.

(Id. at 181.) He explained: "I'm of the belief in criminal defense law that if you look high and low, far and wide, you can come up with a, quote/unquote, expert that will say whatever – that will back up whatever theory you are trying to pursue." (Id.) Although the discussion at the 23B Hearing focused on the need for expert witnesses to support Mr. Taylor's presentation during the penalty phase, Mr. Levine's distaste for experts may have spilled over to his failure to hire experts to evaluate and challenge the State's evidence of Mr. Taylor's guilt.

Mr. Levine's Assessment of the State's Evidence

From the beginning, Mr. Levine took the State's evidence at face value and conveyed his belief to Mr. Taylor that the State's case was essentially unassailable:

> Q. I assume, since you had other police reports and you had observed the preliminary hearing and Mr. Taylor had seen at least many of the police reports and other information from the County and had also sat through the preliminary hearing, that it was clear to both of you that would it [sic] be a difficult case or – let me ask it this way: How strong was your estimate of the State's case in January and February of 1991?
>
> A. Very, very strong.
>
> Q. Did you convey that to Mr. Taylor?
>
> A. Yes.
>
> Q. Did you discuss with him the eyewitness testimony?
>
> A. Yes, we discussed everything. We discussed everything.

(23B Hr'g Tr. Vol. 2 at 185–86.) Mr. Levine said "there was a lot of overwhelming physical evidence…." (23B Hr'g Tr. Vol. 7 at 49.) None of that evidence was tested.

Mr. Taylor's Decision to Plead Guilty

Still, Mr. Levine testified that he encouraged Mr. Taylor to go to trial and advised him that he should not plead guilty. By his reasoning, conviction of the capital charges was a given but Mr. Taylor had nothing to lose by requiring the State to present its case at the guilt phase. He offered his assessment of the situation, and the reason for his advice: "This is a capital homicide case. His options are – worst option is death penalty. As far as I was concerned, it was going to trial. You didn't have an option." (23B Hr'g Tr. Vol. 1 at 102–03.)

Mr. Taylor decided to plead guilty based on evidence he heard during the State's presentation at the non-adversary preliminary hearing, his review of the State's case file, and his conversations with Mr. Levine. Mr. Levine did nothing to dissuade Mr. Taylor from believing that no other evidence existed and did not tell him that an independent expert analysis of the State's evidence was available and might provide a defense to the charges filed. That is because Mr. Levine did not test the State's evidence by hiring an investigator or expert witnesses. But a review of the State's evidence by a qualified expert could have shown (and ultimately did show

during the Schlup Hearing) that the State's evidence raised material questions about whether Mr. Taylor fired the bullets that killed Ms. Potts and Ms. Tiede.

Mr. Levine testified that when Mr. Taylor expressed his desire to plead guilty, Mr. Levine was surprised. According to Mr. Levine, Mr. Taylor decided to plead guilty because "he didn't want to put his family and he didn't want to put himself through a trial. … And he also expressed a desire not to put the victims through the agony of trial." (23B Hr'g Tr. Vol. 2 at 192.) Mr. Levine testified that he "couldn't quite understand" Mr. Taylor's decision. "I stressed to him that even if he were to plead guilty, there's still a penalty phase that is the same as a trial. In other words, I tried to dispel his notion that he would be saving anything." (Id. at 193.)

In other words, Mr. Levine believed Mr. Taylor's reason for pleading guilty—to spare his family and the Tiede family the "agony" of going through a trial—was nonsensical because his family and the victims would still have to endure presentation of the evidence at the penalty trial.[16] While Mr. Levine's characterization of the situation was accurate, he made the mistake of assuming the State's evidence was conclusive proof of guilt.

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[16] During the 23B Hearing, Mr. Taylor denied telling Mr. Levine he wanted to spare his family and the victims the "agony" of going through trial.

> Q. Did you tell Mr. Levine that you refused to put your family through the trial?
> A. No.
> Q. Do you recall –
> THE COURT: Did you tell him that that was the reason that you were willing to plead guilty?
> ...
> THE WITNESS: No, I did not.
> …
> Q. (BY MR. SAVAGE) Did you have concerns about having your family attend the trial?
> A. I didn't want them – I didn't want to put them through it, but I didn't tell Mr. Levine that I would not put them through it.

(23B Hr'g Tr. Vol. 5 at 9.) The 23B court did not believe Mr. Taylor. But even if Mr. Taylor did tell Mr. Levine he was pleading guilty to spare his family, such a statement does not change

His assessment of the case was illustrated by his answer to questions at the 23B Hearing about the plea negotiations. Mr. Levine said "basically I had nothing to work with…." (23B Hr'g Tr. Vol. 3 at 137.) "I'm stuck with these certain facts, okay? I have a gentleman who desired to plead guilty. He had – he admitted the crime." (Id. at 100.)

Mr. Levine conveyed his view of the evidence to Mr. Taylor, which included the conclusion that Mr. Taylor had fired the bullets that killed both Ms. Tiede and Ms. Potts. But Mr. Levine was uninformed about the strength and nature of the State's evidence. His assessment of the case, which he expressed to Mr. Taylor, misled Mr. Taylor. As a result, Mr. Taylor was uninformed when he decided to plead guilty.

Evidence at the *Schlup* Hearing

On February 25, 2019, this court issued Findings of Fact and Conclusions of Law (ECF No. 399) following the Schlup Hearing (the "Actual Innocence Order"). As noted above, that order lifted the procedural bar to consideration of Mr. Taylor's defaulted claims, including Claim Four. To lift that bar, the court had to, and did, conclude that "no reasonable, properly instructed juror, viewing the record, would have concluded beyond a reasonable doubt that Mr. Taylor fired the fatal shots that caused the deaths of Beth Potts and Kaye Tiede." (Actual Innocence Order at 52.)

The court issued its findings of facts and conclusions of law based on a review and analysis of evidence—old and newly discovered—of the murders. The court explained that "Mr. Taylor submitted new evidence that he only fired the .38 special, not the .44 magnum, and that the .38 special did not cause the fatal wounds of Ms. Tiede or Ms. Potts." (Id. at 5.)

Mr. Taylor's belief that he was guilty of capital murder. Only an investigation could have changed that understanding.

The court found that Mr. Deli held the .44 magnum throughout the shooting. The court reached that conclusion not just on Mr. Deli's testimony at the hearing, but also on Linae Tiede's eyewitness statements and Detective Joseph Offret's conclusion that it would have been a physical impossibility for Mr. Taylor to have shot the women with the .44 magnum. (See id. at 9–14.)

The court then addressed whether each woman's fatal wounds was caused by the .44 magnum rather than the .38 special. The court found that the evidence strongly indicated that Ms. Tiede died from a .44 magnum bullet and that no reasonable juror could find beyond a reasonable doubt that Ms. Pott's fatal wounds were caused by a .38 special. (Id. at 26, 43.)

Those conclusions were based on evidence from the scene (for example, the investigators' bullet analysis, photos of the cabin, and physical evidence gathered by investigators), the autopsy reports, and the testimony and analysis presented by forensics and ballistics experts (both of whom Mr. Levine could have hired). The court also considered the 2007 declaration and 2014 deposition of the State's medical examiner, Dr. Sharon Schnittker. In her sworn statements, Dr. Schnittker questioned and ultimately withdrew the conclusion she reached in 1991 that Ms. Tiede was killed by a .38 special bullet. (See id. at 38–39.)

The ballistics experts compared the significant destructive power of a .44 magnum to the less powerful .38 special. (See id. at 19–20.) The forensics experts analyzed the nature of the wounds and opined about the type of bullet that caused each wound. (See id. at 20–51.) Their testimony of course shed light on the ultimate question of whether the .44 magnum rather than the .38 special caused each woman's fatal wounds. But it also highlighted significant problems with Dr. Schnittker's conclusion about the type of bullet that killed each woman. If Mr. Levine had hired ballistics and forensics experts and an investigator, he likely would have gathered

evidence to undermine, or at least call into question, the State medical examiner's methodology and testimony about the cause of death.

For example, it would have discredited her theory that the .38 bullet recovered during Ms. Tiede's autopsy caused her fatal wound. In fact, Dr. Schnittker, upon further reflection in 2007 and 2014, discounted the value of the discovery and location of that bullet, upon which she relied when determining that the .38 special caused Ms. Tiede's death. (See id. at 23.) Additionally, the level of damage to the bullet, the significance of which was apparent to Mr. Taylor's ballistics expert from the Schlup Hearing, suggested it was not the bullet that caused the fatal wound. (See, e.g., id. at 39-41.)

As for the cause of death of Beth Potts, the court said in its Actual Innocence Order that the

> uncertainty [about the size of the bullet that caused Ms. Potts' chest wound], coupled with Mr. Deli's testimony that he held the .44-caliber handgun throughout the shooting, creates reasonable doubt about Mr. Taylor's guilt. While the evidence does not conclusively resolve the caliber of bullet that caused Gunshot Wound #2 [Ms. Potts' chest wound], a reasonable juror would not be able to find beyond a reasonable doubt that a .38 caliber bullet caused either of Ms. Potts' fatal wounds.

(Id. at 51.) In sum, the State's evidence, when countered by Mr. Taylor's ballistics and forensics experts (which Mr. Levine could have hired to test the State's case), would not have been enough for any reasonable, properly instructed juror to find beyond a reasonable doubt that Mr. Taylor fired the bullet that caused Ms. Potts' death.

That evidence was sufficient to satisfy the demanding Schlup standard; it also serves as an example of the evidence—both information creating reasonable doubt and exculpatory information—that would have been available to Mr. Levine if he had investigated and tested the State's case.

ANALYSIS

Claim Four of the SAP raises an ineffective-assistance-of-counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). Mr. Taylor asserts that Mr. Levine's ineffective assistance resulted in an unconstitutional guilty plea. He argues that his plea was not knowing or intelligent because Mr. Levine "had not conducted the investigation necessary to offer any reasonable advice," and had "misled [him] by telling him that he was responsible for Kaye Tiede's death[.]" (Pet'r's Brief Regarding Claim Four at 3, ECF No. 408.) Similarly, he contends that his plea was invalid because "there was an inadequate basis for [him] to plead guilty to the murders." (Id.)

To prevail on his ineffective-assistance-of-counsel claim, Mr. Taylor must satisfy the well-known two-part test articulated in Strickland. See Hill v. Lockhart, 474 U.S. 52, 58–59 (1985) (holding that Strickland applies in the guilty plea context). Under the first prong, Mr. Taylor must show that Mr. Levine's "performance fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687. The second prong requires Mr. Taylor to establish prejudice caused by the ineffective assistance. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

1. Mr. Levine's Performance

Strickland requires Mr. Taylor to show that Mr. Levine "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Review of Mr. Levine's performance must be highly deferential. That imposes "a heavy burden" on Mr. Taylor to overcome the presumption that Mr. Levine provided "adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment." Harmon v. Sharp, 936 F.3d 1044, 1058 (10th Cir. 2019) (internal citations and quotation marks omitted).

Taking a deferential view of counsel's performance, the court may find an attorney's performance is inadequate if, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The Tenth Circuit characterizes this as conduct that was "'completely unreasonable, not merely wrong.'" Hooks v. Workman, 606 F.3d 715, 723 (10th Cir. 2010) (quoting Boyd v. Ward, 179 F.3d 904, 914 (10th Cir. 1999)). To makes this decision, the court must consider "prevailing professional norms" in place at the time of representation. Harmon, 936 F.3d at 1058.

According to Mr. Taylor, Mr. Levine provided sub-standard representation—that is, he did not meet the prevailing professional norms—because he "fail[ed] to conduct the investigation necessary to offer any reasonable advice, and [based] his advice on an incomplete and virtually non-existent investigation." (Pet'r's Brief Regarding Claim Four at 18, ECF No. 408.) "[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." Strickland, 466 U.S. at 680. See also United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("[F]ailure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness.") (emphasis added).

In death penalty cases, "prevailing professional norms" have been articulated in the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines). Harmon, 936 F.3d at 1058. The United States

Supreme Court recognized the advisory but still substantial role the ABA Guidelines play in a Strickland analysis:

> The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." [Strickland, 466 U.S. at 688.] We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...." [Id.] Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation[.]

Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010) (multiple internal citations omitted). See also Harmon, 936 F.3d at 1059 ("'[T]o determine what is reasonable investigation, courts must look first to the ABA guidelines, which serve as reference points for what is acceptable'" performance) (quoting Wilson v. Sirmons, 536 F.3d 1064, 1084 (10th Cir. 2008)); Taylor II, 156 at 753 (analyzing Mr. Levine's competence in part based on the ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases).

At the time Mr. Levine was assigned to represent Mr. Taylor, the ABA had issued advisory guidelines regarding the duty to investigate in a capital case. (See ABA Guideline 11.4.1, 1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, attached as Ex. 109 to SAP, ECF No. 20-120.) In the 1989 version, ABA Guideline 11.4.1 says that counsel for a capital defendant should conduct an independent investigation relating to both the guilt/innocence phase and the penalty phase. A legal expert who testified at the 23B Hearing, John Hill, said "the ABA standards are very specific that you have a duty to investigate, even if the defendant does not wish you to investigate…. [The ABA Guideline concerning investigation] even outlines specifically the areas that you're required to investigate, and what you're required to do." (23B Hr'g Tr. Vol. 5 at 125.)

According to the Guidelines, capital counsel's investigation "should begin immediately upon counsel's entry into the case and should be pursued expeditiously." (ABA Guideline 11.4.1(A).) ABA Guideline 11.4.1 also emphasizes that an investigation "should be conducted regardless of any admission or statement by the client concerning facts constituting guilt." (Id. 11.4.1(B).) Sources of evidence to investigate include the charging documents, the defendant and potential witnesses, information in the possession of the police and prosecution, physical evidence, and the scene. (Id. 11.4.1(D).) And Guideline 11.4.1 stresses that counsel should seek out expert assistance where necessary and appropriate, including for "preparation of the defense; adequate understanding of the prosecution's case; rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; [and] presentation of mitigation." (Id. 11.4.1(D)(7)(A)–(D).)

In particular, the commentary to Guideline 11.4.1 declared that "Counsel has a duty to investigate the case before recommending that a guilty plea be taken (or sought) or proceeding to trial. This duty is intensified … by the unique nature of the death penalty and is broadened by the bifurcation of capital trials into two phases." (Commentary to ABA Guideline 11.4.1 (emphasis added).) The Commentary further emphasized that

> Counsel's duty to investigate is not negated by the expressed desires of a client. Nor may counsel 'sit idly by, thinking that investigation would be futile.' The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each. Without investigation, counsel's evaluation and advice amount to little more than a guess.

(Id. (emphasis added).)

Mr. Levine testified vaguely during the 23B Hearing that he consulted the ABA Guidelines. (See 23B Hr'g Tr. Vol. 7 at 176.) But he did not elaborate. Later, in a 2013 declaration prepared for Mr. Taylor's federal habeas appeal, Mr. Levine declared that he could not "be sure that the manual [he] read was the guidelines and not another death penalty related

publication." (Apr. 18, 2013 Decl. of Elliott Levine ¶ 15, Ex. 130, attached to Reply to Response to Second Am. Habeas Pet., ECF No. 139-1.) But even if he reviewed the ABA Guidelines—and it does not appear that his review was more than cursory—he did not follow the recommendations.

At most, Mr. Levine reviewed the State's file, spoke with Mr. Taylor, and hired his girlfriend Robina Gillespie, who considered herself to be primarily a paralegal and whose activities were very limited in time and scope.[17] He did not visit the scene. He did not hire an investigator. And, critically, he did not consult, much less hire, experts.[18] The ABA Guidelines state that capital defense counsel should obtain experts at a minimum to adequately understand the prosecution's case and, ultimately, to rebut that case. (See ABA Guideline 11.4.1(D)(7)(A)–(D).)

Mr. Levine had the ability to hire ballistics and other experts to investigate and support Mr. Taylor's defense. During the 23B Hearing, he said he would brag to other attorneys that his "clients had the best advantage" because he had "an unlimited budget" to "get any expert [he] wanted" and that it gave him "a lot of room to do a lot of things" that would otherwise have been restricted. (23B Hr'g Tr. Vol. 3 at 108.) Indeed, he had hired experts for other cases in Summit

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[17] As noted above, over a period of eleven days, between April 19, 1991, and May 1, 1991 (the date Mr. Taylor pled guilty), Ms. Gillespie talked to Mr. Levine, read the case file, talked to Detective Offret, and observed Edward Deli's trial.

[18] The fact that he briefly spoke with a "gun expert, ballistics expert," does not qualify. (23B Hr'g Tr. Vol. 1 at 179–80.) He testified that he did not "seek to utilize" a ballistics expert. (Id. at 178.) Also, when asked whether he had "arrange[d] to have anyone independent of prosecutors, the witness, review any of this evidence," he vaguely responded, "I can't say for sure, but I may have discussed the matter, informally, possibly, with somebody who I had used in a prior case." (Id. at 179.) He could not describe who that person was. "I believe his name was – I can't remember his last name. I think his first name was Chuck or Charles, but at this time I can't recall his last name." (Id.) The record does not contain written documentation of any such visit, which Mr. Levine described as "lunch or a phone call; just a very informal kind of discussion." (Id.)

County, including ballistics experts. But he did not do so in Mr. Taylor's case. More importantly, he did not provide any reason, strategic or otherwise, for deciding to forego the use of experts to analyze the strength of the State's case against his client. See Strickland, 466 U.S. at 690–91 (whether an attorney has satisfied his duty to investigate is evaluated by focusing on "strategic choices" the attorney makes in light of all the circumstances).

If Mr. Levine had fulfilled his duty to investigate by, for example, hiring a ballistics expert and a forensics expert, he would have uncovered evidence that contradicted the State's evidence, and, as shown at the Schlup Hearing, exculpatory evidence. The same can be said of the need to interview witnesses. Detective Joseph Offret and Dr. Sharon Schnittker, the medical examiner, were key witnesses for the prosecution. Yet both provided sworn declarations in 2007 in which they questioned the very evidence the State proffered to convict Mr. Taylor. Additionally, in a 2014 deposition, Dr. Schnittker provided more specific testimony retreating from her 1991 conclusion that Ms. Tiede was killed by a .38 special bullet.

The United States Supreme Court's admonition that an attorney's strategic choices should be accorded great deference is tempered by the requirement that the attorney's decision about the need for, or the scope of, the investigation should be based on "informed legal choices … made only after investigation of options." Id. at 680. If a decision is "informed," a strategic choice may be respected if it is "based on professional judgment." Id. at 681.

But Mr. Levine was not informed when he advised Mr. Taylor, and he made little to no effort to become informed. There was no articulated, or conceivable, strategic reason for failing to hire an investigator and experts in a death penalty case.

"Effective representation hinges on adequate investigation and pre-trial preparation." Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984). Mr. Levine did neither. "Though there

may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation." Id. (emphasis added) (internal citations omitted). Because Mr. Levine did not provide "minimally competent professional representation" when Mr. Taylor was deciding whether to plead guilty, Mr. Taylor was in essence unrepresented when he made the crucial decision to plead to two charges of first-degree murder. See Taylor II, 156 P.3d at 754 ("failing to investigate because counsel does not think it will help … [is] 'an abdication of advocacy'") (quoting Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005)).

The State points out that Mr. Levine testified during the 23B Hearing that he advised Mr. Taylor to go to trial rather than plead guilty and that Mr. Taylor chose to plead guilty against his advice.[19] Under the circumstances, this does not absolve Mr. Levine.

Mr. Levine did nothing to dissuade Mr. Taylor from believing that the bullets he fired had killed both women. Rather, Mr. Levine conveyed his impression that the State's evidence, which he neither tested nor analyzed, overwhelmingly showed that Mr. Taylor was guilty. (See, e.g., 23B Hr'g Tr. Vol. 2 at 185–86, Vol. 7 at 49 (testifying that he believed the case against his client was "[v]ery, very strong," that "there was a lot of overwhelming physical evidence," and that he discussed that with Mr. Taylor).)

Mr. Taylor made his decision based on Mr. Levine's assessment of the case and, given that he thought a guilty verdict was a foregone conclusion, he decided to spare the victims and

[19] The court takes Mr. Levine's sworn testimony during the 23B Hearing at face value simply because it is his only contemporaneous explanation of the events leading up to Mr. Taylor's guilty plea. Counsel for Mr. Taylor has questioned Mr. Levine's motives and the truthfulness of Mr. Levine's self-serving testimony. Mr. Taylor also submitted an April 18, 2013 declaration from Mr. Levine, untested by cross-examination, shedding light on events and undermining some of Mr. Levine's 23B testimony. (See Ex. 130 attached to Pet'r Reply to Resp. to Second Am. Habeas Petition, ECF No. 139-1.) While the court recognizes the problems inherent in Mr. Levine's 23B testimony, the content of his testimony does not undermine Mr. Taylor's claim.

his family the distress a trial would cause. Mr. Levine only advised Mr. Taylor to go to trial because Mr. Taylor's decision to protect his family and the victims would be futile; the same parade of evidence would occur regardless of whether the forum was a guilt-phase trial or a penalty-phase trial. His advice to go to trial had nothing to do with whether Mr. Taylor would have a fighting chance during the guilt phase. In other words, he did not advise Mr. Taylor to go to trial to test the substance of the State's case.

Because Mr. Levine did not investigate, he gave incorrect and misleading advice to Mr. Taylor based on his uninformed opinion that the evidence of Mr. Taylor's guilt was overwhelming. He did not explain his failure to investigate during the 23B Hearing and nothing in the record supports a finding that his decision was based on strategic reasons under the circumstances. An attorney may be accorded deference "to the extent [a] reasonable professional judgment[] support[s] the limitations on investigation." Strickland, 466 U.S. at 691. Here, there was no evidence that Mr. Levine made a strategic choice or otherwise exercised reasonable professional judgment. Accordingly, Mr. Taylor has overcome the "strong presumption" that Mr. Levine's representation fell "within the wide range of reasonable professional assistance[.]" Id. at 689.

2. Prejudice to Mr. Taylor

Under the Strickland prejudice prong, Mr. Taylor must show there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). The court finds he has shown prejudice.

Because Mr. Levine failed to investigate, he was not able to reasonably advise Mr. Taylor about whether or not to plead guilty. "Without investigation, counsel's evaluation and advice amount to little more than a guess." (Commentary to ABA Guideline 11.4.1.)

Mr. Levine's flawed advice did not give Mr. Taylor a chance to intelligently weigh his options. "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Hill, 474 U.S. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). Mr. Taylor was not aware that if he pled guilty, he was foreclosing his chance to present strong evidence that he was not guilty and, as a result, avoid conviction and the penalty of death. As the court found in the Actual Innocence Order, expert witness testimony and physical evidence from the Schlup Hearing support the conclusion that no reasonable juror would find beyond a reasonable doubt that Mr. Taylor killed Ms. Tiede and Ms. Potts. If Mr. Levine had investigated the case and properly advised Mr. Taylor about the merits of the evidence against him, there is a reasonable probability that Mr. Taylor would not have pleaded guilty to the first-degree murder charges and instead would have insisted on going to trial.

In short, Mr. Taylor was prejudiced by Mr. Levine's completely unreasonable errors.

CONCLUSION

Based on a review of the record and application of the standards in Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52 (1985), the court concludes that Mr. Taylor's guilty plea was unconstitutional and must be invalidated.

Mr. Taylor has satisfied the requirements of Strickland. He has established that his attorney, Elliott Levine, provided him with deficient representation falling well below the prevailing professional norms. Because Mr. Levine failed to conduct an investigation, he did not

have the information necessary to provide competent advice. As a result, Mr. Taylor did not make a knowing and intelligent decision to plead guilty to two capital crimes. But for Mr. Levine's uninformed advice and substandard representation, there is a reasonable probability that Mr. Taylor would not have pled guilty and would have insisted on going to trial. And, as demonstrated by the findings in the court's Actual Innocence Order, there is a reasonable probability that the result of a guilt-phase trial would have been different because no reasonable juror would have voted to convict him on the first-degree murder counts for which he was charged. Mr. Taylor was unquestionably prejudiced by his attorney's ineffective representation.

Because Mr. Taylor's death sentence was based on his invalid guilty plea, it must be vacated. Accordingly, the court grants Mr. Taylor's request for habeas relief under Claim Four.

ORDER

For the reasons set forth above, the court GRANTS Von Lester Taylor's Second Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 94). Mr. Taylor's guilty plea and death sentence are hereby vacated.

SO ORDERED this 10th day of March, 2020.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CASE NO. 2:07-CV-194-TC

VON LESTER TAYLOR,
Petitioner,

v.

SCOTT CROWTHER, Warden,
Defendant.

[Filed January 17, 2017]

ORDER AND MEMORANDUM DECISION GRANTING EVIDENTIARY HEARING

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

VON LESTER TAYLOR, Petitioner, vs. SCOTT CROWTHER, Warden, Utah State Prison, Defendant.	ORDER AND MEMORANDUM DECISION GRANTING EVIDENTIARY HEARING Case No. 2:07-cv-194-TC

This case involves death-row inmate Von Lester Taylor's petition under 28 U.S.C. § 2254. Mr. Taylor previously pleaded guilty to the capital murders of Beth Potts and Kaye Tiede. Now, Mr. Taylor proffers new evidence and asserts that he is actually innocent of both murders. Determining that Mr. Taylor has established the potential to advance his claim of actual innocence, the court grants his motion for an evidentiary hearing.

I. BACKGROUND

A few days before Christmas 1990, two men, Petitioner Von Lester Taylor and Edward Steven Deli, broke into a remote mountain cabin owned by the Tiede family in Summit County, Utah. Although members of the family were spending the holidays at the cabin, they had gone to Salt Lake City for the evening and the cabin was empty. After breaking in, Mr. Taylor and Mr. Deli spent the night in the cabin.

The following day, Kaye Tiede, her twenty-year-old daughter Linae Tiede, and her mother Beth Potts, returned to the cabin. When the women entered the cabin, Mr. Taylor and Mr. Deli shot Kaye and Beth, but they did not shoot Linae.[1] Both women died of their wounds.

Mr. Taylor and Mr. Deli took Linae outside the cabin where they encountered two other members of the Tiede family who had just arrived: Tricia Tiede (Linae's sister) and Rolf Tiede (Linae's father). Mr. Taylor shot Rolf twice before he set the cabin on fire. Then he and Mr. Deli drove away from the cabin in a snowmobile, forcing Linae and Tricia to leave with them.

When they arrived at the Tiedes' car, they abandoned the snowmobile and took the car, keeping Linae and Tricia as hostages. Soon the police began a high-speed pursuit which ended when Mr. Taylor lost control of the car and crashed.

The police arrested Mr. Taylor and Mr. Deli. Both men were charged with multiple crimes, including two charges of capital homicide for the murders of Kaye and Beth. Initially, Mr. Taylor and Mr. Deli pleaded not guilty by reason of insanity, but both men were found legally sane. Mr. Taylor then pleaded guilty to the two capital-homicide charges and was sentenced to death. Mr. Deli went to trial and was found guilty of second-degree murder. He is serving a life sentence with possibility of parole.

After filing a direct appeal and pursuing his post-conviction remedies, with no success, Mr. Taylor filed an initial petition under 28 U.S.C. § 2254 in 2007, followed by a first amended petition. In 2012, he filed a second amended petition (Petition) which raises the issues now before the court. Mr.

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[1]To avoid confusion, the court refers to the victims by their first names because Linae and Kaye share the same last name.

Taylor asserts twenty-six claims in the Petition, including a claim of actual innocence, a claim of ineffective assistance of counsel, and a claim that his guilty plea was constitutionally defective. (Second Am. Petition, Docket No. 94.)

In 2013, the court granted Mr. Taylor's motion for discovery. (See Docket Nos. 141, 166.) During discovery, he obtained documents and video footage and deposed witnesses.

Mr. Taylor now moves for an evidentiary hearing on seventeen of his twenty-six claims, including his actual-innocence claim. In that claim, Mr. Taylor does not deny that he took part in the shootings at the Tiede cabin, but he contends that he did not fire the bullets that killed Kaye and Beth. Because a successful actual-innocence claim, as explained later, creates a gateway through which a petitioner can litigate his procedurally barred constitutional claims, the court determined that it would first consider whether Mr. Taylor is entitled to an evidentiary hearing on the actual-innocence claim alone.

II. LEGAL STANDARD

Mr. Taylor contends that he deserves an evidentiary hearing because he has reliable new evidence showing that he did not fire the shots that killed Beth or Kaye. Accordingly, Mr. Taylor brings this actual-innocence claim to establish a gateway by which he can litigate his procedurally barred constitutional claims. The State responds that even if Mr. Taylor's proffered evidence were true, he would not meet the actual-innocence standard and, consequently, he does not deserve an evidentiary hearing on his claim.

At common law "res judicata did not attach to a court's denial of habeas relief." McCleskey v. Zant, 499 U.S. 467, 479 (1991). Instead, petitioners could seek habeas relief successively. Id.

Federal courts tolerated successive petitions, in part, because habeas relief historically performed only the "narrow function of testing either the jurisdiction of the sentencing court or the legality of Executive detention." Schlup v. Delo, 513 U.S. 298, 317 (1995). But the scope of habeas relief later "expanded beyond its original narrow purview to encompass review of constitutional error that had occurred in the proceedings leading to conviction." Id. The broadening of the scope of habeas relief risked bogging down federal courts in repetitious and meritless petitions. This, in combination with the respect for finality of judgements and principles of comity and federalism, motivated Congress to fashion procedural bars to second and subsequent petitions. Id. These same concerns also led the Supreme Court to hold that "a habeas court may not ordinarily reach the merits of successive claims." Id.

Though the Supreme Court held that habeas courts shouldn't ordinarily reach the merits of successive claims, it also stated that habeas corpus's distinct "equitable nature" precludes the "application of strict rules of res judicata." Id. at 319. As a result, a court must adjudicate even successive habeas claims when required by the "ends of justice." Sanders v. United States, 373 U.S. 1, 15 17 (1963). If a habeas petitioner has defaulted a claim of constitutional error, he may excuse the default by establishing that "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Schlup, 513 U.S. at 314 15 (citation and internal quotations omitted) (ellipsis in original).

Because this "fundamental miscarriage" exception must be "rare" and applied only in the "extraordinary case," the Supreme Court has tied it to a petitioner's actual innocence. Id. "[I]n rare cases, an assertion of innocence may allow a petitioner to have his accompanying constitutional claims heard despite a procedural bar." Rivas v. Fischer, 687 F.3d 514, 540 (2d Cir. 2012) (citing Schlup,

513 U.S. at 315). The term "[a]ctual innocence means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). Accordingly, an actual-innocence claim is a "gateway" through which a habeas petitioner may pass to have his otherwise-barred constitutional claims heard on the merits. Schlup, 513 U.S. at 316.

To establish actual innocence, a petitioner bears the burden of establishing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 327. This standard requires courts to determine what "reasonable, properly instructed jurors would do." Id. at 329. And the new evidence must be reliable "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." Id. at 324.

Because a petitioner's actual-innocence claim must be based on new evidence, district courts often require evidentiary hearings so they can weigh that evidence. And district courts have broad discretion on whether to hold an evidentiary hearing on a petitioner's actual-innocence claim. Johnson v. Medina, 547 F. App'x 880, 886 (10th Cir. 2013). A court should exercise its discretion and hold an evidentiary hearing if the hearing has "'the potential to advance the petitioner's claim.'" Lopez v. Miller, 906 F. Supp. 2d 42, 53 (E.D.N.Y. 2012) (quoting Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000)). In other words, a court should grant an evidentiary hearing "if it could enable a habeas applicant to prove his petition's factual allegations, which, if true, would entitle him to federal habeas relief." Coleman v. Hardy, 628 F.3d 314, 319 20 (7th Cir. 2010).

In an actual-innocence evidentiary hearing, a court must "must make its determination concerning a petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have

been wrongly excluded or to have become available only after the trial." Schlup, 513 U.S. at 328 (citation and internal quotation marks omitted). At such a hearing, the "Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered." Bousley, 523 U.S. at 624.

Here, Mr. Taylor asks this court for an evidentiary hearing on his actual-innocence claim. Mr. Taylor pleaded guilty to the murders of both Beth and Kaye. As a result, Mr. Taylor need only be found innocent of one of those murders to avoid the procedural bars to his constitutional claims. Mr. Taylor's constitutional claims are based not on his innocence, but rather on his contention that he was denied "the full panoply of protections afforded to criminal defendants by the Constitution." Schlup, 513 U.S. at 314. Accordingly, Mr. Taylor's "claim of innocence is offered only to bring him within this "narrow class of cases." Id. at 315 (citation and internal quotation marks omitted).

Given Mr. Taylor's proffered evidence, as discussed below, the court determines that an evidentiary hearing on Mr. Taylor's actual-innocence claim is necessary. Because Mr. Taylor pleaded guilty to the murder of both Beth and Kaye, he must establish only that he is actually innocent of one of those murders to create a gateway through which he may litigate his procedurally barred claims. Mr. Taylor has sufficiently demonstrated "'the potential to advance'" his actual-innocence claim. Lopez v. Miller, 906 F. Supp. 2d 42, 53 (E.D.N.Y. 2012) (quoting Campbell v. Vaughn, 209 F.3d 280, 287 (3d Cir. 2000)).

III. MR. TAYLOR'S PROFFERED EVIDENCE[2]

Before the shooting began, Mr. Deli was holding a .44-caliber handgun and Mr. Taylor was holding a .38-caliber handgun. No one disputes that Mr. Taylor fired the first shot from the .38 and hit Kaye. Immediately after he shot her, Kaye doubled over, cried "I've been shot," put her hands up to her chest or shoulder area, and fell to the ground.[3] A second or two later, Beth was shot in the head. Although Linae saw Mr. Taylor shoot Kaye, she did not see who fired at Beth because she "was looking at [her] grandmother. . . . [she] saw her shot and blood spray everywhere." (Tr. of Penalty Phase Trial ("Penalty Trial Tr.") at 509.) At that point, Linae turned away and looked at the fireplace wall.[4] More shots were fired, and at the end of the shooting commotion Kaye and Beth were lying on the floor dead.

Kaye had been shot five times. She was shot twice in the chest, including the shot causing the fatal wound, referred to as "Gunshot Wound #2."[5] The bullet that caused Gunshot Wound #2 entered

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[2]Mr. Taylor proffers a series of declarations, deposition testimony, and video footage of a "48 Hours" television episode. Of particular relevance to this order are the declarations of Sharon Schnittker, Joseph Offret, and Edward Deli, and the deposition testimony of Sharon Schnittker.

[3]Linae's testimony has been somewhat unclear on this point. She has described that moment, either verbally or by gestures, indicating alternatively that Kaye grabbed her left shoulder area, her chest and shoulder area, or her chest. The exact location of Kaye's physical response is relevant to one of Mr. Taylor's theories, but the court need not address the uncertainty now.

[4]On the day of the murders, Linae reported during an interview that Mr. Taylor was the shooter. But later, during the preliminary hearing, she was less certain about who fired shots at Beth. (See Prelim. Hrg. Tr. at 17.) And during the penalty phase trial, she testified under oath that she did not see who fired the shot that killed Beth because she was looking directly at Beth at the time. And then she turned away. She heard, but did not see, additional shots being fired.

[5]The medical examiner's numbering of the gunshot wounds bears no relation to the order in which the wounds were inflicted.

the front of Kaye's left shoulder, crossed at a downward angle through Kaye's torso, and exited at the back of Kaye's right shoulder. In addition, Kaye was shot with bird-shot pellets on her left side, suffered a superficial graze wound on her upper-left arm and had "an irregular superficial abrasion having a similar configuration to that of a nose of a bullet" in the middle upper-chest region. (Report of Kaye Tiede Autopsy at 6, Ex. 84 to Petition, Docket No. 20-87.) Other than the pellets, no bullet lodged in her body.

Beth was shot three times: once in the head (the fatal wound), and twice in the chest. It is undisputed that the head wound was caused by a .44. All of the bullets went straight through her body.

According to the State's theory of its case, Mr. Taylor killed both women.[6] The State's case was based largely on forensic evidence and testimony from Dr. Sharon Schnittker (the medical examiner who performed the autopsies), Linae's testimony, and statements made by Mr. Taylor. During the Penalty Trial, Linae testified about the shooting, including a description of where Mr. Taylor and Mr. Deli were standing when Kaye and Beth were shot and which gun each man was holding. According to Linae's description, Mr. Taylor possessed the .38, not the .44 during the crime, at least when Linae was looking at the two men.[7] (Linae's sister Tricia, who encountered Mr. Taylor and Mr. Deli after the two women had been shot, also associated the .38 with Mr. Taylor and the .44 with Mr.

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[6]Yet the State independently prosecuted Mr. Taylor's co-defendant Edward Deli for capital murder of both women.

[7]Mr. Taylor points out that Linae never saw him holding the .44. Although that is true, it is also true that Linae did not see who shot Beth with the .44 because she was looking directly at her grandmother and then she turned to look at the fireplace wall and began to pray. That particular point in her testimony, on its own, does not rule out the possibility that Mr. Taylor held the .44 while Linae was looking at Beth and then at the fireplace.

Deli.) At Penalty Trial, Dr. Schnittker opined that the bullet that Mr. Taylor shot from the .38 caused Gunshot Wound #2 and concluded that Beth's fatal head wound was caused by a .44. And Mr. Taylor admitted, during a psychiatric exam, to grabbing the .44 from Mr. Deli and shooting both women.

After the State filed multiple charges against Mr. Taylor, it held a preliminary hearing.[8] It also provided autopsy reports and other documents to Mr. Taylor's attorney, after which Mr. Taylor pleaded guilty to two counts of capital murder. The State then presented more extensive evidence to a jury during the penalty phase trial ("Penalty Trial").[9]

By pleading guilty, Mr. Taylor admitted that he caused the death of Kaye and Beth by firing the bullets that caused the fatal wounds. But, according to Mr. Taylor, he entered into his plea agreement based on his mistaken belief that he fired both fatal shots. He says he held that mistaken belief because he only had the State's unquestioned forensic evidence to assess his guilt, evidence that he now contends is wrong. In particular, he disputes the State's evidence that the .38 he fired caused Gunshot Wound #2 and that he fired the .44 that killed Beth.

Mr. Taylor presents new evidence, discussed below, that raises significant concerns about the State's case against him. The import of Mr. Taylor's evidence is that he did not fire either of the fatal

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[8]The preliminary hearing was short and the State presented a limited amount of evidence because the hearing was held approximately two weeks after the men were charged with the crimes. The presiding judge held that the State had established probable cause to detain the men and proceed to trial.

[9]Because Mr. Taylor pleaded guilty, the trial focused on whether to sentence Mr. Taylor to life in prison or death by execution.

shots and so the legitimacy of his guilty plea is undermined.

A. The Cause of Kaye's Death

At the Penalty Trial, Dr. Schnittker opined that Gunshot Wound #2 was caused by the .38 bullet Mr. Taylor fired at Kaye. She based her opinion largely on the location of a .38 bullet she recovered from the inside of Kaye's sweatshirt a bullet that had no blood on it. She described the recovery in her autopsy report: "During removal of the sweatshirt, a projectile is located in the right shoulder region which appears to be adjacent to the exit of gunshot wound #2." (Report of Autopsy of Kaye Tiede at p. 5, Ex. 84 to Petition, Docket No. 20-87.) And she testified at the Penalty Trial that "[w]e found a medium caliber projectile in the sweatshirt of the [right] shoulder region . . . [t]hat would be consistent with [Gunshot Wound #2] that we found in the right shoulder during removal of the sweatshirt." (Penalty Trial Tr. at 708 (emphasis added).) But no characteristic of Gunshot Wound #2 played a part in Dr. Schnittker's opinion. Instead, she "assumed that [Gunshot Wound #2] was caused by a .38" based on its proximity to the exit wound, "not because of anything found in [Gunshot Wound #2] itself . . . ." (2014 Dep. of Sharon Schnittker at 118, Ex. 2 to Mot. Evid. Hr'g, Docket No. 217-3.)

Mr. Taylor challenges Dr. Schnittker's original opinion with subsequent statements she made in her 2007 Declaration and her 2014 deposition. According to Mr. Taylor, new evidence shows that Dr. Schnittker's assumption was incorrect.

Based on that new evidence, primarily presented through post-conviction statements of Dr. Schnittker, it appears that the bullet's proximity to Gunshot Wound #2 had very little, if any, probative value in the cause-of-death determination. Dr. Schnittker assumed that the bullet landed there because

it traveled through Gunshot Wound #2. But, as she conceded, given the handling of Kaye's body after she died, the bullet likely moved around before Dr. Schnittker discovered it. As Dr. Schnittker notes, "An unattached bullet in the clothing may have changed position within the clothing by movement of the body after being shot and post-mortem." (2007 Decl. of Sharon Schnittker ¶ 5, Ex. 117 to Petition, Docket No. 31-6.)

The body was moved a lot. After Kaye was shot, she fell to the ground. After Kaye died, Mr. Taylor and Mr. Deli dragged her body outside. During the investigation at the cabin, Kaye's fully-dressed body was put in a body bag and transported to the autopsy. And in preparation for the autopsy, Kaye was removed from the body bag after which the examiners rocked her from side to side and undressed her. Given that caveat, Dr. Schnittker, in 2007, said that, "[b]ecause the bullet I recovered was not recovered from the body itself, I know of no characteristics on the bullet at this point, that allow me to definitively conclude that it went through Kaye Tiede." (Id. ¶ 6.)

Three other aspects of the physical evidence, all of which were highlighted and clarified by Dr. Schnittker's declaration and deposition, raise questions about her original opinion.

First, the condition of the t-shirt Kaye wore under her sweatshirt was inconsistent with the conclusion that the .38 caused Gunshot Wound #2. In 2007, Dr. Schnittker declared that she "found no exit perforation through the underlying T-shirt between the exit of the skin and the sweatshirt" and that she "would have expected to find such a perforation if the recovered projectile was responsible for Gunshot Wound #2." (Id. ¶ 5.) In other words, if the .38 bullet had traveled through the path of Gunshot Wound #2 and ended up in the sweatshirt, it likely would have traveled through the t-shirt before coming to rest by Kaye's right shoulder. The lack of a perforation further undermines the

validity of Dr. Schnittker's conclusion.

Second, Dr. Schnittker conceded that her measurements of the entrance and exit wounds of Gunshot Wound #2 do not conclusively tie the .38 to the fatal wound. They could have been caused by a .44.

> The type of tissue beneath the skin or a wobbly bullet and other factors such as distance or an intermediate target can change the way an entrance wound looks. I reviewed a photograph of the entrance wound of Gunshot Wound #2. Gunshot Wound #2 appears to measure about 1.1 or 1.2cm in diameter. The exit wound measured 1.5cm vertically according to the autopsy report and would not exclude a .44 caliber bullet. I cannot rule out a .44 caliber projectile fired from a handgun as having caused the injuries associated with Gunshot Wound #2.

(Id. ¶ 7 (emphasis added).)

Third, the nature of Gunshot Wound #2 was consistent with the destructive capability of a bullet from a .44, which exerts more force than a .38. (Schnittker Dep. at 116.) The bullet that caused Gunshot Wound #2 was propelled by a force strong enough to move the bullet through Kaye's left shoulder, fracture her second and third ribs, pass through the upper lobe of her left lung, as well as her aorta and her right lung, and fracture the fourth right rib before exiting Kaye's body.

In short, when asked whether Gunshot Wound #2 could have been caused by a .44-caliber bullet, Dr. Schnittker replied, "Yes." (Id. at 112.)

Finally, Mr. Taylor uses Dr. Schnittker's reassessment of the evidence to articulate an alternative theory for the bullet's location by tying it to the superficial abrasion on Kaye's sternum. Right after Kaye was shot by Mr. Taylor, she reached for her upper body area. The abrasion was located on her chest area and had a shape similar to the nose of a bullet. The recovered bullet had a

damaged nose.

> Q. You have said that the bullet in Kaye Tiede autopsy photo number 1 . . . has damage to the nose of the bullet?
> A. Correct.
> Q. And that that indicates to you that it hit something.
> A. Yes.
> Q. If this bullet went through something or ricocheted off something, couldn't it have hit something and then caused the abrasion to Kaye Tiede in the center of her sternum?
> A. Yes.
> Q. And wouldn't it then have possibly wound up inside her clothing with this damage to it?
> A. Yes.

(Id. at 235-36.) Also, Dr. Schnittker did not find blood on the bullet. That fact is more consistent with an abrasion than a wound that reached from one shoulder to the other, while passing through Kaye's aorta.

Other than proximity, the record reveals no physical evidence linking the .38 bullet to Gunshot Wound #2. (Id. at 107.) And Dr. Schnittker could not rule out the possibility that Gunshot Wound #2 was caused by a .44. So when asked whether she could state with a reasonable degree of medical certainty that the .38 bullet caused Gunshot Wound #2, she replied, "No." (Id. at 112.)

Dr. Schnittker's 2007 and 2014 statements, along with Mr. Taylor's alternative theory that the .38 caused the abrasion rather than Gunshot Wound #2, raise serious questions about the accuracy of the State's conclusion that the .38 bullet fired by Mr. Taylor caused Gunshot Wound #2 and, it follows, that Mr. Taylor killed Kaye.

B. The Cause of Beth Potts' Death

The State concluded that Mr. Taylor shot a .44 bullet through Beth's head. The dispute about the cause of Beth's death lies not with the caliber of bullet that killed her but with identification of the man who fired the fatal shot. To support its conclusion, the State points to Mr. Taylor's admissions that he killed Beth with the .44, as well as Mr. Deli's statement that Mr. Taylor did all of the shooting.

The strongest part of the State's case concerning Beth's death lies with Mr. Taylor's incriminating statements made during a psychiatric examination and a statement that was overheard by Linae. But Mr. Taylor proffers new evidence that undercuts the probative value of his admissions.

1. Statements to Dr. Moench

Mr. Taylor's principal admissions came during a psychiatric examination that was conducted after Mr. Taylor pleaded not guilty by reason of insanity. Court-appointed psychiatrist Louis A. Moench, M.D., examined Mr. Taylor to determine whether he was competent to stand trial. Dr. Moench then related Mr. Taylor's statements through a report to the trial court. Two statements stand out.

First, Mr. Taylor told Dr. Moench that he grabbed the .44 from Mr. Deli and proceeded to shoot both women. According to Dr. Moench, Mr. Taylor said that

> he didn't mean to shoot them and doesn't remember squeezing the trigger, but nevertheless did. The mother of the family was hit first and exclaims 'I've been shot!'. Taylor then emptied his gun, a 38 pistol, at the victims, [then] grabbed Deli's 44 pistol, and emptied it at them. He reloaded both guns and counted nine spent cartridges.

(Moench Feb. 18, 1991 Report at 4, Ex. 57 to Petition, Docket No. 20-59 (emphasis added).)

Second, Mr. Taylor said he killed the two women in "cold blood." During the examination,

when Dr. Moench asked Mr. Taylor whether "he believes he is insane, he replies 'No, but how can you determine? I shot two people with no motive, out of cold blood, with my gun, then Ed's.'" (Id. at 9.)

Mr. Taylor now questions the validity and value of his admissions for a couple of reasons: (1) the conclusion that the admission is true is not supported by the evidence; and (2) Mr. Taylor had an ulterior motive to lie when he made the statements.

a. Likelihood that Mr. Taylor Shot the .44

Mr. Taylor offers the October 30, 2007 Declaration from Joseph Offret, one of the detectives who investigated the murders, who declared:

> At some point in the case, I believe during the trial of Edward Deli, I recall hearing that Von Taylor said he had done all of the shooting in the Tiede/Potts murders. I did not hear this directly from Von Taylor. I do not recall the source.
> My belief at that time was that this was unlikely. It did not appear to be supported by the evidence. Von Taylor would have had to have been firing both handguns at the same time in order to accomplish this. I recall that the shootings of the two women occurred very close together in time. I recall that this was corroborated by the testimony of the Tiede daughter who was in the cabin at the time of the shootings.

(Decl. of Joseph Offret ¶¶ 9-10 (emphasis added), Ex. 116 to Petition, Docket No. 31-5.)

As Detective Offret notes, in view of Linae's testimony about the order of events and the time frame in which they occurred, the action does not match the evidence. Linae testified that Mr. Taylor shot Kaye with the .38 while Mr. Deli was pointing the .44 in the direction of Kaye and Beth. She then said that after Kaye was shot, she turned to see her grandmother shot. When asked how long it was between the shooting of Kaye and Beth, she said "seconds." (Penalty Trial Tr. at 509.) She did not

see who pulled the trigger on the .44.

Linae's testimony about what followed immediately after that also supports Detective Offret's conclusion. After the shooting stopped, Mr. Deli took Linae to the bedroom and tied her up. (Id. at 511.) Linae testified that when Mr. Deli tied her up, he was holding a knife and the .44. (Id. at 512.) At the Penalty Trial, when she was asked what Mr. Deli did with the .44, Linae responded, "He called out to Mr. Taylor, asking him saying, 'we need to reload our guns. Did you reload yet?' And he was holding his gun to reload." (Id. at 513.) Mr. Taylor was in the other room at that point. Under those circumstances, if Mr. Taylor grabbed the .44 from Mr. Deli to shoot the women, Mr. Taylor gave it back to Mr. Deli right after the shooting and before Mr. Deli grabbed Linae. Mr. Taylor would have had to return the .44 quickly and outside of Linae's sight, because Linae never actually saw the .44 in Mr. Taylor's possession, yet right after the shooting stopped, she was looking at Mr. Taylor who spoke to her:

> Q. When the shooting stopped, Linae, what happened at that point; were you still praying?
> A. Yeah. Von Taylor looked at me and told me to shut up, it wouldn't work, 'cause he was a devil worshipper.

(Id. at 511 (emphasis added).) Then she watched Mr. Deli walk over to her; he grabbed her by the arm and took her to the bedroom. (Id.) She does not testify that she saw the men exchange guns at any point, so by the time Mr. Taylor spoke to her, Mr. Deli, not Mr. Taylor, apparently had the .44.

Detective Offret's conclusion is also bolstered by Mr. Taylor's testimony during the penalty phase that he never held the .44. (Id. at 808.) Although his testimony does not necessarily contradict his statements to Dr. Moench, those statements were made in a non-trial context i.e., a psychiatric

examination to determine whether he was legally sane. And, as noted below, Mr. Taylor may have made his admissions during the exam with an ulterior motive: to avoid conviction by convincing Dr. Moench that he was insane.

b. Context in Which Statements Were Made

There is evidence that Mr. Taylor made his statements to convince Dr. Moench that he was not competent to stand trial. During voir dire questioning of Mr. Taylor at Mr. Deli's trial, Mr. Taylor (who had already pleaded guilty) articulated that motive:

> Q. (By Mr. Gravis [Mr. Deli's attorney]) If I were to call you to [the] stand and ask you if you knew who Dr. Louis Moench is, what would your response be?
> A. [by Mr. Taylor] I remeber [sic] him, yes.
> Q. Do you recall if you had a conversation with him?
> A. Yes, I remember that.
> Q. Did you talk to him about the events of this case?
> A. Yeah.
> Q. If I were to ask you if a statement made if you made a statement to Dr. Moench that you shot Kaye Tiede, what would your response be?
> A. I remember the statement.
> Q. I'm asking what would your response be if I put you on the witness stand?
> A. Yes, I did make a statement, but I would like to explain why.
> Q. Okay, and what would your explanation be?
> A. Because I plead not guilty by reason of insanity and I was hoping it would make me look more insane that it did. No further explanation.

(May 8, 1991 Tr. of Testimony and Colloquy in State of Utah v. Edward Steven Deli, at 494 95 ("Deli Tr."), Ex. 61 to Petition, Docket No. 20-63.) Mr. Deli's attorney did not get any further explanation from Mr. Taylor, who had exercised his Fifth Amendment right. But in an exchange at the end of the colloquy, Mr. Taylor's attorney added the following explanation:

> If I could make one comment. I've talked to Mr. Taylor about this issue. We've talked about it extensively and Mr. Taylor is trying to be up front with everybody. So let me just state his position. His position is in relation to the statement that appears in Dr. Moench's report, that statement being basically that he shot Beth Potts and then grabbed Mr. Deli's gun and then emptied it, his position is that, yes, he made that statement; yes, it was not a truthful statement he would be willing to testify as to his rationale for making that statement.

(Id. at 500.)[10]

2. Statement Overheard by Linae

After both women had been shot, Linae overheard Mr. Taylor say that he "had to shoot the bitch in the head twice." (Penalty Trial Tr. at 513.) The State presents Mr. Taylor's statement as an admission that he fired the shot that killed Beth. This statement is inconsistent with the evidence that Beth was shot once in the head, although in theory Mr. Taylor may have thought he shot Beth twice in the head, when only one of his shots hit the intended target. Still, the statement is only valuable to the State if Mr. Taylor actually fired the .44. As noted above, that point is sufficiently contested at this

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[10]Edward Deli, in his August 17, 2007 Declaration, also articulates a motive for Mr. Taylor to admit to firing all of the shots and killing both women. First he said, "Von did tell me on one or two occasions that he would take the 'rap,' or take responsibility, for the crime." (2007 Decl. of Edward Steven Deli ¶ 17, Ex. 14 to Petition, Docket No. 20-15.) Then he declared that he and Mr. Taylor tried to say things that made them sound insane because they had pleaded not guilty by reason of insanity.

> I decided to say whatever I could think of to the psychiatrist. I assumed that if I was outrageous enough, that nothing I said would be believed. When I was evaluated, I told the psychiatrist a number of things that were not true, including that I had killed someone else in the past. I also told him information relating to devil worshiping. In my mind, I was just screwing with him. It did not occur to me that he would believe me. Von knew that this was my intent and I believe he did the same.

(Id. ¶ 18.) To the extent Mr. Deli has credibility, this supports Mr. Taylor's 1991 statement.

stage.

3. Mr. Deli's Statement

Mr. Deli purportedly testified at his own trial (or at least took the position) that Mr. Taylor did all of the shooting. The record does not include a full transcript of Mr. Deli's trial. Mr. Taylor insists that Mr. Deli did not testify at all, and cites to the "Clerk's Transcript" from the case which, he says, "confirms that he never testified at his trial." (Mot. Evid. Hr'g at 25 (citing Deli CT 248), Docket No. 217.) But the State provides an affidavit from Robina Gillespie Levine as evidence that Mr. Deli did testify. Ms. Levine stated:

> As part of my duties on Mr. Taylor's defense team, I sat through the Deli trial, and, among other things, heard Mr. Deli testify . . . . that Mr. Taylor did all of the shooting and that he (Deli) shot no one.

(Feb. 11, 2009 Aff. of Robina Gillepsie Levine ¶¶ 4, 6, Ex. to V to State's Response to Petition, Docket No. 125-28.) Her statement is corroborated by language in a memorandum decision addressing Mr. Taylor's post-conviction appeal. In that decision, the court said "Deli testified that Mr. Taylor did all of the shooting at the time the crimes were committed and that he (Deli) was surprised when Mr. Taylor shot the victims and that he had no actual intent to kill." (Penalty Trial Tr. at 1150.) Even if Mr. Deli did testify, as the State asserts, his veracity is questionable given that he had a motive to lie during his murder trial, especially because Mr. Taylor had already pleaded guilty. Ultimately, the jury found Mr. Deli guilty of second degree murder. Moreover, in connection with Mr. Deli's sentencing, prosecutors told the Utah Board of Pardons that Mr. Deli also fired shots. (June 14, 1991 Ltr. to Utah Bd. of Pardons from Summit County Attorneys, Ex. 127 to Petition, Docket No. 95-10.) At this stage,

the court finds that Mr. Deli's statement does not overcome the probative value of Mr. Taylor's evidence.

IV. ACCOMPLICE LIABILITY

The State resists the conclusion that Mr. Taylor merits an evidentiary hearing on his actual-innocence claim. The State argues that, even accepting Mr. Taylor's assertions as true, an actual-innocence evidentiary hearing would be futile because the evidence establishes that a reasonable jury would convict him of capital murder as an accomplice. The State contends that Mr. Taylor's plea inherently included an admission of guilt as an accomplice to capital murder, which carries the same punishment as capital murder as a principal. Mr. Taylor responds that he did not plead guilty to accomplice liability and, accordingly, imposing accomplice liability on him now would violate his constitutional rights.

The Sixth Amendment to the United States Constitution requires that a defendant have notice of the crime to which he is pleading guilty. Faretta v. California, 422 U.S. 806, 818 (1975), cited in D.B. v. State, 289 P.3d 459, 471 n.15 (Utah 2012). Relying on State v. Gonzales, 56 P.3d 969 (Utah Ct. App. 2002), the State asserts that charging Mr. Taylor with capital murder as a principal gave him notice of the possibility that it would raise accomplice liability at trial and that such a possibility was adequate: "[I]f Taylor had gone to trial, and if evidence was presented that showed [Mr.] Taylor was guilty as an accomplice, the State could have asked for a jury instruction on accomplice liability." (State Br. re: Accomplice Liability at 14, Docket No. 254 (emphasis added).) Then, equating accomplice liability with the principal crime, the State claims that Mr. Taylor would receive the death penalty regardless of his evidence because accomplice liability carries the same punishment as principal liability. (Id. at 4

(“‘accomplices incur the same liability as principals’”) (quoting Gonzales, 56 P.3d at 972).)

But the accomplice-liability section of the Utah Code “requires conduct different from direct commission of an offense before a defendant incurs accomplice liability.” D.B., 289 P.3d at 465. An accomplice is one “who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense[.]” Utah Code Ann. § 76-2-202 (Michie 1990). “Mere presence, or even prior knowledge, does not make one an accomplice to a crime absent evidence showing beyond a reasonable doubt that defendant advise[d], instigate[d], encourage[d], or assist[ed] in perpetuation of the crime.” State v. V.T., 5 P.3d 1234, 1236 37 (Utah Ct. App. 2000) (citation and internal quotation marks omitted) (alterations in original).

Here, the State in effect asks the court to actually impose accomplice liability on Taylor. In other words, the State asks the court to conclude that because Mr. Taylor pleaded guilty to Counts I and II, it is a done deal that he is guilty of accomplice liability and so any proof of actual innocence regarding principal liability would be futile. In D.B., the Utah Supreme Court rejected an argument very similar to the one the State makes now.

The D.B. court addressed whether a defendant charged as a principal has received adequate notice under the Sixth Amendment so that he may be convicted as an accomplice. 289 P.3d at 465 68. The D.B. court quoted Gonzales, noting that “a person charged with a crime [as a principal] has adequate notice of the possibility of accomplice liability being raised at trial.” D.B., 289 P.3d at 471 (citation and internal quotation marks omitted) (emphasis and alteration in original). But the court described the issue before it as whether “a defendant charged as a principal has received adequate Sixth Amendment notice that he may be adjudicated [liable] as an accomplice.” Id. Distinguishing

Gonzales,[11] the court said that "the question of what notice is constitutionally sufficient before the State may actually pursue accomplice liability" was one of first impression. Id.

There, the State argued that "principal and accomplice liability do not represent separate offenses and that its petition alleging principal liability provided [the defendant] with adequate notice, standing alone, of the potential that he could be [convicted of the charged crime] under a theory of accomplice liability." Id. at 470. The court, rejecting the State's position, held that "[c]harging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice theory." Id. at 471 (emphasis added). This is because "development of an accomplice liability after the close of evidence eliminates a defendant's ability to prepare his defense and present evidence relating to the accomplice liability theory." Id. at 472 (emphasis in original).

The D.B. court articulated ways in which a defendant receives constitutionally adequate notice:

> The simplest way for the State to provide adequate notice is by actually charging the defendant as an accomplice. The state may also notify a defendant of potential accomplice liability through presentation of adequate evidence at any time prior to the close of evidence at trial. . . . However, development of an accomplice liability theory after the close of evidence eliminates a defendant's ability to prepare his defense and present evidence relating to the accomplice liability theory.

Id. at 471 72 (emphasis omitted).

None of those situations occurred here. The Information did not charge Mr. Taylor with accomplice liability. Nothing in the Statement of Defendant or plea colloquy mentions accomplice

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[11] Gonzales is distinguishable from this case for an additional reason. Mr. Gonzales did not plead guilty. Instead, he received a trial, after which the court concluded that the evidence did not warrant an accomplice liability jury instruction.

liability. And, of course, no trial occurred. As a matter of law, Mr. Taylor did not plead guilty to accomplice liability.

The State alternatively relies on the second mode of notice listed in D.B.: evidence at trial proving the elements of accomplice liability. Id. at 471. The State reasons that even if Mr. Taylor did not kill either Beth or Kay, a reasonable jury would convict him as an accomplice to capital murder based on evidence already in the record, as well as Mr. Taylor's proffered forensic evidence. But the State's scenario is hypothetical as it discusses only what the evidence would show to a jury if Mr. Taylor had gone to trial. The State essentially asks the court to conduct the Schlup analysis now based on proffered, but not fully explored, evidence. At this stage, where the court is considering only whether to grant an evidentiary hearing, such an analysis would be premature.

More importantly, Mr. Taylor could not have received notice of the State's accomplice-liability theory at trial because Mr. Taylor pleaded guilty and bypassed a trial on liability altogether.[12] Although it is possible that a jury could have convicted Mr. Taylor of accomplice liability, he did not go to trial so we will never know. In fact, the situation is just the opposite of what the State contends. As Mr. Taylor

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[12]The State's position that charging murder gives notice of possible accomplice liability and that punishment is the same for both could be interpreted to include the argument that accomplice liability is a lesser-included-offense of capital murder. That cannot be so. In Utah, a lesser-included-offense is an offense that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" Utah Code Ann. § 76-1-402(3)(a) (Michie 1990). As noted above, liability as an accomplice requires proof of elements different than those required to convict a defendant for capital murder, so it is not a lesser-included-offense of capital. But even if it were, it would be a legal impossibility for Mr. Taylor to alternatively plead to both the murders of Ms. Potts and Ms. Tiede and being an accomplice to their murders. "A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." Id. § 76-1-402(3) (emphasis added).

notes, given the history of this matter as opposed to the hypotheticals offered by the State "[n]o reasonable juror could have convicted him of capital murder as an accomplice because he was not charged pursuant to that statute, no jury ever considered the matter, and he did not plead guilty to accomplice liability." (Reply Supp. Mot. Evid. Hr'g at 28, Docket No. 246.)

In short, because Mr. Taylor pleaded guilty only to capital murder and did not have notice of accomplice liability, the State's argument that Mr. Taylor would have been found guilty of capital murder as an accomplice and, consequently, that a Schlup hearing would be futile fails.

The question must be whether Mr. Taylor can advance his claims that he is actually innocent of the crime to which he pleaded capital murder as a principal not any crime to which he could have been convicted of had he gone to trial and been put on notice.

V. CONCLUSION

Mr. Taylor has sufficiently established the potential to advance his claims at this point. The court has seen enough evidence to conclude that Mr. Taylor must be given the opportunity to develop the record. And the only way to do that is through an evidentiary hearing.

ORDER

For those reasons, Mr. Taylor's Motion for Evidentiary Hearing (Docket No. 217) is GRANTED on the actual-innocence claim. The court will hold a five-day evidentiary hearing on the actual-innocence claim beginning on Tuesday, August 1, 2017, at 10 a.m.

DATED this 17th day of January, 2017.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 20-4039

VON LESTER TAYLOR,
Petitioner - Appellee,

v.

ROBERT POWELL, Warden,
Respondent - Appellant.

[Filed October 8, 2021]

ORDER DENYING PETITION FOR REHEARING AND REQUEST FOR EN BANC CONSIDERATION

FILED
United States Court of Appeals
Tenth Circuit

October 8, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

VON LESTER TAYLOR,

Petitioner - Appellee,

v.

ROBERT POWELL, Warden, Utah State Prison,

Respondent - Appellant.

No. 20-4039
(D.C. No. 2:07-CV-00194-TC)
(D. Utah)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MORITZ**, Circuit Judges.

This matter is before the court on *Appellee's Petition for Rehearing and Request for En Banc Consideration* and *Appellant's Opposition to Petition for Rehearing and En Banc Consideration.* Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 20-4039

VON LESTER TAYLOR,
Petitioner - Appellee,

v.

ROBERT POWELL, Warden,
Respondent - Appellant.

[Filed September 13, 2021]

APPELLEE'S PETITION FOR REHEARING AND REQUEST FOR EN BANC CONSIDERATION

Case No. 20-4039

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VON TAYLOR,
Petitioner-Appellee,

vs.

ROBERT POWELL, Warden
Respondent-Appellant.

APPELLEE'S PETITION FOR REHEARING AND

REQUEST FOR EN BANC CONSIDERATION

DEATH PENALTY CASE

On Appeal from Order of the United States District Court
for the District of Utah
Docket No. 2:07-CV-194 (TC)
The Honorable Tena Campbell, Judge

KENNETH F. MURRAY
OH Bar #2519; AZ Bar #33090
316 East Mitchell Drive
Phoenix, AZ 85012
Telephone: (602) 684-7391
kfmurray2013@gmail.com

BRIAN M. POMERANTZ
NY Bar #4141024; CA Bar #214264
P.O. Box 853
Carrboro, NC 27510
Telephone: (323) 630-0049
Habeas@protonmail.com

Attorneys for Petitioner-Appellee
VON TAYLOR

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Appellee Von Taylor respectfully petitions this Court for rehearing pursuant to Fed. R. App. P. 40 and further requests en banc consideration pursuant to Fed. R. App. P. 35. This Petition is timely filed based on this Court's Opinion and Taylor's extension request.

STATEMENTS REQUIRED BY RULES 35(b) AND 40(a)(2)

In 1991, Taylor pled guilty to the first degree murders of Kaye Tiede and Beth Potts.[1] His co-defendant, Edward Deli, who was also charged with first degree murder, but whose jury received both principal and accomplice liability instructions, was only convicted of the second degree murders of both women. Taylor is not a saint; he was present when Kaye Tiede and Beth Potts were tragically murdered, and an eyewitness testified that Taylor fired the first shot (which was only birdshot). Despite the fact that he did not fire any fatal shots, the Panel's opinion portrays Taylor as primarily responsible for the murders.

The Panel arrived at its conclusions by repeatedly misapprehending Utah law and by failing to consider newly discovered facts from the district court evidentiary hearing. The Panel's opinion contravened Supreme Court law that "real notice of the true nature of the charge against" a defendant is "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). The issue in this case is not whether Mr. Taylor is a good guy or a bad guy, but the Panel opinion time and again weighed in on that question rather than focusing on the very narrow legal determinations before the Court. *See*, *e.g.*, Op. at 4, citing *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (despite the fact that

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[1] Both the Panel and Concurrence discuss aggravated murder, rather than first degree murder, because they utilized the current Utah Statutory Code, rather than the applicable code at the time of the crimes. The differences do not alter the outcome herein. The Panel also references both § 76-5-202(1)(b) and (d), but Taylor only pled guilty to (b).

Taylor did not bring a *Herrera* claim).

Critically, in 2018, the federal district court held an evidentiary hearing that focused on determining which co-defendants' bullets actually caused the fatal wounds. After substantial discovery, including several depositions, and a three-day evidentiary hearing with expert testimony from two medical examiners and two ballistics experts, as well as testimony from co-defendant Deli, the district court concluded "that no reasonable, properly instructed juror, viewing the record, would have concluded beyond a reasonable doubt that Mr. Taylor fired the fatal shots that caused the deaths of Beth Potts and Kaye Tiede." (XX Appx. 4907.) The Warden did not challenge that finding in this appeal.

The district court further concluded that under Utah law, Taylor pled guilty to first degree murder as the principal, not an accomplice, therefore placing him within the parameters of *Schlup v. Delo*, 513 U.S. 298 (1995). The Panel concluded otherwise, determining that the theory of liability could not effect the charge that Taylor pled guilty to because the charge encompassed both theories of liability. As a result, Taylor remains the only person in the State of Utah ever sentenced to death based on accomplice liability.

Respectfully, Taylor's arguments before the Panel regarding Utah law have recently been proven correct by the Utah Supreme Court in a decision released on August 12, 2021, two weeks after the Panel's opinion issued. *See State v. Eyre*, 2021 UT 45 (Sup.Ct.). *Eyre* makes it clear that contrary to the Panel's opinion, accomplice liability requires proof of additional and essential elements that principal liability does not require. Elements that Taylor was not given notice of and to which he did not plead. In light of the recent development or clarification of Utah law, the district court's ruling should be affirmed.

Alternatively, if this Court has any doubt about the impact of *Eyre*, this Court should grant rehearing and certify a question to the Utah Supreme Court for clarification of Utah law on this critical issue. *See* 10th Cir. R. 27.4 ("The court may certify on its own or on a party's motion."). Utah R. App. P. 41 authorizes certification of questions of law by federal courts. Specifically, if *Eyre* does not convince this Court that *D.B. v. State*, 289 P.3d 459 (Utah 2012) overruled the portion of *State v. Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002) that the Panel relied on, then it is appropriate to certify any lingering questions related to the accomplice liability notice to the Utah Supreme Court, the final arbiter of Utah law, for dispositive clarification. Following *Eyre*, maintaining the Panel's decision would be an affront to Utah law. Before invoking such an option, *Garza v. Burnett*, 672 F.3d 1217, 1222 (10th Cir. 2012) instructs that "[i]n furtherance of 'the interests of comity and federalism' that certification protects . . . the Utah courts should have the opportunity in the first instance to decide" whether Taylor was properly on notice of his potential liability as an accomplice. This proceeding involves a question of exceptional importance (Fed. R. App. P. 35(b)(1)(B)), as Taylor's life depends on such clarity; therefore, rehearing, and possibly certification, are warranted in light of the change of authority. Fed. R. App. P. 40(a)(2).

Finally, the Panel failed to properly conduct the analysis required by *Schlup* when it concluded that Taylor's "guilt as an accomplice is well established by the overwhelming and uncontested evidence." (Op. at 36.) The Panel took the evidence from trial and considered it without consideration of the newly developed evidence from the *Schlup* hearing. Because the Warden did not contest the factual findings of the *Schlup* hearing, the Panel did not have cause to delve into the particulars of the new evidence. Therefore, it is understandable that

it did not fully understand how the newly discovered evidence significantly altered what reasonable, properly instructed jurors could conclude about Taylor's accomplice liability.

ARGUMENT

I. AFTER THE ISSUANCE OF THE PANEL'S OPINION, THE UTAH SUPREME COURT MADE CLEAR THAT UTAH LAW IS CONSISTENT WITH THE ARGUMENTS TAYLOR MADE IN HIS APPEAL

If Taylor had fired the fatal bullets that killed Kaye Tiede and/or Beth Potts, he would be guilty as a principal for their murder(s). It is uncontested in this appeal that he did not. Of central importance to the consideration of rehearing, the Panel placed significant weight on *State v. Gonzales*, which said "conviction of accomplice and principal liability do not require proof of different elements or proof of different quality." *Id.* at 972. Although Taylor argued accomplice liability encompasses additional elements not found in principal liability, the Panel held he was wrong. That disagreement was the foundation of the Panel's reversal. With the recent release of *Eyre*, the Utah Supreme Court clarified that Taylor's arguments correctly interpreted Utah law.

> As anyone who has sat through the first day of an introductory course on criminal law knows, *mens rea* (or mental state) is typically a requisite of criminality. *See*, *e.g.*, *State v. Bird*[, 345 P.3d 1141, 1145 (Utah 2015)] ("A mens rea element is an essential element of [an] offense." (alteration in original) (citation omitted)(internal quotation marks omitted)); *State v. Barela*, [349 P.3d 676, 681 (Utah 2015)] ("[O]ur criminal code requires proof of mens rea for each element of a non-strict liability crime.") . . . . But while most offenses require a showing of only one culpable mental state, accomplice liability requires at least two.

Eyre, 2021 UT 45, ¶16.

Eyre validates Taylor's argument that *D.B.* implicitly established that accomplice and principal liability require proof of different elements, or proof of different quality. In *State*

v. Grunwald, 478 P.3d 1 (Utah 2020), the Utah Supreme Court determined that errors in the jury instructions regarding the elements of § 76-2-202 justified reversal. That holding required § 76-2-202 to articulate separate elements that must be independently proven. Acknowledging *D.B.*, the Panel said that, "[a]ccomplice liability, to be sure, 'requires conduct different from direct commission of an offense[.]'" (Op. at 25 (quoting *D.B.*, 289 P.3d at 465)). But then the Panel appeared to equate the fact that because accomplices and principals "incur the same liability . . . the state need not provide the same level of notice as when it charges a defendant with a substantive crime." (*Id.*) Of course, if, in fact, they have different elements, then different notice is required. *See* Utah R. Crim. P. 11(e)(4)(A).[2]

In order to be found guilty as an accomplice, Taylor would have needed to have done one of five further actions delineated by Utah Code, which requires additional elements and burdens of proof beyond that necessary for principal liability.[3] Critically, the Panel did not address the additional *mens rea* requirement that accompanies § 76-2-202, merely stating,

> Accomplice liability applies when two conditions are met. First, the defendant must "have the intent that the underlying offense be committed." *State v. Briggs*, 197 P.3d 628, 632 (Utah 2008). Second, the defendant must have engaged in one of the enumerated acts from the accomplice liability statute—that is, soliciting, requesting, commanding, encouraging, or intentionally aiding.

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[2] In *Eyre*, the Utah Supreme Court held that there are at least two, and sometimes more, separate but essential *men rea* elements that must be proven beyond a reasonable doubt to convict someone as an accomplice. *Eyre*, 2021 UT 45, ¶¶16-17. The Utah Supreme Court has not decided what type of notice is required for these essential *mens rea* elements in the context of a guilty plea, but this Court may *sua sponte* certify such a question.

[3] "Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Code Ann. § 76-2-202 (1990).

(Op. at 24.) *Eyre* establishes the misapprehension of the Panel's conclusion.

As the Panel noted, "the crux of Mr. Taylor's actual innocence claim hinges on how Utah understands accomplice liability." (Op. at 23.) Following *Eyre*, there can be no doubt that there is a second *mens rea* requirement attached to accomplice liability:

> while most offenses require a showing of only one culpable mental state, accomplice liability requires at least two. [¶] This branched *mens rea* requirement is codified in the Utah accomplice liability statute. . . . Utah Code § 76-2-202. The first *mens rea* element— "[e]very person, acting with the mental state required for the commission of an offense"—is a reference to the underlying crime (including any additional *mens rea* requirements associated with aggravating factors, if present). *Id.* The second—"who . . . intentionally aids another person to engage in conduct which constitutes an offense"—must be understood as a reference to the defendant's mental state solely in regard to "aid[ing]" the commission of the underlying offense. *Id.*

Eyre, 2021 UT 45, ¶¶16-17.

Taylor did not plead guilty to any of the accomplice culpability elements, nor did he have notice of the additional element(s) clearly established in *Eyre*. Neither the Warden nor the Panel have discussed, or even acknowledged, the second *mens rea* requirement for accomplice liability. While the Panel conclusively determined "no doubt exists that [Taylor] would have been convicted of the murders under" an accomplice liability theory, it did not articulate any facts supporting the second *mens rea* requirement. (Op. at 4.) The Panel merely said, "[t]he evidence clearly establishes that Mr. Taylor intended to cause the deaths . . . and intentionally aided Mr. Deli to that end." (Op. at 28.) But for Taylor to be an accomplice, he would have to have aided Deli desiring to cause the deaths, or he must have aided Deli, with a requisite mental state, knowing it would most likely help Deli to cause the deaths. *Grunwald*, 478 P.3d at 10.

The Panel stressed "Mr. Taylor could have committed the capital murders as either a principal or an accomplice. [fn] Thus, he must establish his actual innocence under both theories of liability to qualify for *Schlup's* gateway for overcoming a procedural default" (Op. at 33), but the Panel did not explain what evidence supposedly fulfilled the second *mens rea* requirement. The Panel cannot because there is no such evidence. Instead, the Panel claimed, "[t]he parties do not dispute that Mr. Taylor intended the deaths of the two victims." (Op. at 36.) Even were that true—and Taylor specifically disputed that during oral argument—that only goes to the first *mens rea* requirement, not the second.

As the court in *Grunwald* explained, "[w]hen determining the mental state of a criminal defendant, we cannot simply impute the mental state of a 'reasonable person' to the defendant. Instead, we must determine the defendant's actual mental state." 478 P.3d at 11. The Panel made no effort to look at it individualistically, which is what *Eyre* demands. Instead, it imputed a "reasonable person's" mental state and made assumptions of guilt.

II. THE PANEL MISAPPREHENDED UTAH LAW, ELEVATING A LOWER COURT OPINION OVER A UTAH SUPREME COURT OPINION DIRECTLY ON POINT

A. Utah Law Requires Very Specific Notice

In *D.B.*, the Utah Supreme Court held that accomplice liability requires specific notice. "Charging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *Id.* at 471. Accordingly, the district court found that, "[i]n *D.B.*, the Utah Supreme Court rejected an argument very similar to the one the State makes now." (XX Appx. 4809.) This Court, relying more on *Gonzales*, a lower court of appeals decision, held differently.

Taylor respectfully requests en banc consideration, and/or that the Panel conduct rehearing relating to its interpretation of Utah law regarding theory of liability notice, because the Panel's opinion did not give proper weight to Utah's particularized notice requirement. In Utah, notice of the theory of liability that the state is proceeding on is a basic due process requirement that is reinforced by *D.B.* Nonetheless, the Panel never addressed the fact that the Warden admitted in the district court that "the State did not pursue a conviction based on accomplice liability." (XIX Appx. 4646.) *See also* XIX Appx. 4647 ("Taylor argues that charging an individual as a principal does not provide adequate notice that the State is actually pursuing an accomplice liability theory . . . *This is irrelevant because the State was not pursuing an accomplice liability theory*. . . .") (emphasis added.)

The Warden's admission is consistent with the fact that contrary to the Concurrence's description of the record, at the preliminary hearing the state clearly argued that Taylor was the person with principal liability, raising accomplice liability only in regards to co-defendant Deli's arguments.[4] *See* III Appx. 546 ("Under those circumstances, your Honor, I'd ask the

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[4] While in this appeal the Warden relied on the preliminary hearing as notice of the potential for accomplice liability, and the Panel twice referenced the statement of the judge therein, the Warden never once made such arguments in the district court. Prior to coming before this Court, the Warden apparently did not see the preliminary hearing in the way now posited. The Warden never raised the preliminary hearing as evidence of Taylor having received notice of accomplice liability until the Warden's opening brief in this appeal. In more than thirteen years of federal court litigation before that point, including specific briefing on accomplice liability in the district court (Dkt. No. 254) and a Petition for Writ of Mandamus and Prohibition to this Court (Case No. 17-4058, filed April 17, 2017), the Warden never raised the preliminary hearing as evidence of accomplice liability notice to Taylor. Moreover, the judge who conducted the preliminary hearing was not the judge who took Taylor's plea. The judge who actually took his plea clearly believed that Taylor pled as the principal, as did the Utah Supreme Court. *See* Appellee's Response Brief, filed January 4, 2021, at ECF pages 32-33.

Court to dismiss Mr. Gravis' motion on behalf of Mr. Deli . . . ."). In his very next sentence, the prosecutor said, "[w]ith respect to Mr. Levine's argument, your Honor, there is direct testimony that Mr. Taylor physically fired at both the mother and the grandmother . . . so his claim really has no merit." (*Id.*) Thus, even were the prosecutor suggesting that accomplice liability could apply to either man, he then immediately reinforced that when it came to Taylor, the state was proceeding on a principal liability theory. At no time during the preliminary hearing, or in the decision of the judge finding probable cause to hold the defendants for trial, was the essential second *mens rea* element required in accomplice liability cases, as announced in *Eyre*, explained to Taylor or Deli.

Tellingly, the Panel stated, "[o]ur review begins and ends with Mr. Taylor's actual innocence claim. Mr. Taylor was charged with capital murder. Neither the Information nor the plea agreement specified a particular theory of liability, nor did they have to." (Op. at 27.) Critically, that is not in concert with Utah law. As *D.B.* explained,

> The State argues that principal and accomplice liability do not represent separate offenses and that its petition alleging principal liability provided D.B. with adequate notice, standing alone, of the potential that he could be adjudicated delinquent under a theory of accomplice liability. The State also argues, in the alternative, that D.B. received adequate notice of its accomplice liability theory through inferences from trial testimony and the State's closing rebuttal argument. We hold that D.B. did not receive constitutionally adequate notice of accomplice liability . . . .

D.B., 289 P.3d at 470-71.

The Utah Supreme Court's holding necessarily means the Warden's argument that an information alleging principal liability, standing alone, provides adequate notice of the potential that one could be convicted under a theory of accomplice liability, is incorrect under

Utah law. That directly undermines the Panel's holding herein.

Utah's Rules of Criminal Procedure, which have been altered since the time of Taylor's trial, now evidence the effect of *D.B.'s* holding, explaining that in a prosecution by information, "[t]he prosecution may allege alternate theories of the same offense in a single count or in multiple counts." Utah R. Crim. P. 4(b)(2)(A). The rule inherently recognizes that Utah requires alternate theories to be clearly alleged in some format. That is consistent with the Utah Supreme Court's explanation that, "[c]harging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *D.B.*, 289 P.3d at 471. The prosecution herein never alleged alternate theories in the Information or the plea. While the Concurrence embraces the Utah Court of Appeals' rejection in *Gonzales* of "the notion 'that accomplice liability is a separate offense from principal liability such that it would require specific notice'" (Conc. Op. at 4, quoting 56 P.3d at 972), that conclusion has been expressly overruled by *D.B.* The Panel notes that "simply because the state can explain it is pursuing a theory of accomplice liability in the initial information does not mean it must" (Op. at 26), and that is true, but the Panel misses the fact that *D.B.* does require that notice be made clear *somewhere*. In fact, since the issuance of *D.B.*, *Gonzales* has never been cited by the Utah Supreme Court or the Utah Court of Appeals for the premise that the Panel and Concurrence relied on it for -- that because accomplice liability is not a separate charge, it does not require notice. Any doubt as to that fact is negated by *Eyre*, as it explains the additional separate elements that accomplice liability incurs and makes it clear that the portion of *Gonzales* that the Panel found important did not survive *D.B.*

It is baffling that both the Panel and Concurrence relied so frequently on the lower court opinion from *Gonzales*, when the Utah Supreme Court has addressed the holdings in *Gonzales* and ruled contrary to the court of appeals on the critical accomplice liability issues before this Court. Nowhere does the Information or Taylor's plea express any of the elements of party culpability as delineated in § 76-2-202 -- either by statute or words. The elements of the specific offenses to which Taylor entered his plea simply do not discuss or provide notice of accomplice liability. Because the elements were never expressed in the Information or during the plea, Taylor could not have understood accomplice liability to have been an alternative theory to which he was potentially pleading guilty. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' Black's Law Dictionary 634 (10th ed. 2014). . . . at a plea hearing, they are what the defendant necessarily admits when he pleads guilty . . ."). [5] The Panel opinion also runs counter to decisions from this Court, which has held "[b]ecause [the defendant] did not know the elements of the crimes with which she was charged and because she was not informed of the correct penalties for those crimes, her plea necessarily was not a 'deliberate' choice between 'available alternatives.'" *United States v. Gigot*, 147 F.3d 1193, 1199 (10th Cir. 1998).

In *State v. Wilcox*, 808 P.2d 1028, 1032 (Utah 1991), the Utah Supreme Court noted the "right to adequate notice in the Utah Constitution requires the prosecution to state the

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[5] *See also United States v. Cruikshank*, 92 U.S. 542, 558 (1875) ("The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence . . . . A crime is made up of acts and intent; and these must be set forth in the indictment . . . .").

charge with sufficient specificity to . . . give notice sufficient for the one charged to prepare a defense," adding "there are few ironclad rules for determining the adequacy of notice beyond the requirement that the elements of the offense be alleged." *Id.* Citing *Wilcox*, the Utah Supreme Court has further explained, "[b]eyond requiring a statement of the elements of the offense, however, the test for notice has few rules." *State v. Taylor*, 116 P.3d 360, 362 (Utah 2005); *see also State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (holding the State has the burden of proving all elements of a crime); *State v. Starks*, 627 P.2d 88, 92 (Utah 1981) ("A fundamental precept of our criminal law is that the state must prove all elements of a crime beyond a reasonable doubt."). The simple fact is that the plea document would have read very differently if Taylor were pleading to accomplice liability because he would need to have pled to those elements. That is especially important now that the Utah Supreme Court has made it clear that the essential elements of accomplice liability include at least two *mens rea* elements; the second of which the Panel neither discussed nor considered.

The reality is that the state was never operating under an accomplice liability theory, it was operating under a co-principal theory, i.e. "I, Von Lester Taylor, in conjunction with Edward Steven Deli . . . ." (I Appx. 19.) *See United States v. Bell*, 812 F.2d 188, 194 (5th Cir. 1987) ("It is hornbook law that 'there can be more than one principal in the first degree.'") (citing W. LaFave & A. Scott, Criminal Law § 63, at 497 (West 1972)). The prosecutors did so because in making Taylor and Deli both principally liable, it removed the accomplice statutory mitigator for both of them. When each man challenged his role as a principal at the preliminary hearing, the prosecution articulated theories supporting Taylor's principal liability, while falling back on accomplice liability as an alternative for Deli.

B. Taylor Could Not Have Reasonably Understood That He Was Potentially Subject To Accomplice Liability

Even were the prosecution to have articulated an accomplice liability theory against Taylor in the preliminary hearing—which it did not—it would not matter because the charges were significantly altered. While the Information, filed on January 14, 1991, made Mr. Taylor aware of many potential charges, by the time he pled guilty in May, those charges had been narrowed down. He was no longer charged with eight other crimes, he was no longer charged with the second alternative theory of capital murder, and there was still no indication of proceeding on an accomplice liability theory. Following those alterations, without the state further articulating specific theories, Taylor could not have reasonably known that the allegedly expressed theory remained without further iteration. *See United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir. 1990) (A plea must "constitute a deliberate, intelligent choice between available alternatives" in order to be knowingly and intelligently made.) (cleaned up).

Moreover, assuming the preliminary hearing constituted sufficient notice, Taylor would not have understood how the facts he admitted rendered him guilty under such a theory. Because the second *mens rea* requirement in accomplice liability requires an inquiry into whether Taylor had the ability to comprehend how his actions would have aided Deli to commit the murders, it is highly likely that reasonable jurors would have found Taylor's understanding to be below that of a reasonable person. *Grunwald*, 478 P.3d at 12. Only getting straight "A's" in machine shop as a high school senior saved Taylor from graduating last in his class, propelling him to 340th out of 351. (Further Appx. 67.)

III. THE PANEL WRONGLY FAILED TO CONSIDER THE NEW EVIDENCE WHEN CONCLUDING THAT A REASONABLE, PROPERLY INSTRUCTED JURY COULD HAVE CONVICTED TAYLOR OF BOTH MURDERS AS AN ACCOMPLICE

In order to assess Taylor's accomplice liability, reasonable jurors would have to weigh all of the evidence, but the Panel only considered evidence from the original trial. When the Panel concluded that, "[t]he facts are well established. Linae witnessed and then testified that Mr. Taylor fired his gun first, shooting Kaye" (Op. at 36), the Panel did not appear to consider that the newly discovered evidence clearly established that the first shot Taylor fired was a non-lethal birdshot round, not a standard bullet. In fact, the district court concluded that only two actual bullets matching Taylor's gun were found at the scene and that only one of those was even possibly tied to the murders. (XX Appx. 4871.) As to the one potentially relevant .38 bullet, the district court found that "the circumstances surrounding [the bullet] . . . raise more questions than answers." (XX Appx. 4873.)

The Panel next said, "Mr. Deli told Mr. Taylor they needed to reload their guns, an indication that both guns had been emptied during the shooting" (Op. at 36), failing not only to consider that Deli could not have known whether Taylor's gun was empty, but also that the evidence shows that Taylor did not fire enough rounds to have emptied his gun. And while the Panel finds some meaning in Taylor allegedly having "told Mr. Deli he had shot one of the victims in the head twice" (*id.*), Ms. Tiede was never shot in the head, Ms. Potts was shot once in the head, and that was definitively by Deli, so that alleged statement does not comport with the evidence.

It is not surprising that the Panel got so many facts wrong, as it had no cause to delve into the specifics of the newly discovered evidence the way the district court did because the Warden did not appeal the district court's evidentiary hearing findings. However, the factual findings of the district court have significant relevance here, as they counter the Panel's bright line conclusion that "no doubt exists that [Taylor] would have been convicted of the murders under" an accomplice liability theory. (Op. at 4.) Finally, the Panel's conclusion that "[t]his is accomplice liability of the clearest kind" because "Mr. Taylor fired the first shot. He then fully participated in and tried to cover up the murders," not only does not consider critical evidence, including about that first shot, it improperly considers actions after the crime as evidence of accomplice liability. (Op. at 37.) Utah law specifically excludes such consideration. *Grunwald*, 478 P.3d at 15 n.55 ("We clarify that, under our accomplice liability statute, aid given to a principal actor after the underlying crime has been committed is insufficient to establish accomplice liability if the alleged accomplice did not have the requisite mental state at the time the crime was committed.") (citing *State v. Bowman*, 70 P.2d 458, 461 (Utah 1937) ("If he was an accessory after the fact, he could not become a partaker of the guilt, as there would be no union of criminal intent and act." (citation omitted))).

CONCLUSION

This Court should grant rehearing and either affirm the district court's grant of a conditional writ of habeas corpus, or if necessary, certify question(s) to the Utah Supreme Court for clarification of Utah law as to whether Taylor was properly noticed regarding potential accomplice liability.

Respectfully submitted,

DATED: September 13, 2021

By: */S/ Brian M. Pomerantz*
BRIAN M. POMERANTZ
KENNETH F. MURRAY

Attorneys for Petitioner-Appellee
VON LESTER TAYLOR

CERTIFICATE OF COMPLIANCE WITH RULE 35(b)(2)(B)

This brief complies with Fed. R. App. P. 35(b)(2)(B)'s fifteen page limitation for en banc hearing or rehearing, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of 10th Cir. R. 32(A) and the type style requirements of Fed. R. App. P. 32(a)(6), having utilized Times New Roman font.

/S/ Brian M. Pomerantz

CERTIFICATE OF DIGITAL SUBMISSION

THIS IS TO CERTIFY THAT:

(1) All required privacy redactions have been made, and with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the hard-copy document filed with the Clerk, and

(2) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (McAfee Total Protection Version 16.0) and, according to the program, are free of viruses.

/S/ Brian M. Pomerantz

CERTIFICATE OF SERVICE

I certify that on September 13, 2021, I served the above **APPELLEE'S PETITION FOR REHEARING AND REQUEST FOR EN BANC CONSIDERATION** on Mr. Andrew F. Peterson and Ms. Erin Riley by electronic filing in the United States Court of Appeals for the Tenth Circuit's CM/ECF filing system in case no. 20-4039.

/S/ Brian M. Pomerantz