CAPITAL CASE

No. 21-7329

IN THE

Supreme Court of the United States

VON LESTER TAYLOR, *Petitioner,*

vs.

ROBERT POWELL, WARDEN, *Respondent.*

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

RESPONDENT'S APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VON TAYLOR,
Petitioner-Appellee,

vs.

ROBERT POWELL, Warden
Respondent-Appellant.

APPELLEE'S RESPONSE BRIEF

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

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this Court.

GLOSSARY

References to the Brief of Appellant are abbreviated as "AOB," followed by the page number of the brief itself, rather than the ECF page number.

References to the Appellant's Appendix are designated by the Roman numeral volume number, the abbreviation "Appx.," and then the bates number applied by Appellant in the lower right hand corner.

References to the Appellee's Supplemental Appendix are designated by the abbreviation "Supp.Appx.," and then the bates number applied by Appellee in the lower right hand corner. There is only one volume, thus volume numbers are unnecessary.

References to the District Court record are abbreviated as "Dkt. No.," followed by the ECF number and then the page number.

INTRODUCTION

After substantial discovery, including depositions, and a three-day evidentiary hearing, the district court concluded "that no reasonable, properly instructed juror, viewing the record, would have concluded beyond a reasonable doubt that [Appellee Von] Taylor fired the fatal shots that caused the deaths of Beth Potts and Kaye Tiede." (XX Appx. 4907.) Respondent Warden does not challenge the district court's holding on Taylor's innocence. (AOB 16 n.5.)

Following briefing and argument on Claim Four of the Second Amended Petition ("SAP"), that Taylor's guilty plea is constitutionally defective, the district court held that, "Mr. Taylor's guilty plea was unconstitutional and must be invalidated" because he "satisfied the requirements of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. . . . establish[ing] that his attorney, Elliott Levine, provided him with deficient representation falling well below the prevailing professional norms." (XX Appx. 5036.) The court further explained that,

> 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.

(XX Appx. 5036-37.)

Now, having lost in the district court, and unable to credibly challenge the district court's finding of actual innocence, the Warden's appeal is a futile attempt to rewrite history. Instead of addressing the district court's finding regarding the charge to which Taylor actually pled guilty–capital murder as a principal–the Warden manufactures a story that Taylor knowingly pled guilty as an accomplice. Not only is this newly invented position wholly disingenuous given the Warden's own repeated admissions before the district court that "the State did not pursue a conviction based on accomplice liability" (XIX Appx. 4646), it is based on material misrepresentations of the record. The Warden then relies on his creation to argue that Taylor had notice, using a twisted interpretation of *Schlup v. Delo*, 513 U.S. 298 (1995), that is as faulty as his misleading recitation of purported "fact."

The district court properly found that under *Schlup* Taylor is entitled to the innocence gateway because he pled guilty as a principal and the evidence does not support a "reasonable, properly instructed juror" concluding beyond a reasonable doubt that "Taylor fired the fatal shots." (XX Appx. 4907.) Accordingly, trial counsel's failure to conduct an investigation led to an unintelligent and unknowing plea.

STATEMENT OF THE ISSUES

1. **Did the district court correctly conclude that Taylor pled guilty as a principal to causing the deaths of the two victims and not to accomplice liability?**

2. **Did the district court correctly conclude that because Taylor's trial counsel provided ineffective assistance, Taylor did not make a knowing and intelligent decision to plead guilty?**

STATEMENT OF THE CASE

The Warden's lengthy statement of facts details what happened at Taylor's trial over the course of several pages, but spends only three paragraphs recounting the *Schlup* hearing that led to the district court's grant of relief. The Warden chose not to appeal the district court's finding of actual innocence, affirmatively stating that the court's finding "doesn't matter for this appeal." *See* AOB 16 n.5.

///

The Warden's Statement of the Case misrepresents Taylor's culpability.[1] However, because the Warden has taken the position that Taylor's innocence does not matter, Taylor will not correct the record here. The district court found that Taylor was not principally liable for the murders, and the Warden has not challenged that conclusion.

The Warden also misrepresents Taylor's involvement by incorrectly stating that co-defendant Edward "Deli testified at his own trial that Taylor did all of the shooting and that Deli shot no one. Deli testified that Taylor began shooting out of the blue, and that he was surprised when Taylor began shooting." (AOB 11.) Whether Deli testified is not critical to this Court's inquiry, nonetheless, Taylor does not want to implicitly confirm these false facts by foregoing the following corrections. First, the Warden incorrectly stated, "[t]here are no transcripts from Deli's trial." (*Id.* n.3.) Portions of the Reporter's Transcript exist, as does the entirety of the Clerk's Transcript, including jury instructions, minutes, etc. Second, the weight of the evidence overwhelmingly indicates that Deli did

[1] For instance, the Warden spends more than a page discussing medical examiner Schnittker's autopsy findings, but never mentions that her conclusions were successfully challenged in the *Schlup* hearing. In fact, Dr. Schnittker later conceded that she had used unreliable methodology and shifted the basis for some of her opinions. (XX Appx. 4878-79, 4893-94.)

not testify. The Warden's statement did not share any of the following: (1) The Clerk's Transcript from Deli's case confirms that he never testified at his trial (*See* Supp.Appx. 56-62); (2) Despite significant media coverage of the trial, no article states Deli testified (XII Appx. 2672-2791); (3) although the Warden obtained a "declaration from Taylor's paralegal who witnessed the trial" (AOB 11 n.3) recounting that Deli testified, the Warden did not mention that she was an employee of the Attorney General's Office when the declaration was obtained (Supp.Appx. 117); (4) the Warden had that paralegal on his witness list for the *Schlup* hearing, for the "limited purpose" of saying "who testified and who did not at trial" (Dkt. No. 385:7), but the Warden made no attempt to impeach Deli's sworn testimony at the *Schlup* hearing that he did not testify at his trial, either by calling the paralegal or cross-examining Deli on the issue (Dkt. No. 385:12-32); (5) Deli's two attorneys signed sworn declarations declaring that Deli did not testify at his trial. (Supp.Appx. 119-20); and (6) Deli's jury was given an instruction relating to his not having testified. (Supp.Appx. 76.) In short, the overwhelming evidence establishes that Deli did not testify notwithstanding the Warden's assertion to the contrary, but because it is not germane to this appeal, Taylor will not

further belabor the issue.

STANDARD OF REVIEW

The parties agree that de novo review is appropriate as to the legal conclusions. Factual findings underlying the district court's ruling are reviewed for clear error. *United States v. Sanchez-Leon*, 764 F.3d 1248, 1259 (10th Cir. 2014). Whether the district court correctly concluded that Taylor pled guilty as a principal and not to accomplice liability is a mixed question of law and fact. When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate. *Roberts v. Printup*, 595 F.3d 1181, 1186 (10th Cir. 2010).

SUMMARY OF ARGUMENT

The Sixth Amendment requires that Taylor be "informed of the nature and cause of the accusation" against him. Taylor was informed that he was charged with capital murder as a principal. Taylor was not charged with accomplice liability and he did not plead guilty to accomplice liability. He was never informed that the State considered charging him as an accomplice; indeed, every indication was that the prosecution saw him as principally liable. *Schlup* does not permit the Warden to now

claim, thirty years later, that the State could have imprisoned Taylor for something else, so his innocence of the crime for which he was actually charged is irrelevant.

Although it is clear from all of the charging documents that the State did not charge both principal and accomplice liability, even if it had, Taylor could only plead to one. And, in such a situation, Taylor would have had the right to opt for which charge to plead to. The evidence is equally clear that if there was an option, he chose principal liability.

Although this appeal is about a violation of Taylor's federal constitutional rights, the arguments presented necessitate consideration of Utah state law to determine what constitutes reasonable notice in Utah. The law in Utah leaves no doubt that Taylor was not sufficiently notified of the State potentially proceeding on an accomplice liability theory. The Warden contends that the prosecution "gave Taylor clear notice of the State's intent to prove his liability as an accomplice" at the preliminary hearing (AOB 34), but that is a demonstrably false representation of the record. The record is clear: the prosecution chose not to articulate an accomplice liability theory either before or at the time of the plea. The Warden's wish that it had in the face of his loss before the district court simply does not make it so.

Believing that the evidence against him was overwhelming because trial counsel failed to perform a reasonable investigation, Taylor pled guilty as a principal to causing the deaths of two victims. Having now been found not to have principal liability following the *Schlup* hearing below, the Warden has rested his appeal on a faulty assumption that Taylor also pled guilty as an accomplice. The Warden's appeal never asks this Court for a legal conclusion as to whether Taylor pled guilty to such a charge because he assumes it to be a foregone conclusion. It cannot be the clear fact that the Warden makes it out to be because he previously admitted twice in the district court that Taylor never pled guilty as an accomplice. (XIX Appx. 4646-47.)

With the facts of the plea so clearly supporting the district court's grant of relief, the Warden seeks to reinterpret *Schlup* to create a "forward-looking" standard that is unsupported by *Schlup* or the cases interpreting it. The Warden's proposed interpretation is so distorting, it is tantamount to asking this Court to overrule the Supreme Court.

The district court properly applied the *Schlup* gateway and then correctly concluded that because trial counsel's assistance was ineffective, Taylor's plea was not knowing and intelligent. Trial counsel failed to

sufficiently investigate, foregoing the hiring of experts in ballistics and pathology, and assuming that the State's presentation of the evidence was true and correct.[2] Accordingly, trial counsel could not effectively advise Taylor.

The Warden has not claimed that the district court erred in determining that Taylor could be actually innocent of having been principally responsible for fatally shooting the two victims. Because the Warden has not addressed these and other issues in his opening brief, they are waived and forfeited. *See United States v. Fisher*, 805 F.3d 982, 990 (10th Cir. 2015) (finding issue waived and forfeited due to inadequate briefing); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (holding that this Court has routinely declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief).

[2] Reviewing the penalty phase, the Utah Supreme Court found that trial counsel "belie[ved] that all experts were 'hired guns' and that it was unethical to use them." *Taylor v. State*, 156 P.3d 739, 755 (2007) ("*Taylor II*"). That court termed this "an abdication of advocacy" rather than "a reasonable strategic decision." *Id.*

ARGUMENT

I. The District Court Correctly Concluded That Taylor Pled Guilty As A Principal To Causing The Deaths Of Two Victims

A. Taylor Pled Guilty As A Principal Only

The United States Constitution requires that Taylor be "informed of the nature and cause of the accusation" against him. U.S. Const., Amend. VI. This Court has explained that,

> *a defendant is informed of the nature and cause of the accusation against him if the indictment charges all of the essential elements of the offense with sufficient completeness and clarity to apprise him of the crime charged* with such reasonable certainty as will enable him to make his defense and to plead the judgment of acquittal or conviction in bar to a future prosecution for the same offense. [citations omitted] Where a statute creating an offense sets forth fully, directly, and expressly all of the essential elements necessary to constitute the crime intended to be punished, it is sufficient if the indictment charges the offense in the words of the statute.

United States v. Crummer, 151 F.2d 958, 962 (10th Cir. 1945) (emphasis added) (collecting cases); accord *Rosen v. United States*, 161 U.S. 29, 34 (1896); *see also Carter v. United States*, 173 F.2d 684, 685 (10th Cir. 1949) ("under [the Sixth Amendment], it is essential to the validity of an indictment that it charge all of the essential elements of the offense with

sufficient clearness and completeness to show a violation of law, to enable the accused to know the nature and cause of the accusation.").

The Sixth Amendment requirements closely track Utah Rule of Criminal Procedure 4, which

> specifies what an information must provide to a defendant: "An . . . information shall 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." Utah R. Crim. P. 4(b). "What the defendant is entitled to is an information which sufficiently informs him to enable him to understand the charge against him and to prepare a defense. If it fulfills that requirement, it is sufficient."

State v. Snyder, 932 P.2d 120, 127 (Utah Ct. App. 1997) (quoting *State v. Smathers*, 602 P.2d 708, 710 (Utah 1979)).

Utah has a statute that "fully, directly, and expressly" contains "all of the essential elements necessary to constitute" accomplice liability. *Crummer*, 151 F.2d at 962. Specifically, Utah Criminal Code Title 76 defines "criminal responsibility for direct commission of offense or for conduct of another" and sets forth the essential elements of accomplice liability:

> 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 § 76-2-202. Thus, in Utah, accomplice liability requires: (1) mental intent; and (2) an overt act either "solicit[ing]," "request[ing]," "command[ing]," "encourag[ing]," or "intentionally aid[ing]" another person to engage in the conduct that constitutes an offense. This language makes clear that accomplice liability requires proof of specific elements separate from the associated principal offense.

The Warden contends that whether Taylor was guilty as a principal or an accomplice is "inconsequential" and "immaterial" (AOB 3-4), but the requirement that notice be constitutionally adequate can never be inconsequential. Proper pre-plea notice has long been required.

> No principle of procedural due process is more clearly established than that 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. . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Cole v. Arkansas, 333 U.S. 196, 201 (1948).

The Warden claims the prosecution "gave Taylor clear notice of the State's intent to prove his liability as an accomplice" at the preliminary hearing (AOB 34), but that is patently untrue. The prosecutor cited the accomplice liability statute at the preliminary hearing, not in connection with Taylor, but to overcome Deli's contention that the charges against him should be dismissed. (III Appx. 545-46.) Specifically, Deli's attorney argued that the murder counts against Deli should be dismissed "on the basis that the State has failed to present any evidence that Mr. Deli fired any shots at the victims or knowingly and intentionally aided or abetted Mr. Taylor in the murders, that he commanded, solicited or in any way was an accomplice to the murders." (*Id.* 539-40.) The record is clear that the prosecutor was responding to that motion when he made the accomplice liability arguments, which he ended by saying, "[u]nder those circumstances, your Honor, I'd ask the Court to dismiss Mr. Gravis' motion on behalf of Mr. Deli." (*Id.* 546.) The prosecutor then unambiguously signaled he was done with that argument, stating, "[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 . . .." (*Id.*) The prosecutor then explained the alleged proof

that Taylor shot both victims, making him principally liable for intentional murder, and made arguments as to why the felony murder counts should also survive.[3] (*Id.* 546-47.) There was no mention of accomplice liability by the prosecutor related to Taylor. The arguments in response to Taylor's motion to dismiss charges were exclusively based on a theory of principal liability.

Similarly, Taylor's plea to capital homicide focused solely on his acts as a principal, and was devoid of any reference to the essential elements of accomplice liability set forth in § 76-2-202. Specifically, in Count I he pled guilty to "intentionally or knowingly caus[ing] 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." (I Appx. 19.) Count II was identical except it applied to the death of Kaye Tiede and reversed the victims' names at the end. *Id.*

This Court has previously looked at "the fundamental due process question of whether one can be sentenced for a crime not charged and to which no plea of guilty has been entered," determining that the "answer

[3] The felony murder counts were subsequently dismissed by the prosecutors at the time of Taylor's plea.

is an unequivocal no." *Von Atkinson v. Smith*, 575 F.2d 819, 821 (10th Cir. 1978) (applying *Cole*). Yet that is precisely what the Warden now asks this Court to do: convict (without a jury) and then sentence Taylor to the uncharged crime of accomplice capital murder to which he did not plead guilty. The district court correctly rejected this request below. (XX Appx. 4809.) "It is axiomatic that due process does not permit one to be tried, convicted or sentenced for a crime with which he has not been charged or about which he has not been properly notified." *Von Atkinson*, 575 F.2d at 821 (citations omitted).

Notwithstanding the foregoing, the Warden rests his entire appeal on his assertion that Taylor pled guilty to accomplice liability. That argument fails because the record repeatedly affirms that Taylor only received notice he was pleading to principal liability, and Utah state law forecloses the Warden's arguments.

1. The Warden's Assertion That Taylor Pled Guilty To Accomplice Liability Has No Basis In Fact

The Warden's newfound contention in the face of his loss before the district court is belied by his own repeated admissions to the contrary. In the Warden's Supplemental Briefing on the Issue of Accomplice Liability, he told the district court that, "Taylor complains that he 'was not provided

specific, or even adequate, notice that the State was pursuing a conviction based on accomplice liability.' . . . This is irrelevant, because *the State did not pursue a conviction based on accomplice liability*." (XIX Appx. 4646, emphasis added.)

He further said, "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* – but it could have, if Taylor had gone to trial and insisted as he does now that he was only an accomplice." (XIX Appx. 4647, emphasis added.)

Despite these clear admissions that Taylor never pleaded guilty as an accomplice, the Warden now contends that the district court "misread" Taylor's guilty plea and was "plainly wrong" because it concluded that he did not plead guilty to accomplice liability. (AOB 1.) The Warden claims the "plea statement used accomplice liability language," because the factual basis included the words "*and the conduct of other persons for which I am criminally liable*," and that Taylor "'*in conjunction with* Edward Steven Deli' 'unlawfully entered' the victims' cabin, and when the victims returned to the cabin, '[he] *and* [his] co-defendant, Edward Steven

Deli, intentionally and knowingly caused the death of both' of them." (AOB 1-2, emphases in original.)

That language is not notice. The vague phrases cited by the Warden do not track the statute, never approaching "solicit[ing]," "request[ing]," "command[ing]," "encourag[ing]," or "intentionally aid[ing]." To support the Warden's claim, the plea would have required some reference to the accomplice liability statute, whether the elements or even just the name given to the offense by common law or by statute. It had neither. The plea supports the Warden's honest admission that "the State was not pursuing an accomplice liability theory." (XIX Appx. 4647.)

That Taylor pled to principle liability is discernable from: (1) the Information (I Appx. 1-4); (2) Statement of Probable Cause (I Appx. 5-6); (3) Warrant of Arrest (I Appx. 7-9); (4) Statement of Defendant (I Appx. 18-25); and (5) the transcript of the plea hearing. (IX Appx. 1917-36.)

(a) The Information

The Information did not sufficiently apprise Taylor that he was being charged as an accomplice, as it neither charged the offense in the words of the statute, nor did it set out with certainty all of the elements necessary to constitute the offense. (I Appx. 1-4.) Moreover, the

Information could not have charged Taylor with accomplice liability because it would have been "fatally defective" for failing to state the actus reus required for accomplice liability. *Cf. State v. Steele*, 245 P. 332, 333-34 (Utah 1926) (information "fatally defective" for failure to allege requisite mens rea to be an accomplice).

Had Taylor's prosecutors meant to charge him as an accomplice, they knew what was required. From the beginning to the end, Deli had notice of the State's intent to prove his liability as an accomplice. The State exclusively discussed accomplice liability in relation to Deli at the preliminary hearing (III Appx. 545-46), and again echoed it in the jury instructions at his trial:

> 1. That on or about the 22nd day of December, 1990, in Summit County, Utah, the defendant, Edward Steven Deli, either:
>
> (a) caused the death of Beth Potts; OR
>
> (b) solicited, requested, commanded, encouraged or intentionally aided Von Lester Taylor to cause the death of Beth Potts.

(Supp.Appx. 19-22, 82, 86 (same instruction re: Kaye Tiede).)

The prosecutors knew that Deli could only be guilty of principle "OR" accomplice liability, which is why they requested and received jury instructions in his case explaining the theories in the alternative. Taylor

also could only be liable for one.

(b) Statement Of Probable Cause

The Information was "supported by a Statement of Probable [C]ause" which was attached to it and incorporated by reference. (I Appx. 4.) The Statement alleged "[t]he defendants, Von Lester Taylor and Edward Steven Deli ordered the women into the residence. *A few minutes later, the defendant, Von Lester Taylor shot Beth Potts and Kaye Tiede with a handgun*. The defendants then tied up Linae Tiede. . . ." (I Appx. 6, emphasis added.) Thus, like the Information, the Statement did not contain factual allegations providing notice of accomplice liability, only principal liability. (I Appx. 5-6.)

(c) Warrant Of Arrest

The arrest warrants, which were filed with the Information and the Statement of Probable Cause, charged Taylor and Deli with two Counts of "Murder in the First Degree a capital offense" pursuant to Utah Code § 76-5-202(1)(b) and/or (d). (I Appx. 7-9.) Section 76-5-202 does not reference accomplice liability. And, the arrest warrants did not reference § 76-2-202, the accomplice liability statute. (I Appx. 1-9; *see also* XX Appx. 5003-04.)

(d) Statement Of Defendant

The Statement of Defendant is even more clear than the Information that Taylor was charged only as a principal. While the Information charged both Taylor and Deli in Counts I and II with "intentionally or knowingly, caus[ing] the death of [the victims]" (I Appx. 1), the Statement of Defendant changed Counts I and II to charge *only* Von Taylor with the homicides. (I Appx. 19.) Neither the accomplice liability statute, nor its language, are included in the Statement.

Following Counts I and II is the language which the Warden now claims gave notice of accomplice liability: "[m]y conduct, and the conduct of other persons for which I am criminally liable, constitute the elements of the crimes charged." (I Appx. 19.). This precise phrase is commonly found in Utah plea statements. As the Warden acknowledged before the district court, "perhaps accomplice liability is different in different states." (XIX Appx. 4723.) In Utah the Warden's purported linchpin is nothing more than boilerplate plea language. A national search for the phrase "and the conduct of other persons for which I am criminally liable" in both Lexis and Westlaw yields only four cases -- all in the State of Utah. In three of those four cases, there were no co-defendants or other possibly complicit persons. *See Salazar v. Utah State Prison*, 852 P.2d 988, 989 n.1

(Utah 1993); *State v. Lehi*, 73 P.3d 985, 987 (Utah Ct. App. 2003) (involving a DUI offense); *State v. Trujillo-Martinez*, 814 P.2d 596, 599 n.4 (Utah Ct. App. 1991). The phrase also was found in two briefs, both also referencing Utah pleas. *See State v. Ott*, 2008 WL 8772419 (Utah); *State v. Watson*, 2016 WL 7744969 (Wash.App. Div. 2) (referencing a prior conviction in the State of Utah). Finally, two Statements by Defendants available on Westlaw reveal the same boilerplate. *See State v. Mabey*, 2008 WL 4411688 (Utah Dist.Ct.); *State v. Redd*, 2007 WL 5253421 (Utah Dist.Ct.) These latter four references also appear to be cases with no co-defendants or other potential accomplices.

Not only do these cases confirm that the phrase has nothing to do with accomplice liability, it establishes that the language could not have informed Taylor or his attorney of the nature and cause of an accomplice liability accusation against Taylor.

(e) Plea Hearing

The transcript of the plea hearing on May 1, 1991, confirms that Taylor pleaded guilty to two counts of capital murder as a principal. (IX Appx. 1917-36.) Although Taylor acknowledged he was pleading to acts he did with his co-defendant, there was no discussion of Utah Code

§ 76-2-202, the language of that statute, the required elements, or any other discussion of accomplice liability. Without such notice, Taylor could not, and did not plead to charges as an accomplice. *See State v. Seumanu*, 443 P.3d 1277, 1284 (Utah Ct. App. 2019).

The district court painstakingly reviewed all of these documents charging Taylor and carefully construed Utah Code § 76-5-202, the capital murder statute, Utah Code § 76-2-202, the accomplice liability statute, and *D.B. v. State*, 289 P.3d 459, 465 (Utah 2012), before concluding that 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." (XX Appx. 5003-04.)

2. Courts That Have Reviewed His Plea Confirm That Taylor Pled Guilty As A Principal

Even the judge who took the original plea never gave any hint that the plea was one for accomplice liability. Ruling on the Warden's summary judgment motion in 2004, the trial judge explained that Taylor's guilty pleas had the factual basis to support principal liability.

> Before reciting the facts supporting the capital murder charges, th[is] Court set forth the elements that the State had to prove using specific language that reflected petitioner's personal responsibility. As to Beth Potts' murder, the Court stated, "*You*,

> as the defendant, 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, to wit, . . . Beth Potts and Kaye Tiede were killed." Tr. of Plea-Change Hrg. at 9 (emphasis added). The Court used similar language with respect to Kaye Tiede's capital murder.

(IX Appx. 1951-52, emphasis in original.) The trial judge also noted the "Court's express emphasis during the elements explanation that petitioner was himself responsible for the victims' deaths." *Id.*

The Utah Supreme Court also viewed Taylor as having only principal liability. *See Taylor v. State*, 270 P.3d 471, 482 (2012) ("*Taylor III*") ("Although he pled guilty to killing Kay [*sic*] Tiede and Beth Potts, Taylor now alleges that it was actually his coconspirator, Deli, who killed these women."). Referencing Taylor's claim that the shots that killed the two women came from his co-defendant's .44 caliber gun and not from Taylor's .38 caliber gun, and therefore Taylor is innocent, the court referred to the argument as "frivolous because there is ample evidence in the record to support Taylor's guilt." *Id.* at 483. The court then supported its finding with a litany of supposed facts all pointing to Taylor's principal liability.

From the arrest warrant to post-plea hearings before the trial court, principal liability was reinforced time and again. Contrary to the Warden's assertion, the district court did not say Taylor's plea as an accomplice "didn't exist" (AOB 27), it found that he had not so pled after conducting a thorough review of the plea related documents and the pertinent state law that was conspicuously downplayed in the Warden's brief. Indeed, *D.B.*, the seminal case on the matter, is only mentioned twice in passing by the Warden, despite the district court finding 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 is why the district court, after substantial analysis (XX Appx. 4808-12), concluded in the Order Granting Evidentiary Hearing 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."[4] (XX Appx. 4810-11.) If neither the trial court nor the district court could find evidence of notice of accomplice liability, then Taylor certainly could

[4] This final point is significant because as discussed below, notice of accomplice liability in Utah can be provided from evidence offered at trial. In this case, no such avenue for notice existed.

not have gleaned such notice from the same record. Without such notice, the Warden's arguments fail.

3. Utah State Law Forecloses The Warden's Arguments

Hoping something might stick, the Warden has thrown out a variety of suggested ways in which this Court can find that Taylor pled guilty to accomplice liability. At various points in his brief, the Warden argues that principal and accomplice liability are not separate, and if they are separate, one is sufficient to provide notice of the other. He then goes so far as to claim that Taylor pled guilty to both simultaneously. Each of these rather preposterous arguments is foreclosed by Utah law.

The Warden's first and second arguments have been directly rejected by the Utah Supreme Court, and this Court is bound by that court's interpretation. In *D.B.*, a post-*Gonzales*[5] case, the Utah Supreme Court started with the premise 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. The court then concluded that "the question of what notice is constitutionally sufficient before the State may *actually* pursue accomplice liability is an issue of first

[5] *State v. Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002).

impression for this court." *D.B.*, 289 P.3d at 471 (emphases in original) (internal citation and quotations omitted). Answering that question, the D.B. court found that accomplice liability requires specific notice: "[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. And, by concluding that notice of one cannot provide notice of the other, the Utah Supreme Court has also necessarily concluded that they are, in fact, separate crimes.

The *D.B.* court took the guesswork out of reasonable notice, explaining that the "simplest way for the State to provide adequate notice *is by actually charging the defendant as an accomplice*." *D.B.*, 289 P.3d at 471 (emphasis added); *see also State v. Swapp*, 808 P.2d 115, 116-17 (Utah Ct. App. 1991) (defendant was charged with criminal homicide and accomplice liability was separately alleged.). It then spelled out what constitutes constitutionally sufficient notice. 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." *D.B.*, 289 P.3d at 471 (citations omitted).

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Here, the prosecution chose not to articulate an accomplice liability theory at the time of the plea, but wants to pursue that theory now, decades later, because Taylor won relief. *D.B.* prevents such a result:

> The Sixth Amendment requires the State to provide a defendant charged as a principal with adequate notice if the State also plans to pursue an accomplice liability theory. To do so, the State must either charge the defendant as an accomplice or present evidence of accomplice liability prior to the close of evidence at trial.

D.B., 289 P.3d at 472. The prosecution neither provided adequate notice by charging Taylor as an accomplice, nor could it have notified him via trial evidence, as there was no trial.

The Warden also asserts that Taylor's plea was to both principal and accomplice liability, but the *D.B.* court made clear the impossibility of that outcome. Indeed, the dissent in *D.B.* posited such a theory, and the majority criticized the "dissent's theory [as] unworkable because it would dictate that a perpetrator who commits an offense with another would necessarily be liable as both a principal and an accomplice. But section 76-2-202 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. In Utah, the prosecution may charge alternative

offenses in a single count, but "charges must be pled in separate counts if the prosecution desires to preserve an alternative charge in the face of a defendant's plea of guilty to the other charge." *State v. Loveless*, 232 P.3d 510, 511 (Utah 2010). "Alternative charges filed in a single count allow a defendant to plead guilty as charged to either of the alternative charges." *Id.*

Thus, even were this Court to find that Taylor was charged as both a principal and an accomplice, it would then have to determine to which charge Taylor pleaded guilty. The Warden appears to believe that in such a circumstance, he gets to retroactively choose which of the alternative charges Taylor pled guilty to, but that is not the law in Utah. Assuming Taylor was charged as both a principal and accomplice in the same count, the choice of which to plead to would be his and his alone. *See Loveless*, 232 P.3d at 513 ("prosecutors who opt to charge alternative offenses in a single count are 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. . . . If the state desires a judicial determination as to every charge in an information, including charges pled in the alternative, the prosecutor must charge each offense in separate counts"). Even

viewing the charging instrument as having been a menu of choices, every indicator is that Taylor chose to plead guilty as a principal.[6]

State v. Gonzales, a case cited repeatedly by the Warden, does not change the analysis. *See* 56 P.3d 969 (*Gonzales* is a intermediate court case that has been distinguished by the Utah Supreme Court in *D.B.*, as well as the district court herein). While *Gonzales* notes other ways to achieve sufficient accomplice liability notice under Utah law, none apply here. And, although *Gonzales* states that an Information charging an individual with a general offense, without reference to principal or accomplice liability, may be tolerable when the prosecution presents evidence of accomplice liability at trial, such additional notice is required.[7] Taylor never received such additional notice.

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[6] While the defendant in *Loveless* chose the lesser charge, and most would, here choosing the more severe charge fit with the mitigation theory presented during the penalty phase trial. *See* I Appx. 70-71 ("I think you'll see from the testimony that Mr. Taylor was willing to come forth, knowing the consequences he faced, come forth and admit the wrong doings that he had been involved in. Mr. Taylor in no way, shape or form denies that he murdered those two women.").

[7] In *Gonzales*, the lack of error was due to the State's continuous use of a principal liability rather than an accomplice liability theory. *See Gonzales*, 56 P.3d at 972 (noting the state did not vary from the charges in the information). The State did not need to give notice of the accomplice liability theory in the information because it never sought to use that theory. *Id.*

Indeed, where, like here, the specific charges are never going to otherwise be presented via trial evidence, it is especially important for a defendant to have specific additional notice of the accomplice charge. In fact, Utah Rule of Criminal Procedure 11(e)(4)(A) requires that the defendant understand the nature and elements of the offense to which the plea is entered and that the plea be an admission of all those elements. The Supreme Court has "long held that a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Yet, when Taylor entered his guilty plea he was not provided specific, or even adequate notice that the State was pursuing a conviction based on accomplice liability.[8]

As in *D.B.*, where the court held that "the State's vague allusion to accomplice liability in its rebuttal did not put D.B. on notice that it was pursuing accomplice liability" *D.B.*, 289 P.3d at 466, the charging

[8] *Gonzales* is further distinguishable from this case because 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.

documents did not put Taylor on notice that the state was pursuing accomplice liability because they clearly and consistently relied on principal liability. The district court properly looked to *D.B.* in concluding that Taylor pleaded guilty to principal liability, and did not plead guilty as an accomplice. (XX Appx. 4810-11.)

B. The Warden's Attempt To Rewrite *Schlup* Is Equally Without Merit

1. *Schlup* And Its Progeny Make Clear That It Is Backward-Looking

Relying on a tortured reading of *Schlup*, the Warden asks this Court to overturn the district court based on what the State speculates it could do if the case were retried. Specifically, the Warden asserts that the State could have pursued accomplice liability and would do so at a new trial, so *Schlup's* "forward-looking probabilistic determination of what a reasonable, properly instructed juror would do" warrants reversal. (*See*, *e.g.*, AOB 2.) This self-serving view of *Schlup* is entirely unsupported in case law, having never been adopted by any court.

The Warden arrives at his interpretation by cherry-picking a sentence from *Schlup* and ignoring the two sentences that bookend it which unequivocally show that the term "would" is backward-looking, not

forward-looking.

> The meaning of actual innocence as formulated by *Sawyer*[9] and *Carrier*[10] does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror *would have* found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, *would have* voted to find him guilty beyond a reasonable doubt.

Schlup, 513 U.S. at 329 (emphasis added).[11] *See also House v. Bell*, 547 U.S. 518, 540-41 (2006) (showing how the predictive standard is

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[9] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

[10] *Murray v. Carrier*, 477 U.S. 478 (1986).

[11] Even three dissenting Justices in *Schlup* made clear that this is backwards looking:

> The reviewing court must somehow predict the effect that this new evidence would have had on the deliberations of reasonable jurors. It must necessarily weigh this new evidence in some manner, and may need to make credibility determinations as to witnesses who did not appear before the original jury. This new evidence, however, is not a license for the reviewing court to disregard the presumptively proper determination by the original trier of fact.

Schlup, 513 U.S. at 341 (Rehnquist, J., dissenting).

backward-looking. Through the discussion in *House*, this Court can see that to achieve the answer as to whether reasonable jurors would have reasonable doubt, the Court posits a hypothetical wherein it looks to the proof at trial, considering the weight a jury would have given to that evidence. This Court must then look at the new evidence to determine how that jury would have been informed by having this knowledge added to what it already had. *Id.* ("A jury informed [of the new evidence] might have found . . .") This Court then decides whether the jury considering the previously presented evidence and new evidence would have come to a different conclusion.).

The "would have" phrasing in *Schlup* is what is quoted in *McQuiggin v. Perkins*, leaving no doubt that the Supreme Court intended the test to be one that looks backward to what would have happened. 569 U.S. 383, 399 (2013) ("To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'") (citing *Schlup*, 513 U.S. at 327).

To establish a *Schlup* gateway, a petitioner must first establish that he is actually innocent of the offense for which he was convicted. The

Warden wants this Court to replace that test with one that looks to whether Taylor could be convicted of some other crime following a host of speculative events. To require a petitioner to establish that he is actually innocent of another offense for which he *could have been* convicted (but one he has not yet been convicted of) – *if* charged, and *if* tried and sufficient evidence were presented, and *if* a jury was properly instructed, and *if* a jury finding of guilt was obtained – is illogical and inconsistent with the holding of *Schlup*. Moreover, it is incompatible with American criminal justice values of due process and fairness.

Under *Schlup*, the mere existence of sufficient evidence that *could possibly* convict Taylor of a different offense than his offense of conviction is irrelevant. The prosecution decides whether to offer a plea. Yet, despite having unfettered power to have crafted the plea however it liked, the Warden has now asked this Court to expand on the prosecution's deal because, with 20/20 hindsight, it was not broad enough to encompass the full range of offenses for which the Warden wishes Taylor had actually been charged and convicted.

The Warden also posits that, "[i]f Taylor had gone to trial . . . the most likely scenario would have been that the prosecution would have

asked for a jury instruction on accomplice liability, and argued to the jury that Taylor was guilty regardless of whether he fired any fatal shots." (AOB 51.) What the State could have charged is not a proper inquiry. The focus must be on what would have happened in the case that existed, in light of the new evidence. In context, it is obvious that the reference to what the juror "would have" done is the implication of a probabilistic determination by a reasonable juror examining the new and old evidence together in *this* case.

The Warden's "would've, could've, should've" argument is not supported by either legal authority or logic. Taylor was not charged as an accomplice. Despite this fact, and without authority, the Warden treats accomplice-liability culpability as a lesser included offense to capital murder.[12] The argument has no proper place here because even within

[12] The district court explained the problem well in its Order Granting An Evidentiary Hearing. *See* XX Appx. 4811 n.12 (explaining that accomplice liability is not a lesser-included-offense of capital murder. "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. . . . 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 *Schlup* universe, there are basic parameters to the hypothetical. While expansive, *Schlup* is finite, limiting the habeas court to a fixed universe of information. *Schlup* calls for a reweighing of the new and old evidence within a fixed static temporal model, the case as it was at the time. *Schlup* certainly is not referring to a future trial, as the Warden posits without supporting case law, nor does it permit an evaluation based on how different charges would effect that evidentiary analysis.

2. The Warden's Effort To Impose A Standard Of Proof Beyond That Required By *Schlup* Is Without Merit

Again the Warden seeks to rewrite *Schlup* by taking a single word out of context – "entirely" – and giving it determinative weight that no other court has given. In *Schlup*, the Supreme Court said, "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324-25. The Supreme Court was explaining the ultimate miscarriage of justice in dicta, not setting the benchmark for the gateway past procedural bars. The holding articulated the correct standard: the petitioner must "show that it is more likely than not that no reasonable juror would have convicted him in the light of the

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the offense charged and the included offense.' *Id.* § 76-1-402(3)." (Emphasis in original.)

new evidence." *Schlup*, 513 U.S. at 327.

No part of that standard requires one to prove they are "entirely innocent" as the Warden contends. The Warden has nonetheless taken the Supreme Court's example of the utmost transgression and tried to create a much higher burden for Taylor, claiming "*Schlup's* actual-innocence default exception . . . applies only for someone who is 'entirely' innocent." (AOB 2; *see also* 14, 19, 22, 23, 28, 29, and 36.) Only one circuit court case even tangentially approaches such a standard, and even there it proffers entire innocence to be a reason, not a requirement. *See Amrine v. Bowersox*, 128 F.3d 1222, 1227 (8th Cir. 1997) ("The underlying reason for an actual innocence gateway is that the 'quintessential miscarriage of justice is the execution of a person who is entirely innocent.' *Schlup*, 115 S. Ct. at 866.").[13] Not only is the Eighth Circuit's approach to *Schlup* cases decidedly different from other circuits (XX Appx. 4861), even *Amrine* only suggests that "entire innocence" is the underlying reason for having the *Schlup* gateway, it does not make it a

[13] Other circuits to have discussed "entire" innocence have done so only in dissents; thus, it is not the law anywhere. *See*, *e.g.*, *In re Davis*, 565 F.3d 810, 831 (11th Cir. 2009) (Barkett, J., dissenting) (discussing entire innocence in a case where a *Herrera v. Collins*, 506 U.S. 390 (1983) claim was brought.)

contingency for the gateway. Moreover, in *Jones v. Delo*, the Eighth Circuit explained that,

> Although '[a] prototypical example of 'actual innocence' . . . is the case where the State has convicted the wrong person of the crime," *Sawyer*, [505 U.S. at 340], 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.

56 F.3d 878, 883 (8th Cir. 1995) (citing *Schlup*, 513 U.S. at 321).

The Warden's reliance on *Bousley* as support for his novel theory is equally misplaced. (AOB 22.) First, *Bousley* was not a capital case. If *Schlup* only applied to cases pertaining to "the *execution* of a person who is entirely innocent," Bousley could not have had his case analyzed pursuant to *Schlup*. Moreover, in *Bousley* the government attempted to argue that because the statute under which the petitioner was charged included liability for both carrying and using a firearm during a drug transaction, the petitioner would have to demonstrate he was innocent of both using and carrying a firearm during such a transaction. *Bousley*, 523 U.S. at 624. The Supreme Court rejected that argument because "petitioner's indictment charged him only with 'using' firearms" and there was no "evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." *Id.* Similarly,

Taylor "need demonstrate no more than that he" was not guilty of principal liability. *Id.*

The Warden's next instance of cherry-picking language is even more egregious given that he does so from a case that he knows supports Taylor. Specifically, the Warden argues that "proving innocence on one theory while guilt on another is overwhelmingly proved by uncontested evidence fails to prove 'entire[]' innocence. For a defendant to be able to successfully defend against an indictment as a perpetrator by proving he was an aider and abettor is 'morally absurd.'" (AOB 37 (quoting *State v. Petry*, 273 S.E. 2d 346, 349 (W. Va. 1980)). As Taylor already explained before the district court:

> [I]n Ms. Petry's case the court actually reversed the circuit court and remanded the case "with directions to enter a judgment of acquittal" because the state's common law "required that aiders and abettors be indicted as such." *Petry*, 273 S.E.2d at 352. Thus, if *Petry* has any persuasive value here, it is to support Mr. Taylor's arguments.
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> The moral absurdity discussed in *Petry* referenced the "ludicrous point . . . that the defendant can successfully defend against an indictment as a perpetrator by proving she was an aider and abettor and vice versa." *Id.*, 273 S.E.2d at 349. Mr. Taylor is doing no such thing. It is the State that is obsessed with Mr. Taylor's alleged accomplice liability. Mr. Taylor is not seeking to

> avoid conviction by arguing he was an accomplice, he is challenging the conviction he has. This is precisely what *Schlup* requires.

(XIX Appx. 4786.) Moreover, this is not a case where guilt on another theory is overwhelmingly proved by uncontested evidence, because Taylor was never charged under another theory and therefore has never had a chance to contest the purported evidence.[14]

The Warden's position is further foreclosed by the Supreme Court's debate in *Schlup* whether to utilize the *Carrier* standard, i.e. "the petitioner must show that the constitutional error 'probably' resulted in the conviction of one who was actually innocent," or the *Sawyer* standard requiring "*clear and convincing* evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup*, 513 U.S. at 322-23 (quoting *Sawyer*, 505 U.S. at 336 (emphasis in *Schlup*)). The Supreme Court held that "the *Carrier* 'probably resulted' standard rather than the more stringent *Sawyer* standard must govern the miscarriage of justice inquiry when a petitioner

[14] The Warden is fond of claiming in the AOB that Taylor has not contested evidence of his guilt as an accomplice, but Taylor has never had to contest whether the evidence proves accomplice liability because he was never charged under such a theory. Taylor has consistently contested the relevance of accomplice liability.

who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims." *Schlup*, 513 U.S. at 326-27.

Beyond choosing the easier to meet *Carrier* standard, the Court left no doubt about the test to be applied, explaining that the "*Carrier* standard requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup*, 513 U.S. at 327 (quoting *Carrier*, 477 U.S. at 496). Taylor is actually innocent of principal liability in the deaths of Kaye Tiede and Beth Potts, which is all that matters here. The Supreme Court's decision to impose the "lower burden of proof" (*id.*), would be entirely undermined if courts read *Schlup* as the Warden proposes.

Indeed, not only does a petitioner not have to prove he is "entirely innocent," there are instances where a petitioner need not even have new evidence to argue actual innocence. *See United States v. Davies*, 394 F.3d 182, 191 (3d Cir. 2005) (explaining that in *Bousley*, "the Supreme Court held that a habeas petitioner may demonstrate 'actual innocence' by pointing to post-conviction decisions 'holding that a substantive criminal statute does not reach [his] conduct.'" (citing *Bousley*, 523 U.S. at 620)).

If "*Bousley* could cure [his] default by showing that, under the new . . . interpretation of 'using,' he was 'actually innocent' of violating § 924(c)(1)" *Davies*, 394 F.3d at 192, then the district court was certainly correct to rule for Taylor because he is actually innocent of the principal liability to which he pled guilty.

The Warden's appeal depends entirely on his assertions that Taylor pled guilty as an accomplice and that *Schlup* is forward-looking and requires "entire" innocence. Because none of those assertions are correct as matters of fact or law, the district court's rulings should be affirmed.

II. The District Court Correctly Concluded That Because Taylor's Trial Counsel Provided Ineffective Assistance, Taylor Did Not Make A Knowing And Intelligent Decision To Plead Guilty

Trial counsel, Elliot Levine, provided constitutionally deficient representation by failing to investigate or test the prosecution's case. Trial counsel's failure to investigate precluded him from providing informed advice to Taylor during the plea process. Because trial counsel's deficient performance was prejudicial, the district court correctly granted relief.

In Claim Four of his SAP, Taylor argued that his guilty plea to two capital homicides was constitutionally defective. (XIII Appx. 2910-25.)

Sub-claim 4.A argued trial counsel failed to meaningfully investigate the State's case and to offer Taylor adequate advice "on the advisability of entering into any plea agreement." (*Id.* 2910-14.) Also included was sub-claim 4.D, that a guilty plea can be rendered involuntary and unintelligent based on ineffective assistance of counsel. (*Id.* 2921-25.)

The district court concluded that these sub-claims were not addressed on the merits by the Utah courts because they were procedurally barred. Because the court found that Claims 4.A and 4.D provided "sufficient reason to vacate Mr. Taylor's sentence," it did not address the remaining sub-claims. (XX Appx. 5016.)

In granting relief, the district court found that trial counsel failed to investigate and test the State's case. Specifically, the court found that trial counsel performed deficiently when he failed to fulfill "his duty to investigate by, for example, hiring a ballistics expert and a forensics expert," or to "interview witnesses," including "key witnesses for the prosecution." (XX Appx. 5033.) The district court also found that "[b]ecause [trial counsel] failed to investigate, he was not able to reasonably advise Mr. Taylor about whether or not to plead guilty." (XX Appx. 5036.)

The district court then found that trial counsel's deficient performance prejudiced Taylor because "[i]f [trial counsel] 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." *Id.* The court further found that "Taylor did not make a knowing and intelligent decision to plead guilty to two capital crimes" and, as a result, "Taylor's death sentence was based on his invalid plea." (XX Appx. 5037.)

Even in his arguments regarding ineffective assistance of counsel, the Warden focuses exclusively on accomplice liability as proof that any attempt by trial counsel to defend Taylor would have been futile. The Warden repeatedly refers to the state's evidence against Taylor's conduct "*as an accomplice*" as "unassailable," "overwhelming," "undisputed," and "uncontested," all while ignoring the fact that Taylor did not plead guilty to, and therefore was not convicted of, accomplice liability. Accordingly, once this Court finds that Taylor did not plead guilty as an accomplice, and that *Schlup* is not "forward-looking," the Warden's arguments against ineffective assistance fail.

A. As A Result Of Trial Counsel's Constitutionally Deficient Failure To Investigate, He Was Precluded From Providing Taylor With Meaningful and Informed Advice, Resulting In Taylor's Unconstitutional Guilty Plea To Capital Murder As A Principal

Taylor asserted that ineffective representation resulted in an unconstitutional guilty plea. Specifically, he claimed that trial counsel failed to investigate and challenge the State's case and, as a consequence, was uninformed and unable to effectively advise Taylor regarding his options. The Sixth Amendment guarantees a defendant effective assistance of counsel at "critical stages of a criminal proceeding," including when he enters a guilty plea. *Lee v. United States*, 137 S.Ct. 1958, 1964 (2017); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Hill v. Lockhart*, 474 U.S. 52 (1985). The district court correctly recognized that an ineffective assistance of counsel claim "must satisfy the well-known two-part test articulated in *Strickland*." (XX Appx. 5028.)

Under the first *Strickland* prong, Taylor was required to show that trial counsel's "performance fell below an objective standard of reasonableness." (XX Appx. 5028.) In *Hill*, the Supreme Court explained the proper focus of an analysis of the first prong in cases involving convictions obtained through the plea process, rather than a trial:

> We hold [ ] that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, [411 U.S. 258 (1973)], and *McMann v. Richardson*, [397 U.S. 759 (1970)].

Hill, 474 U.S. at 58-59.

Thus, the first task is to assess whether trial counsel's representation of Taylor was constitutionally deficient. Trial counsel has a duty to investigate all reasonable lines of defense. *Strickland*, 466 U.S. at 691 (recognizing duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary); *Nguyen v. Reynolds*, 131 F.3d 1340, 1347 (10th Cir. 1997). This duty "is strictly observed in capital cases." *Nguyen*, 131 F.3d at 1347. Even if no viable defense is apparent, the Sixth Amendment still requires that counsel hold the prosecution to its heavy burden of proof beyond a reasonable doubt. *Fisher v. Gibson*, 282 F.3d 1283, 1291 (10th Cir. 2002). Trial counsel clearly did not. Had he done so, he would have discovered the readily available evidence that convinced the district court that Taylor had met the high bar of establishing actual innocence under *Schlup*. (*See*

XX Appx. 4856-4908.)

In assessing whether trial counsel's representation fell below an objective standard of reasonableness, courts look to the prevailing professional norms. This Court has recognized that, in capital cases, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") is an appropriate and important source for determining those prevailing professional norms. *Harmon v. Sharp*, 936 F.3d 1044, 1058 (10th Cir. 2019); *Hooks v. Workman*, 689 F.3d 1148, 1201 (10th Cir. 2012).

The Warden attempts to minimize the value of the ABA Guidelines. He argues that "the ABA Guidelines are merely guides to what is reasonable, *Strickland*, 466 U.S., at 688, not "inexorable commands. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009)." While the referenced passages are correctly quoted, the Warden's failure to acknowledge the limitations of the holding in *Van Hook* is misleading. The Supreme Court looks favorably on the Guidelines and Commentary for support of its decisions to grant relief to defendants whose defense counsel failed to investigate adequately. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). The

Court did so in *Van Hook* as well.

Indeed, contrary to the Warden's suggestion, the Supreme Court in *Van Hook* did not minimize the value of the ABA Guidelines. The court found only that it was error for the Sixth Circuit to judge "counsel's conduct in the 1980's on the basis of [the] 2003 Guidelines--without even pausing to consider *whether they reflected the prevailing professional practice at the time* of the trial." *Van Hook*, 558 U.S. at 8 (2009) (emphasis added). The import of the Guidelines as a valued source of the prevailing professional norms in capital cases remains. *Van Hook* merely clarified that courts need to make an effort to corroborate that Guidelines adopted years after trial adequately reflect the professional norms that existed at the time of trial. *Id*.

The district court in Taylor's case did precisely that. Specifically, the court considered and applied the professional norms set forth in the 1989 ABA Guidelines in effect at the time of Taylor's plea. In assessing the reasonableness of trial counsel's performance, the court also considered a wide range of information beyond the 1989 Guidelines, including the Rule 23B testimony of trial counsel and of a legal expert on capital case professional norms. (XX Appx. 5030-32.)

The Warden also incorrectly asserts that the Guidelines provide no guidance on what investigation counsel should do before a defendant pleads guilty. (AOB 41.) In fact, the district court pointed out the relevant guidance contained in the Commentary to ABA Guideline 11.4.1. (XX Appx. 5031.) The district court even emphasized trial counsel's "duty to investigate the case before recommending that a guilty plea be taken" and that counsel may not "sit idly by, thinking that investigation would be futile," concluding that "[w]ithout investigation, counsel's evaluation and advice amount to little more than a guess." *Id.*

Trial counsel admitted that he failed to conduct an adequate investigation, testifying in the Rule 23B hearing that he did not use a ballistics expert or seek formal independent review of the state's evidence. (VI Appx. 1320-21.) The district court noted the import of the Rule 23B hearing, which established trial counsel's failure to investigate and his uninformed assumption that Taylor was guilty of both crimes. (XX Appx. 5018.)

The district court correctly found that trial counsel violated prevailing professional norms by failing, without an informed basis, to conduct an investigation of the State's case. The evidence of trial counsel's failure to investigate the case is irrefutable. As the district court

noted, the failure to conduct an investigation in a capital case, without an informed strategic justification based on an investigation, is an "abdication of advocacy." (XX Appx. 5033.) Citing *Crisp v. Duckworth*, the district court found that "[e]ffective representation hinges on adequate investigation and pre-trial preparation. . . . [Trial counsel] did neither." 743 F.2d 580, 583 (7th Cir. 1984).

As a result of trial counsel's failure to conduct reasonable investigation into the State's case, Taylor was not provided the constitutionally required "minimally competent professional representation" when deciding whether to plead guilty. *See United States v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989) ("Where the deficiencies in counsel's performance are severe and cannot be characterized as the product of strategic judgment, ineffectiveness may be clear. Thus, the courts of appeals are in agreement that failure to conduct any pretrial investigation generally constitutes a clear instance of ineffectiveness.").

The district court found that Taylor "was in essence unrepresented when he made the crucial decision to plead to two charges of first-degree murder." (XX Appx. 5034 (citing *Taylor II*, 156 P.3d at 754[15] and *Harries*

[15] Finding trial counsel deficiently performed, but no prejudice. 156 P.3d at 755-56. Trial counsel was suspended from the practice of law as a

v. Bell, 417 F.3d 631, 638 (6th Cir. 2005)).) The court further found that "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." (XX Appx. 5003.) "[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. Trial counsel failed to take the steps necessary to make informed decisions and advise Taylor accordingly.

As the district court explained, trial counsel "did nothing to dissuade Mr. Taylor from believing that the bullets he fired had killed both women," conveying "his impression that the State's evidence, which he neither tested nor analyzed, overwhelmingly showed that Mr. Taylor was guilty." (XX Appx. 5034.) Trial counsel's ignorance was reflected in his testimony that at the time of the plea he believed the case against Taylor

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direct result of his actions in Taylor's trial. *See* https://bit.ly/3pJOrx9. *See also State v. Holland*, 876 P.2d 357 (Utah 1994) (describing counsel's unethical representation of Taylor in detail and noting that it had previously "entered an order disqualifying Levine from further participation in the Taylor case on the ground that Levine had breached the Utah Rules of Professional Conduct." *Id.* at 358-59).

"was '[v]ery, very strong,' that 'there was a lot of overwhelming physical evidence,' and that he discussed that with" Taylor. *Id.* Had counsel done an investigation into the state's case, there was a treasure trove of readily-available exculpatory evidence. Indeed, it is now clear given the district court's finding of actual innocence, that what trial counsel did not seek to discover included powerful evidence of innocence of the crimes to which Taylor pled guilty.

"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)). When a defendant enters a guilty plea, the Constitution requires that he do so voluntarily, knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences of the plea." *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). This critical requirement exists because a guilty plea not only deprives a defendant of a trial, it also implicates important constitutional rights. *Id.* It follows that where counsel does not provide informed advice as a result of his failure to provide constitutionally

adequate representation, the resulting guilty plea is unconstitutional.

As the court noted, trial counsel made the critical "mistake of assuming the State's evidence was conclusive proof of guilt." (XX Appx. 5024.) He did so because he did not conduct any meaningful investigation.

The district court also explained the impact trial counsel's deficient investigation had on his ability to provide effective advice to his client:

> [trial counsel] 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 [trial counsel] 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.

(XX Appx. 5025.)

Trial counsel's advice to Taylor was uninformed and compromised. Without making an investigatory effort and including the results in the decision-making discussions with Taylor, Taylor could not make a knowing and voluntary decision. Under these circumstances, the district court correctly concluded that Taylor's plea was neither voluntary or knowing.

B. Trial Counsel's Failure To Conduct An Investigation Of The Prosecution's Case, And To Meaningfully Advise Taylor Regarding His Options, Had A Prejudicial Impact On The Plea Process

Having concluded that trial counsel's representation was constitutionally deficient (XX Appx. 5028-36), the district court next had to determine if trial counsel's failures "affected the outcome of the plea process." *Hill*, 474 U.S. at 59. Looking to the ABA Guidelines and *Hill*, the district court held that "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." (XX Appx. 5036.) "But for [trial counsel'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." (XX Appx. 5037.)

Had trial counsel discovered the available exculpatory evidence, which the district court heard in this case, he would have been able to effectively advise Taylor as to his available options. By not doing so, he deprived Taylor of the opportunity to take that strong evidence of innocence into consideration. Taylor needed, and had the right to, the opportunity to counter his belief, fostered by trial counsel, that he fired

the fatal shots that caused the deaths of the victims. This failure certainly "affected the outcome of the plea process." *Hill*, 474 U.S. at 59.

The core of the Warden's arguments throughout these proceedings is his belief that the outcome of any trial for Taylor is a foregone conclusion; certainty that is premised solely on a theory of accomplice liability. The Warden did not, and now cannot, argue with any degree of credibility that the evidence against Taylor of capital murder as a principal is overwhelming or uncontested. Under his logic, if the accomplice case is strong, there is no reason to go to trial. That is not the law, nor does it reflect real life decisions made by informed defendants. And, the Warden's emphasis on predicting the outcome of any trial for Taylor is misplaced. In *Miller v. Champion*, this Court stated:

> Where a defendant alleges that his attorney's ineffective assistance led him to plead guilty, the test for prejudice is whether he can show that he would not have pled guilty had his attorney performed in a constitutionally adequate manner. *It is not necessary for the defendant to show that he actually would have prevailed at trial*, although the strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel.

262 F.3d 1066, 1068-69 (10th Cir. 2001) (emphasis added). While *Miller*

holds that evidence strength can be a factor, it is not necessarily determinative in deciding whether a defendant would have gone to trial. Any argument regarding the strength of the evidence against Taylor as a principal has been shattered. The Warden does not challenge that conclusion, and the strength of the evidence against Taylor as an accomplice is simply not relevant under *Schlup*.

Viewing this case through an accomplice-liability lens distorts the applicable law. The presumption the Warden relies upon is that if Taylor had gone to trial, or does go to trial in the future, he will be convicted of capital murder as an accomplice. But in determining prejudice under *Strickland*, that is not the question. "Where the alleged error of counsel is a failure to investigate or discover exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial" is the critical question. *Miller*, 262 F.3d at 1072. Defendants often face the difficult choice of whether to take a chance on going to trial where the risk of conviction is high or to enter a plea. They are constitutionally allowed to make their own choice, but to be constitutional that choice must be an informed one. Taylor's choice was not.

In determining prejudice, it is also important to consider the circumstances of the case. Subsequent to, but consistent with the holding in *Hill*, the Supreme Court held that where "counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," there is a presumption of prejudice. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000).

In *Lee*, the Supreme Court considered a case in which counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." 137 S.Ct. at 1965 (quoting *Flores-Ortega*, 528 U.S. at 483). The court held:

> When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."

Lee, 137 S.Ct. at 1965 (quoting *Flores-Ortega*, 528 U.S. at 482-83.

The *Lee* court rejected, in all but limited circumstances not applicable in Taylor's case, the contention that in order to establish prejudice in a guilty plea case, one must show that the defendant would

have been better off going to trial. *Lee* rebuts the Warden's arguments.

In this case, the district court focused on the charges to which Taylor pled: capital murder as a principal. It considered the impact the strong evidence of innocence of those charges would have had on Taylor, had he had access to that information, when he made his decision to plead guilty. The court noted that Taylor made his decision based on trial counsel's assessment of the case, thinking a guilty verdict was a foregone conclusion. Had Taylor had access to the powerful evidence of innocence, there is a reasonable probability that Taylor would have thought a trial was a risk worth taking. The district court correctly concluded that Taylor established prejudice based on trial counsel's failures.

CONCLUSION

The district court properly vacated Mr. Taylor's guilty plea and death sentence. This Court should affirm the district court's grant of a conditional writ of habeas corpus.

REQUEST FOR ORAL ARGUMENT

Oral argument is warranted in this case because it involves a death sentence and complex issues.

Respectfully submitted,

DATED: January 4, 2021

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)(i)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), having utilized Century Schoolbook 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 January 4, 2021, I served the above **APPELLEE'S RESPONSE BRIEF** 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.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

VON LESTER TAYLOR, Petitioner, v. SCOTT CROWTHER, Warden, Utah State Prison Respondent.	Case No. 2:07-CV-194 (TC) Judge Tena Campbell **DEATH PENALTY CASE** **PETITIONER'S SUPPLEMENTAL REPLY BRIEF ON ACCOMPLICE LIABILITY ISSUES** Hearing set for Oct. 25, 2016, at 10:00 am.

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I. The Question Asked by the Court and the Responses of the Parties

The parties disagree on the question presented by this Court for supplemental briefing. During the June 9th proceeding, the Court stated:

> I want briefing on whether in this case, whether the question of actual or factual innocence is really futile because [Mr. Taylor] pled guilty and he can't meet the standard so why take any more evidence, because legally it was satisfied by these charging documents and Utah law and factually there is no question. . . . What I need is more careful briefing, and this was good but there was a lot of it, but *on whether in my decision to grant or not grant a hearing on factual innocence, the fact that he pled guilty to this in response to the charge, whether that renders it moot because he pled and the evidence could show it.*

(Transcript of Hearing on June 9, 2016 (hereinafter "TR."), at 114 (emphasis added).)

It is clear to Mr. Taylor that when the Court discussed "the fact that [Mr. Taylor] pled guilty to this in response to the charge" and "because he pled and the evidence could show it" the "this" and "it" terms used by the Court were referencing accomplice liability. The Court ordered briefing seeking assistance from the parties on determining the precise charge to which Mr. Taylor entered a plea and what could have been charged. The Court then asked if the conviction does encompass accomplice liability, what effect, if any, would that have on a actual innocence analysis in this case under *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), *e.g.* would a *Schlup* analysis be futile.

In his supplemental brief, Mr. Taylor cited to the Court's discussion of the scope of the requested briefing and offered his interpretation that the question the Court was asking was "whether there is reason to take more evidence if, as Respondent argues, Utah's laws and procedures, the charging documents, and Mr. Taylor's plea, makes it impossible for him to establish actual innocence in his case." (Dkt. 253 at 2.) But Respondent's argument relies on false assumptions. As a result, Respondent's conclusion that Mr. Taylor can never establish actual innocence of his

conviction is patently incorrect. That is because neither the Utah laws and procedures, nor the circumstances of the plea, can be viewed to encompass a conviction of both capital murder and accomplice liability capital murder.

Mr. Taylor believes that the initial prong of a *Schlup* analysis is to determine the offense of conviction. Mr. Taylor submits that the offense of conviction is the critical issue; Respondent does not. In fact, Respondent stated seven times in his supplemental brief that what Mr. Taylor was convicted of is irrelevant to the *Schlup* actual innocence analysis. (*See* Dkt. 254 at 3, 14-17.) Mr. Taylor cannot comprehend how the question of actual innocence can ever be determined without reference to the offense of conviction. It seems a universal truth that one must first be found guilty of an offense to be able to argue one is not guilty of that offense.

Mr. Taylor seeks an evidentiary hearing to establish that he is not guilty of intentional capital murder. Respondent argues that a hearing is not needed because Mr. Taylor *could be* guilty of another offense, namely accomplice liability. Respondent does not explain how the possibility of being guilty of another offense precludes Mr. Taylor's right to seek to establish his actual innocence of his offense of conviction, namely capital murder.

Mr. Taylor pled to, and was convicted of, the offense of intentional capital murder. Respondent has conceded that Mr. Taylor "did not specifically plead guilty only as an accomplice" (Dkt. 254, at 16) and that "the State did not pursue a conviction based on accomplice liability." *Id.* at 14. These concessions are mere echoes of what was already patently clear: Mr. Taylor was only charged with, only pled to, and was only convicted of, the principal offense of capital murder. Mr. Taylor now seeks an evidentiary hearing so he can establish that he is actually innocent of the principal offense of capital murder. Mr. Taylor and his counsel are flummoxed by Respondent's position that Mr. Taylor should not be granted an evidentiary hearing on actual innocence because Mr. Taylor could have been convicted, if a host of speculative events ultimately took place, of an

offense the State theorizes was encompassed by the principal offense of capital murder.

The Court has asked if it would be futile to hold an evidentiary hearing on actual innocence under *Schlup* given the specific guilty plea and resultant conviction in this case. The question has two critical components: (1) identifying the offense that was the subject of the plea and resultant conviction, and (2) determining the effect, if any, of that conviction on the *Schlup* analysis. Instead of answering the first critical component of this question, to what offense did Mr. Taylor plead and of what offense was he convicted, Respondent argues that the answer is not relevant. Respondent then summarily concludes that a *Schlup* hearing is not necessary because Mr. Taylor is, or *could be*, guilty of some offense (namely accomplice liability capital murder), even if he did not know he pled to that offense. By taking this position (what Mr. Taylor was convicted of is irrelevant, therefore, there can be no *Schlup* analysis), Respondent has effectively refused to answer the question presented by the Court.

II. The Flaws in Respondent's Argument and Position

In order to deny Mr. Taylor a hearing on actual innocence pursuant to *Schlup*, Respondent needs this Court to determine that accomplice liability in Utah is not a separate offense from principal liability, but is automatically included in Mr. Taylor's underlying conviction. Mr. Taylor's Supplemental Brief established that accomplice liability is a separate offense and that a conviction of a principal offense does not encompass a conviction of accomplice liability. The jury can convict on one or the other. In response to the overwhelming case law presented by Mr. Taylor opposing Respondent's position, Respondent is now waffling on his clearly announced prior position before this Court that one can never be charged separately as an accomplice in Utah. He now submits that he "did not say that a defendant could never be charged as an accomplice." (Response in Opposition (hereinafter "Opp.") at 12.) This concession defeats Respondent's previous arguments that accomplice liability can never constitute a separate, chargeable offense in Utah.

Establishing a *Schlup* gateway so that an individual can pursue a miscarriage of justice exception to any defaulted constitutional claim, requires the petitioner to first establish that he is actually innocent of the offense for which he was convicted. To require a petitioner to establish that he is actually innocent of another offense for which he *could have been* convicted (but one he has not yet been convicted of) – *if* charged, and *if* tried and sufficient evidence presented, and *if* a jury was properly instructed, and *if* a jury finding of guilt was obtained – is illogical and inconsistent with the holding of *Schlup*. Moreover, it is inconsistent with American criminal justice values of due process and fairness.

Having established that accomplice liability can be charged separately under Utah laws and procedures, the primary question remains: To what offense did Mr. Taylor enter the plea for which he was convicted? Clearly the answer is capital murder, not accomplice liability. Respondent has stirred the debate over accomplice liability by claiming that despite never having been charged or convicted as an accomplice, this Court must believe that Mr. Taylor effectively pled to accomplice liability. Respondent argues that while "Taylor complains that he 'was not provided specific, or even adequate, notice that the State was pursuing a conviction based on accomplice liability[]' (doc. 246, p. 11)[,] [t]his is irrelevant, because *the State did not pursue a conviction based on accomplice liability*." (Opp. at 14, emphasis added.) By admitting that the State did not pursue an accomplice liability conviction, Respondent concedes that Mr. Taylor did not plead to, and was not convicted of, accomplice liability. That concession should end this detour and return us to our right path.

But despite the admission, Respondent wants this Court to deny a hearing because of what the State could have done if the case had gone to trial. Respondent's arguments are replete with speculation and revisionism. "*[I]f* Taylor had gone to trial, and *if* evidence was presented that showed Taylor was guilty as an accomplice, the State *could have* asked for a jury instruction on accomplice liability." (Opp. at 14, emphasis added.) In this, a death penalty case, the State asks this

Court to deny examination of the facts based on three levels of conjecture.

In mantra like fashion, Respondent states that Mr. Taylor cannot benefit from *Schlup* because he is guilty as an accomplice. (Opp. at 2-3.) Respondent argues further that Mr. "Taylor cannot establish factual innocence because, at the very least, he is guilty as an accomplice and could have been sentenced to death." (Opp. at 2.) This "woulda, coulda, shoulda" argument that Respondent has made so many times before is not supported by either legal authority or logic. Mr. Taylor was not charged as an accomplice. Despite this fact, and without authority, Respondent treats accomplice liability culpability as a lesser included offense to capital murder.

Accomplice liability is a separate charge for which Mr. Taylor was not convicted. As Mr. Taylor indicated in his Supplemental Brief, accomplice liability requires proof of elements separate and apart from the associated principal offense.

> In *D.B. v. State* [289 P.3d 459, 471 (Utah 2012)], the Utah Supreme Court concluded that "[c]harging an individual as a principal, standing alone,[1] does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *D.B.*, 289 P.3d at 471. . . . An individual who commits an offense with another is not automatically, or even necessarily, liable as both a principal and as an accomplice. *D.B.*, 289 P.3d at 465. This is because Utah Code Ann. § 76-2-202 "requires conduct different from direct commission of an offense before a defendant incurs accomplice liability." *Id.*

(Dkt. No. 253 at 12.)

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[1] Respondent argues that Mr. Taylor's claim that it is Respondent's position that it is "impossible to charge someone with accomplice liability in the state of Utah" constitutes a misrepresentation of what was said during the June 9, 2016, hearing. (Opp. at 11-12.) Specifically, Respondent claims that Mr. Taylor left out the crucial language "standing alone" in describing Respondent's position. Mr. Taylor did not offer a specific quotation from the transcript, nor does he have any interest in engaging in semantical gymnastics with Respondent. Mr. Taylor has merely described his interpretation of Respondent's statement before this Court to be an unequivocal statement that one cannot be charged separately as an accomplice in Utah. Additionally, in using this quotation from *D.B. v. State*, Mr. Taylor clearly presented the Court with the precise "standing alone" language Respondent claims he left out of his arguments. As stated in the earlier brief, the case law Respondent cites in this context actually supports Mr. Taylor's position, not Respondent's.

Because a conviction for accomplice liability under Utah Code Ann. § 76-2-202 "requires conduct different from direct commission of an offense," accomplice liability cannot be a lesser included offense of the principal offense, in this case capital murder. Mr. Taylor has not found any authority indicating that accomplice liability is considered a lesser included offense to capital murder under Utah Code Ann. § 76-1-402, which defines lesser included offenses. Utah Code states in pertinent part that, "[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*." Utah Code Ann. § 76-1-402(3) (emphasis added). Mr. Taylor was convicted only of capital murder based on his plea. Under the laws of Utah he was not, and could not have been, convicted of both capital murder and accomplice liability based on his plea. Respondent's argument that Mr. Taylor's plea to capital murder encompasses a conviction to accomplice liability is an impossibility under the laws of Utah.[2]

In addition to his erroneous argument that Mr. Taylor's plea and conviction encompass both the principal offense and accomplice liability, making an actual innocence hearing futile, Respondent also argues that *Schlup* and *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) hold that "[a]ctual innocence under the *Schlup* standard 'means factual innocence, not mere legal insufficiency.'" (Opp. at 3.) Mr. Taylor does not disagree with this proposition, but he submits that it is Respondent who is confusing proof of actual innocence with legal sufficiency. Respondent argues that there is sufficient evidence to *possibly* convict Mr. Taylor, *if* he were to be tried before a jury. Of course, the theoretically sufficient evidence could only be

[2] Petitioner's counsel have spent a considerable amount of time debating the precise scope of Respondent's arguments. Respondent's frequently repetitious, circular, and sometimes self-contradictory pleading, seems to argue both that accomplice liability is a lesser included offense that Mr. Taylor pled guilty to and that it is a separate offense that he could have been convicted of if he had been charged with it, therefore rendering any inquiry into his actual conviction moot. Petitioner's counsel were ultimately unable to definitively determine what exactly Respondent is arguing.

sufficient to convict Mr. Taylor of a different offense (accomplice liability) than his offense of conviction. The *Schlup* procedural bar bypass relates to the offense of conviction, not to the legal sufficiency of evidence relating to an offense that is a lesser or related offense to the offense of conviction.

A review of the holding in *Schlup* reveals yet another error in Respondent's analysis. In adopting the standard from *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), instead of the legal sufficiency standard from *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the court in *Schlup* stated:

> The *Jackson* standard, which focuses on whether any rational juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. First, under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments. Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. *Under Jackson, the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under Carrier, the use of the word "would" focuses the inquiry on the likely behavior of the trier of fact*.
>
> Indeed, our adoption of the phrase "more likely than not" reflects this distinction. Under *Jackson*, the question whether the trier of fact has power to make a finding of guilt requires a binary response: Either the trier of fact has power as a matter of law or it does not. Under *Carrier*, in contrast, the habeas court must consider what reasonable triers of fact are likely to do. Under this probabilistic inquiry, it makes sense to have a probabilistic standard such as "more likely than not." Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under *Carrier*.

Schlup, 513 U.S. at 330 (emphasis added).

Respondent has focused on what *could* occur, not on what *would* occur, given the available

evidence, including Mr. Taylor's new evidence of innocence. Under *Schlup*, the mere existence of sufficient evidence that *could possibly* convict Mr. Taylor of a different offense than his offense of conviction is irrelevant.

In any criminal prosecution, it is the State that holds all the cards. The prosecution decides what to charge, whether to offer a plea, and if offering a plea, what the parameters of that arrangement are. Yet, despite having unfettered power to have crafted the plea however it liked, the State now asks this Court to expand on the prosecution's deal because, in 20/20 hindsight, it was not broad enough to encompass the full range of offenses for which the Office of the Attorney General wishes Mr. Taylor had actually been charged with and convicted. That is a heavy weight that Respondent seeks to add to the prosecution's side of the scale of justice.

III. Allowing Mr. Taylor an Opportunity to Establish a Miscarriage of Justice Based on Actual Innocence Is Not an "Undeserved Windfall," Nor Is it "Morally Absurd"

Having failed to offer compelling arguments that the law in Utah requires the Court to accept the proposition that Mr. Taylor's current conviction is for both capital murder and accomplice liability for capital murder, Respondent now changes course and submits that allowing an evidentiary hearing in this case would be an "undeserved windfall" and a "moral absurdity." (Opp. at 3-4.) Respondent submits that if Mr. Taylor had gone to trial, and if he was convicted of either the principal offense (capital murder) or accomplice liability, he would not be entitled to an evidentiary hearing. (Opp. at 3.) That is patently untrue. If he had gone to trial, for each of the two victims, Mr. Taylor could only have been convicted of one offense (capital murder or accomplice liability), not both. If he had been convicted of capital murder, the same offense to which he entered a plea of guilty and currently stands convicted, he would be entitled to an evidentiary hearing on actual innocence if he presented constitutionally sufficient evidence meeting the *Schlup* standard for granting a hearing. Under either circumstance, conviction of capital murder at trial or based on a

plea, he is entitled to such a hearing under *Schlup* and *Bousley*.

Mr. Taylor fails to see where he is the beneficiary of a "windfall." If there is a windfall, it is the State's. Mr. Taylor pled guilty after he was falsely led by the State and his trial counsel to believe he killed someone when he did not. Mr. Taylor has challenged the constitutionality of his conviction and sentence, in part based on the fact that his disinterested trial counsel did not conduct a sufficient investigation, did not accurately inform him regarding his plea, and handed him over to the State on a silver platter on undeserving charges of intentional murder. Given the procedural posture of this case, and the current laws governing habeas corpus review, Mr. Taylor has a constitutional right to have an opportunity to establish his innocence of capital murder (his offense of conviction) so that his constitutional claims can be addressed on the merits.

The State relies on *State v. Petry*, 273 S.E.2d 346, 166 W. Va. 153 (1980) in support of his position regarding the "moral absurdity" of a defendant being "able to successfully defend against an indictment as a perpetrator by proving she was an aider and abettor." Setting aside the rich irony of the State citing to a West Virginia state case after so often scoffing at Petitioner's citations to Federal Courts of Appeal other than the Tenth Circuit, in Ms. Petry's case the court actually reversed the circuit court and remanded the case "with directions to enter a judgment of acquittal" because the state's common law "required that aiders and abettors be indicted as such." *Petry*, 273 S.E.2d at 352. Thus, if *Petry* has any persuasive value here, it is to support Mr. Taylor's arguments.

The moral absurdity discussed in *Petry* referenced the "ludicrous point . . . that the defendant can successfully defend against an indictment as a perpetrator by proving she was an aider and abettor and vice versa." *Id.*, 273 S.E.2d at 349. Mr. Taylor is doing no such thing. It is the State that is obsessed with Mr. Taylor's alleged accomplice liability. Mr. Taylor is not seeking to avoid conviction by arguing he was an accomplice, he is challenging the conviction he has. This is precisely what *Schlup* requires.

IV. Conclusion

Mr. Taylor has shown that the arguments made by Respondent in the prior hearing before this Court regarding the nature of Mr. Taylor's conviction and its effect on the *Schlup* analysis in this case are incorrect and inapplicable. Therefore, for the reasons articulated in his previous pleadings and at the June 9, 2016 argument before this Court, an evidentiary hearing pursuant to *Schlup* should be granted.

DATED: September 21, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2016, I electronically filed the foregoing document described as **PETITIONER'S SUPPLEMENTAL REPLY BRIEF ON ACCOMPLICE LIABILITY ISSUES** with the Clerk of the Court using the CM/ECF system which sent notice of said filing to:

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