

IN THE
Supreme Court of the United States

LAMONT MCKOY,

Petitioner,

v.

TODD ISHEE, SECRETARY, NORTH CAROLINA
DEPARTMENT OF ADULT CORRECTION,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

REPLY BRIEF

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In reply to the Brief in Opposition filed by Respondent, Petitioner submits the following and respectfully asks the Court to either grant his Petition to consider the important legal issues raised or vacate the clearly erroneous decision below and remand the case for further proceedings that comply with well-established law.

INTRODUCTION

The State of North Carolina has denied Petitioner Lamont McKoy his most basic constitutional rights for more than thirty years. As a result of compounding *Brady* violations, the State has prevented any state court from considering the totality of the evidence now known, a failure not remedied by the courts below. Petitioner asks this Court to correct the fundamental misapplication of law by the Fourth Circuit below so that his claims can finally be fully considered in the manner required by this Court's controlling precedent.

Respondent's Opposition Brief makes no legal argument in response to either the first or second Issues of Law raised by Petitioner. Instead, perhaps recognizing the Fourth Circuit's misapplication of 28 U.S.C. § 2254(e)(1) and this Court's precedent, Respondent purports to offer his own ad hoc analysis that the court below should and could have concluded if it considered the evidence. But the constitution and this Court's precedent secure Petitioner's right to have the court below assess his claims.

Respondent tries to dismiss this Petition as a complex factual dispute unworthy of this Court's attention. This is not the case. Petitioner does not ask this Court to resolve facts; rather, Petitioner asks this Court to hold the court below to the legal standards required by Section 2254(e)(1), a critically important statutory provision establishing the final chance of petitioners to obtain habeas relief from wrongful convictions. Respondent's decidedly one-sided

presentation of what he claims are the relevant facts is nothing more than a ruse to distract this Court from the fact that the Fourth Circuit misapplied Section 2254(e)(1) to avoid the holistic review of the evidence as required by the actual innocence gateway, and failed to make a probabilistic determination of how a reasonable juror would evaluate to the totality of evidence.¹ *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

REASONS FOR GRANTING THE WRIT

I. Respondent Mischaracterizes the Role Section 2254(e)(1) Played in the Fourth Circuit’s Decision in Order to Avoid Discussion of the Fourth Circuit’s Error of Law.

Respondent glosses over the indisputable reality that the Fourth Circuit committed legal error in applying Section 2254(e)(1) deference to factual issues that were *not* determined by the state court (as required by the statute). That is, no state court made a factual determination with respect to whether Petitioner confessed or made any admission of guilt. In fact, the jury returned a general verdict without a factual determination (JA 1775-76), and the North Carolina Supreme Court expressly stated that it was *not* making any factual determination with respect to whether Petitioner’s statements constituted an admission. *State v. McKoy*, 417 S.E.2d 244, 247 (N.C. 1992) (“[I]t was solely for the jury to determine whether [Petitioner] in fact had made any admission.”); (*see* Pet. Br. at 18-20.)

Similarly, no state court made a factual determination concerning whether Williams, the State’s key witness, was credible in light of the previously suppressed new evidence. Despite

¹ While this Reply highlights some of the most egregious factual omissions in Respondent’s Opposition, Petitioner has not endeavored to point out every instance where evidence in the record refutes Respondent’s self-serving analysis. However, the bottom line remains the same: the State of North Carolina presented a case at trial that the totality of the evidence now shows is factually impossible. Among other things, law enforcement officers were present at the very location and at the very same time that the State told the jury Petitioner committed a murder. In light of the current record, no reasonable juror would, find Petitioner guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 329.

that, the Fourth Circuit afforded the jury’s *verdict* deference under § 2254(e)(1) on the issue of Williams’s credibility, even though neither the state court nor the jury made any determination on that issue. A general guilty verdict from a state court jury cannot be deemed a binding factual finding on any issue before a federal court. (*See* Pet. Br. at 19-20); *see also Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (Section 2254(e)(1) “pertains only to state-court determinations of factual issues, rather than decision.”). To hold otherwise would effectively bar federal courts from making the required assessment when confronted with new evidence the state court jury was prevented from considering. Because there were no determinations on the key factual issues now raised by the Petitioner by any state court, the Fourth Circuit improperly applied § 2254(e)(1).

Respondent suggests that “Petitioner overstates the role § 2254(e)(1)—mentioned only once by the Fourth Circuit—played in the opinion.” (Resp. at 20.) To the contrary, the Fourth Circuit’s opinion fundamentally relied on § 2254(e)(1). The Fourth Circuit expressly and improperly presumed facts against Petitioner under § 2254(e)(1) (“such a determination of fact must ‘be presumed to be correct’”) and demanded clear and convincing evidence to overcome that presumption (placing “the burden on McKoy of rebutting the presumption by ‘clear and convincing evidence’”). (*E.g.*, Pet. Br. at 9 (quoting § 2254(e)(1)).) The reason § 2254(e)(1) is “mentioned only once by the Fourth Circuit” is because the Fourth Circuit’s superficial analysis only consists of a few brief sentences that improperly and summarily accords deference where no factual determination exists in the record. (Pet. Br. at 9a–10a.)

Even if the Fourth Circuit was correct in determining that deference under § 2254(e)(1) was appropriate, which Petitioner strenuously maintains *it was not*, the court still failed to consider whether the newly-discovered evidence rebutted the presumptive deference of

Section 2254(e)(1) by clear and convincing evidence. The Fourth Circuit’s abbreviated analysis of the two key factual issues—i.e., what Petitioner’s statements to the police constituted and whether Williams was credible—failed to grapple with any of the new evidence; evidence the State suppressed for decades. The Fourth Circuit simply made a series of bare bones summary statements that these two issues were determined in state court. This error is significant, especially given that judges on the Fourth Circuit panel expressed serious concerns that Petitioner’s statements were not a confession. (*See, e.g.*, <https://www.ca4.uscourts.gov/OAarchive/mp3/20-6598-20221028.mp3> at 30:26–30:35 (last accessed August 16, 2023).)²

The Fourth Circuit also failed to consider the obvious impact that the new evidence of the police presence at the scene, at the same time, of the alleged shooting would have had on the jury’s assessment of Williams’s credibility. (Pet. Br. at 23.) The police presence directly contradicts Williams’s testimony. The impact of that evidence is compounded by new evidence that the arcade, which was an anchor of Williams’s testimony, was closed at the time of the alleged shooting. (*Id.*) Williams unequivocally testified that he and the victim walked into the arcade and saw people playing pool. (JA 73, 1506.) The jury never considered any of this new evidence, and the Fourth Circuit failed to consider it as well when it improperly accorded deference to the jury verdict under Section 2254(e)(1).

² That concern is buttressed by the record, which indicates that the lead investigator explicitly stated that he did not consider Petitioner’s statements to be incriminating. (Pet. Br. at 21; JA 154.)

II. Respondent Ignores Petitioner’s Due Process Legal Argument and Offers a Conclusory, Incomplete Factual Argument that Due Process was Not Violated During Petitioner’s State Court Post-Conviction Proceedings.

Respondent disregards Petitioner’s legal argument, and this Court’s precedent, that no deference is warranted when a state court’s habeas decision is undermined by a due process violation. (See Pet. Br. at 24-28); *see also Panetti v. Quarterman*, 551 U.S. 930, 947-49, 952-53 (2007). Thus, Respondent implicitly admits legal error below if Petitioner’s due process rights were violated. To hold otherwise, and accord deference even when a serious due process violation tainted the state court’s decision, would improperly incentivize state courts to disregard fundamental constitutional rights and protections “for the sake of convenience, expediency, or otherwise.” *Fahy v. Horn*, 516 F.3d 169, 183 n.15 (3d Cir. 2008). Respondent does not address this argument, thereby conceding that a state court process hindered by a due process violation is not entitled to deference under Section 2254(e)(1). *See, e.g., Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001) (“We need not address the first of [defendant]’s arguments as [plaintiff] essentially concedes in [it] his response brief.”); *see also Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990) (“A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority in the face of contrary authority, forfeits the point.” (citation omitted)).

Rather than address Petitioner’s legal arguments, Respondent attempts to confuse and downplay the underlying issues by presenting an incomplete factual record in an apparent effort to persuade this Court that Petitioner’s due process rights were not violated. Respondent’s misdirection is wholly unpersuasive. The fact remains that the State withheld the two original

Crimestoppers tips implicating Talley for more than two decades while simultaneously arguing that there was insufficient evidence connecting Talley to the crime.³

Respondent's claim that no due process violation occurred because Petitioner was aware of the facts underlying his claim is directly contradicted by the record. (See Resp. Br. at 22.) Petitioner did not become aware of the tips inculpating Talley until 2018, more than twenty-five years after he was wrongfully convicted. That fact is confirmed by, among other things, the unrebutted sworn testimony of Petitioner's trial counsel who unequivocally testified that the first time he ever heard Talley's name was after Petitioner was convicted. (JA 923.) Additionally, in 1995, after Petitioner was convicted and incarcerated, he wrote to the Fayetteville Police Department ("FPD") about rumors of Talley's involvement in the murder for which Petitioner was convicted, and the FPD responded with a memo stating that its file did *not* include the name William Talley or his alias "Rat-Rat." (JA 1901.) That fact directly refutes Respondent's assertion that Petitioner had this information because of his "open access to the file." (Resp. Br. at 22.)

The fact that the two tips were not disclosed to Petitioner before trial is further corroborated by Petitioner's post-conviction counsel testimony that the FPD investigative file she received from the district attorney's office, and later personally reviewed at the FPD, did not include the tips. (JA 2043-44.)

³ The impact of the due process violation on the state post-conviction proceedings is evident from the plain text of the state court's opinion after a preliminary hearing on Petitioner's first motion for appropriate relief—"That the alleged new evidence of a shooting similar to the one for which the defendant was convicted would not be beneficial to the defendant in that the only similarity to the defendant's case is that a shooting at an automobile took place at some unknown date and time in the City of Fayetteville." (JA 2600.) If the tips had been disclosed, Petitioner could have made the necessary leap for the state court to grant his claim.

Respondent now attempts to suggest that prior jailhouse rumors of Talley’s responsibility for the murder and generic statements about “government employees” responding to the power outage on Haymount Hill excuse the suppression of evidence during state post-conviction proceedings. (Resp. Br. at 22.) This is disingenuous. Throughout the state-court post-conviction proceedings, Petitioner spent decades requesting and searching for evidence in the State’s file connecting Talley to Myron Hailey’s death and establishing that Williams, the State’s key purported eyewitness, testified falsely at his trial. While the State vehemently denied any connection between Talley and Hailey’s death, it concealed evidence directly establishing this link in its own files.⁴ (See Pet. Br. at 24-28.)

The State also repeatedly argued that the jury resolved the issue of Williams’s credibility, while concealing critical evidence that counters his trial testimony. It is difficult to think of a more obvious due process violation. Without the tips, the state court could never properly consider Petitioner’s claims, and deference under Section 2254(e)(1) is therefore inappropriate.

III. Respondent Wrongly Claims that a Holistic, Totality of the Evidence Examination was not Required and Falsely Claims that the Fourth Circuit made the Requisite Assessment.

Respondent ignores the fact that this Court in *House v. Bell* reaffirmed that the *Schlup* inquiry “requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record” and that this can “include consideration of the credibility of the witnesses presented at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks

⁴ The State instead, as it has repeatedly done in this case, sought to reap the rewards of its suppression by arguing that the evidence of Talley’s involvement was not beneficial to Petitioner because “unfortunately here in Fayetteville, there has been more than one occasion when somebody in Groveview Terrace has shot in [sic] a car that pulled away that didn’t pay for their drugs or snatched them,” (JA 964), and arguing that it was not new evidence because “it’s basically the same information that Mr. McKoy has through his prison contacts.” (*Id.* at 963.)

omitted). A *Schlup* claim is not itself a constitutional claim, but, instead, a procedural gateway for a federal habeas court’s review of constitutional claims. Respondent does not identify any basis in this Court’s precedent for arguing that Section 2254(e)(1) applies in this procedural context. (See Resp. Br. at 17-20.) The Circuit Court decisions cited by Respondent are not binding on this Court and do not negate this Court’s precedent. (See *id.* at 16-17.)

Separate and apart from its legal arguments regarding Section 2254(e)(1)’s application in this context, Respondent argued in the face of reality that the Fourth Circuit “reviewed the probabilistic impact of the overall, newly supplemented record as required by *Schlup*.” (*Id.* at 21; *see also id.* at 20-22.) This is clearly wrong. The Fourth Circuit expressly and improperly presumed facts against Petitioner (“such a determination of fact must ‘be presumed to be correct’”) and demanded clear and convincing evidence to overcome that presumption (placing “the burden on McKoy of rebutting the presumption by ‘clear and convincing evidence’”). (*E.g.*, Pet. Br. at 9 (quoting § 2254(e)(1))). Even under its flawed purported analysis, the Fourth Circuit failed to explain why Petitioner’s evidence does not meet that standard, and made no effort to weigh the totality of evidence for the probabilistic determination of what a reasonable juror would do. (See *id.* at 9-10.) No court in this case has ever made a probabilistic determination based on the totality of the record, as required by *Schlup*.

To compensate for that failure, Respondent undertakes to craft its own *Schlup* analysis. (Resp. Br. at 23-31.) However, *Schlup* does not permit Respondent to perform the role of a federal court in the gateway process. Among other things, Respondent gives insufficient weight to the accounts of ten people who witnessed the shooting that incriminated Talley in the murder (*compare* Resp. Br. at 29-31, *with* Pet. Br. at 8-9), and to the evidence that police were present at

the exact location and time that Williams, its key purported eyewitness, said the shooting took place (*compare* Resp. Br. at 27, *with* Pet. Br. at 22-23).

Respondent's brief also includes numerous other factual errors and omissions, some of which are set out below.

- Respondent argues that "Petitioner failed to establish a motive for Williams to lie." (Resp. Br. at 23-24.) At trial, a private investigator for Petitioner testified that Williams told him that "the police promised [Williams] a thousand dollars." (JA 1710, 1714.) Later, Williams's fiancée swore that Williams admitted to her that he had given false testimony in exchange for \$1,000. (JA 315-16.) And evidence shows that Robert Parker, an FPD officer who investigated Hailey's murder, protected Talley's Court Boys gang from police investigation. (Pet. Br. at 34-35.)
- Respondent argues that Williams underwent two polygraphs that corroborated his account. Not only are polygraphs not valid as Respondent uses them, *see United States v. Scheffer*, 523 U.S. 303, 309 (1998) ("there is simply no consensus that polygraph evidence is reliable"), but the results were, in fact, "inconclusive." (JA 1785-86.)
- Respondent cites statements or police summaries of "statements" from four individuals. (Resp. Br. at 25-26.) Each statement is discredited by the record. Notes from the underlying police interview make clear that James Mitchell said that he was not with Petitioner and did not witness Petitioner shoot at anyone. (*Compare* JA 149, *with* JA 106-107.) Charmaine Evans, only sixteen at the time, recanted this statement the day after he gave it, explaining that he gave a false statement after significant police pressure, (JA 2000-2001), and subsequently wrote multiple letters and testified at the evidentiary hearing stating that that his statement was false (JA 325-326; JA 2012). Charles Williams explained that he "only knew what he read in the paper." (JA 98.) And, Kibby ("Kubbie") Johnson, who never provided a written statement, originally stated that Dennis Fort, and not Petitioner, was involved in Hailey's shooting. (JA 87-88.)
- Respondent argues that Hailey must have been shot in the Haymount Hill area (where Williams placed the shooting) because Hailey's vehicle was moving east at the time of the accident. (Resp. Br. at 1.) But, the magistrate judge concluded that "there is insufficient evidence in the record collected by law enforcement at the time of this investigation to say anything about the direction of that vehicle." (JA 2324.) Additionally, the magistrate judge critiqued Respondents for "moving the marker" on this issue as he "has heard from the Respondent, first, that tire tracks don't lie ... And, of course, now, their expert testifies, and suddenly we're not relying anything on tire tracks. The tire tracks are meaningless," as they were not even from Hailey's Honda. (*Id.*)

- Respondent's summary of Petitioner's statements to Ballard during the traffic stop omits crucial statements detailed in the Petition. (*Compare* Resp. Br. at 6-7, with Pet. Br. at 5-6, 20-21.) It also omits key context, including that Ballard himself believed there was "minimal evidence" in the case following his exchange with Petitioner. (*Id.*)
- Respondent argues that the arcade could have "reopened" after it closed. (Resp. Br. at 28.) There is no evidence this happened; the record is clear that the arcade was closed at the time of the alleged shooting. (Pet. Br. at 5.)

It is not the role of this Court to resolve these facts. Petitioner asks this Court to grant certiorari, vacate the clearly erroneous decision below, and remand the case to the Fourth Circuit for further proceedings consistent with the correct application of this Court's precedent.

CONCLUSION

The deprivation of Petitioner's constitutional rights is truly exceptional. The State of North Carolina suppressed evidence for more than two decades which ensured that no court—neither state nor federal—ever considered Petitioner's claims in light of all the evidence now known. The Court should either grant the Petition and consider the important legal issues raised or reverse and remand the case so that the Fourth Circuit can properly consider Petitioner's constitutional claims in accordance with this Court's precedent.

Respectfully submitted,

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