No. 23-651

In the
Supreme Court of the United States

JOHN LOWERY,
Petitioner,
v.
MIKE PARRIS, WARDEN,
Respondent.

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

BRIEF IN OPPOSITION

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
Counsel of Record
500 Dr. Martin L. King Jr. Blvd.
P.O. Box 20207
Nashville, TN 37202-0207
John.Bledsoe@ag.tn.gov
(615)741-4351

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the petitioner, to overcome the untimeliness of his habeas corpus petition, can show his actual innocence based upon partially-recanted and new-witness testimony when (1) the state trial court reasonably rejected the credibility of the recanting testimony from two trial witnesses, and (2) testimony from a new witness who did not even see the offense does not establish that is it more likely than not that no reasonable juror would have convicted the petitioner.

LIST OF DIRECTLY RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.2, the respondent supplements the list of proceedings provided by the petitioner under Supreme Court Rule 14.1(b)(iii) with the following matters:

State v. Lowery, No. 62316 (Knox Co. Crim. Ct. Jun. 29, 1998) (judgments of conviction for first-degree murder and attempted first-degree murder).

State v. Lowery, No. E1998-00034-CCA-R3-CD (Tenn. Crim. App. Jun. 12, 2000), *perm. app. denied* (Tenn. Feb. 20, 2001) (opinion affirming convictions on direct appeal).

Lowery v. State, No. 98047 (Knox Co. Crim. Ct. Jun. 27, 2012) (order denying petition for writ of error coram nobis).

Lowery v. State, No. E2012-01613-CCA-R3-PC (Tenn. Crim. App. Sep. 4, 2013) (no perm. app. filed) (opinion reversing order denying petition for writ of error coram nobis and remanding for evidentiary hearing).

Lowery v. State, No. 98047 (Knox Co. Crim. Ct. Feb. 23, 2016) (order denying petition for writ of error coram nobis on remand).

Lowery v. State, No. E2016-00587-CCA-R3-CD (Tenn. Crim. App. Jul. 19, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017) (opinion affirming order denying petition for writ of error coram nobis on remand).

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INTRODUCTION

At trial, William Boatwright and Malik Hardin unequivocally identified the petitioner as the one who shot Boatwright and Vincent Hartsell outside Kirk's Market in Knoxville, Tennessee, on October 8, 1996. More than a decade after the trial, the petitioner sought collateral review in state court based upon affidavits by Boatwright and Hardin partially recanting their identifications of the petitioner. He also relied upon an affidavit by Loretta Turner, a store clerk who swore that she did not see the petitioner the morning of this offense. The state court conducted an evidentiary hearing, at which all three witnesses testified. Boatwright testified that he did not see the person who shot him and, thus, could not say whether the petitioner was the shooter. Hardin testified that the person who shot and killed Hartsell resembled the petitioner. But after having seen the petitioner in prison in the intervening decade, Hardin had come to believe, with 100 percent certainty, that the petitioner was not the shooter. After reviewing the live testimony and demeanor of the witnesses, the trial court concluded that Boatwright and Hardin were vague and untruthful in their new testimony, and the court rejected its credibility. It further concluded that Turner, who ducked behind the counter and did not see the shootings, appeared to be truthful but gave limited testimony that was cumulative to other trial evidence that the petitioner was not present.

The petitioner sought federal habeas corpus relief and relied upon this new testimony to show his actual innocence and excuse the untimeliness of his petition under *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Both the district court and the Sixth Circuit concluded that the petitioner could not overcome the deference that applies on federal habeas corpus review to state-court factual findings, especially the credibility determinations made upon Boatwright's and Hardin's live testimony. They further concluded that Turner's testimony was insufficient to prove actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995).

In seeking a summary reversal, the petitioner asks this Court to engage in the rare exercise of error correction. And he does so by making the extraordinary request that this Court reject the witness credibility determinations made by the state trial court upon its own view and consideration of the live testimony by Boatwright and Hardin. With no proper basis presented to overcome the trial court's credibility determinations and with insufficient proof from Turner to show that the petitioner is actually innocent under the high standard required by *Schlup*, there is no error to correct, and the Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

I. State Trial Proceedings

In the early morning on October 8, 1996, in Knoxville, Tennessee, the petitioner, John Bradley Lowery, reported to law enforcement officers that three armed masked men robbed him of his belongings and stole his vehicle. (R.E. 6-1, PageID# 97-101.) Later that morning shortly after 6:30 a.m.—and less than three blocks from where the petitioner made this robbery report—James Bowman stopped at Kirk's Market and stayed in the car while his stepdaughter went into the store. The petitioner got into Bowman's vehicle and told Bowman that he had been robbed. (R.E. 6-1, PageID# 155-156, 166-167.) Nearby, Bowman saw the petitioner's brother, Fred Lowery, and the petitioner's cousin, Jay Harris. During this conversation, William Boatwright and Vincent Hartsell drove up, and the petitioner reported to Bowman that they were "the guys that robbed him." Bowman left the store with his stepdaughter. (R.E. 6-1, PageID# 167-170, 173.)

Boatwright and Hartsell went to Kirk's Market that morning to buy food. Boatwright went inside while Hartsell remained in the car. Once in the store, Boatwright saw the petitioner leering at him, and he asked the petitioner "what was he staring at." The petitioner did not respond and walked outside. Boatwright made his purchase and exited the store, at which time Jay Harris called him to the side of the building for a brief conversation. At that point, Boatwright heard a gunshot, and when he turned around, he saw the petitioner running toward him with

a handgun. Boatwright fled into the store, and as he did so, the pursuing petitioner shot him in the chest. Boatwright then crawled behind the counter. The petitioner "was about to come in the store" until an employee began screaming, at which time the petitioner fled. (R.E. 6-1, PageID# 104-108.)

Immediately before the shootings, Malik Hardin was inside the store and saw the petitioner and Boatwright arguing. After Hardin left the store, as he was backing his vehicle out, he saw the petitioner motioning as if shooting, toward a car. Hardin did not hear any shooting because of the music from his radio. He saw the petitioner turn around with a gun in his hand. He saw the petitioner reach through the door of the store and shoot into the store. Hardin stopped, got out, and saw Hartsell hanging outside his vehicle while holding his neck and bleeding onto the ground. (R.E. 6-1, PageID# 131-132, 135-136, 140-141.)

Boatwright exited the store and discovered that Hartsell had been shot in the neck. He left in Hardin's vehicle while Hardin stayed. Boatwright went to a relative's house and, from there, was transported to the hospital. (R.E. 6-1, PageID# 109-110, 133.) Later ballistics testing indicated that a shell casing found in the victims' car and a shell casing found just inside the store were fired from the same gun. (R.E. 6-1, PageID# 149-151, 177-179.)

Detective David Ridenour arrived at the hospital around 7:00 a.m., and Boatwright told him that "J.B." shot both him and Hartsell. (R.E. 6-1, PageID# 128-129; R.E. 6-2, PageID# 261-264.) Boatwright stated

that he did not know "J.B." but that Hartsell did.[1] Detective Ridenour was unable to speak with Hartsell because he was intubated and undergoing emergency medical procedures. (R.E. 6-1, PageID# 262-263.) Hartsell died from his injuries the next day. (R.E. 6-1, PageID# 194-196.)

Once at the police station after speaking with Boatwright, Detective Ridenour discovered the overnight report of a nearby robbery against "J.B. Lowery," and the suspect descriptions in that report "pretty much matched" those of Boatwright and Hartsell. The detective interviewed Bowman, who reported that the petitioner was at the store that morning. The detective then developed a photographic lineup that included the petitioner. (R.E. 6-2, PageID# 261-264.) From that lineup, Bowman identified the petitioner as the one in his car. Detective Ridenour showed the same lineup to Boatwright and Hardin, and each identified the petitioner as the shooter. (R.E. 6-1, PageID# 109-111, 115, 127, 133-134, 141, 166-167; R.E. 6-2, PageID# 261-264.)

Both Boatwright and Hardin unequivocally identified the petitioner at trial as the shooter. (R.E. 6-1, PageID# 106-107, 129, 132, 134, 140-141.) This exchange reflects the certainty of Boatwright's identification of the petitioner at trial:

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[1] Boatwright testified that "somebody had told me his name was J.B." Defense counsel objected to the admission of what someone told him, and the trial court sustained the objection. Boatwright confirmed that he reported to the police that it was "J.B." who shot him. (R.E. 6-1, PageID# 128-129.)

Q. Okay. And it's my understanding you said you ran into John Lowery or somebody that looked like him?

A. No. I ran into him.

Q. You ran into John Lowery?

A. Yes, sir.

. . . .

Q. Okay. Now, you said that John Lowery shot you—

A. Yes, sir.

Q. —at Kirk's Market that morning around 6:40 is what you testified to; is that right?

A. Yes, sir.

Q. Okay, How do you know it was John Lowery?

A. 'Cause I seen his face.

Q. You seen his face?

A. Yes, sir.

(R.E. 6-1, PageID# 121-122.)

Mary Santos testified at trial that she was romantically involved with the petitioner's uncle, Walter Lowery. According to Santos, the petitioner and Hartsell sold drugs for Walter. In one transaction that occurred around late spring or early summer of 1996, Hartsell delivered to a buyer drugs received from Walter and the petitioner. That buyer later reported to

Walter that the purported drugs were just powdered milk. The petitioner told Walter that he would not allow Hartsell to get away with this, and he stated on several occasions that he would put a bullet in Hartsell. Walter agreed to forgive the petitioner's drug debt if the petitioner killed Hartsell. (D.E. 6-1, PageID# 182-188.)

In his defense, the petitioner presented witness testimony challenging Santos's credibility, as well as alibi witness testimony. At the conclusion of trial, the jury convicted the petitioner of first-degree premediated murder and attempted first-degree premeditated murder, and he received consecutive sentences of life imprisonment and 25 years' confinement. The judgments were affirmed on direct appeal. *State v. Lowery*, No. E1998-00034-CCA-R3-CD, 2000 WL 748103 (Tenn. Crim. App. Jun. 12, 2000), *perm. app. denied* (Tenn. Feb. 20, 2001).

II. State Collateral Review

A decade later, the petitioner filed in the convicting court a petition for writ of error coram nobis seeking a new trial based upon (1) affidavits from Boatwright and Hardin recanting their respective identifications of the petitioner as the perpetrator, and (2) an affidavit from Loretta Turner that she was in the store during the shootings and that she did not see the petitioner there. The trial court initially dismissed the petition. On appeal, the Tennessee Court of Criminal Appeals vacated the dismissal and remanded with instructions to conduct an evidentiary hearing on the petition. *Lowery v. State*, No. E2012-01613-CCA-R3-PC, 2013

WL 4767188 (Tenn. Crim. App. Sep. 4, 2013) (no perm. app. filed).

On remand, Boatwright testified at the evidentiary hearing and recounted the events of the offense in a way that largely matched his trial testimony. However, he testified that he did not see who shot him, that he does not know who shot him, that he does not know whether the petitioner was the shooter, and that he did not see the petitioner at the store. Boatwright explained that, while in his hospital room on the day of the offense, law enforcement officers showed him a photographic lineup and urged him to identify the petitioner by their pointing to his photo. He did not do so. According to Boatwright, he did not know the petitioner and had never seen the petitioner before. He did not learn the petitioner's name until he came to court, and he likely first heard the name "J.B." while in jail. (R.E. 6-16, PageID# 922-927, 929, 944-945. 950.) Boatwright did not recall meeting briefly with Detective Ridenour in the trauma unit shortly after his arrival at the hospital, and he did not recall telling the detective that "J.B." shot both him and Hartsell. (R.E. 6-16, PageID# 935-936, 939, 942.)

According to Boatwright, the officers returned a second time, interviewed him, and threatened to charge him with robbery and murder. At that point, he implicated the petitioner as the shooter. As he explained:

> Yeah. But it was only because they told—this was said to me, well, we know you committed an aggravated robbery, you know, so. . . I'm like, I didn't commit no robbery. They're like, well, you

> committed the robbery, murder. You did the murder. I'm like, I didn't do no murder. So they like, well, is this the person that did it? So I—yeah, he the one did it. Just to keep them, you know what I'm saying, from, I guess, charging me for the murder charge.

(R.E. 6-16, PageID# 926.) He allegedly lied to the officers and at trial because of his fear that he would be charged with robbery against the petitioner and with murder against Hartsell. (R.E. 6-16, PageID# 926-928, 934, 937-938, 941, 954-955.) "[E]verything that [he] said was made up just to keep them from charging [him] with this murder charge." (R.E. 6-16, PageID# 934.) The bulk of Boatwright's evidentiary hearing testimony focused on his interest in avoiding a murder charge; however, he had no explanation for how law enforcement officers conceivably could have charged him for Hartsell's murder. (R.E. 6-16, PageID# 938-939.)

Boatwright explained that he signed an affidavit in 2012 recanting his identification of the petitioner while confined at the South Central Correctional Facility in Clifton, Tennessee. He stated that he did not know the petitioner before doing so and that he has never talked to the petitioner about this case. However, he acknowledged that, at the time of the hearing, both he and the petitioner were confined together at the Morgan County Correctional Complex in Wartburg, Tennessee. (R.E. 6-16, PageID# 928-929, 932-933, 953.) He has never been confined with Hardin or talked about this case with him. (R.E. 6-16, PageID# 933.)

Boatwright acknowledged that he had heard that "snitches" in prison "get stuff done to them" or are ostracized. At the time of his evidentiary hearing testimony, he was on his third term in prison. He was five years into a 49-year sentence, with parole unavailable for at least another 30 years. (R.E. 6-16, PageID# 929-931.)

Hardin testified about the events in this offense, and his testimony generally matched his trial testimony except that he recanted his identification of the petitioner as Hartsell's shooter. (R.E. 6-16, PageID# 955-959, 970-972.) Once law enforcement officers arrived, they asked who committed the shooting, and they stated that he either did it or knew who did it. At the time, he was released on bond, and he was concerned about being charged. However, he was not threatened with prosecution. He was arrested and transported to jail, where he was questioned. He was also shown a photographic lineup, and the officers pointed to a particular photo, which "kind of resembled the guy who [he] had seen running from the car with the gun." He told the officers that he was not sure but that the photograph resembled who he saw. The officers directed him to initial that photo, and he complied. He later testified at trial that the petitioner was the shooter. (R.E. 6-16, PageID# 959-961, 969-970.)

However, after having seen the petitioner up close and having stood next to the petitioner, he is now 100 percent certain that the petitioner was not the shooter. The petitioner is shorter than the shooter. (R.E. 6-16, PageID# 961-962.) Hardin explained that he stood

next to the petitioner when they were in transit together for court proceedings. At the time of the hearing, Hardin was confined at the Turney Center Industrial Complex in Only, Tennessee, but he was transported through the Morgan County Correctional Complex, where the petitioner is housed, en route to a court appearance in the error coram nobis proceeding. (R.E. 6-16, PageID# 962-964.)

Hardin first recanted his identification of the petitioner in 2010, when Hardin was in the Morgan County Correctional Complex for "classification." At that time, a law library worker who was a "jailhouse lawyer" presented Hardin with an affidavit prepared on the petitioner's behalf. Hardin edited the affidavit and signed it. (R.E. 6-16, PageID# 965-966.) Hardin was released from prison in 2012 but returned to custody after imposition of a 15-year sentence for a drug possession conviction. At the time of the evidentiary hearing, he was beginning service of that sentence. (R.E. 6-16, PageID# 966-967.) Hardin testified that he does not like "snitches" and that he knows of "snitches" in prison being assaulted, especially in state prisons. (R.E. 6-16, PageID# 967-968.)

Turner testified that she worked at Kirk's Market the day of this shooting. Several people were in the store, and an argument among them ensued. She was concerned that she might be robbed. But the customers paid for their groceries, and as they started to leave, she heard gunshots, crouched behind the front counter, and called 911. One man was shot in the back and came back in the store. She locked the door and pulled

him around the counter. A few minutes later, someone screamed that it was clear and that the man should come outside. She responded that she could not open the door, and the man said that if she did not open the door, he would shoot her. She opened the door. Outside, another man had been shot in the neck. She testified that she knew the petitioner because he had dated her niece. He went by "J.B." She did not see the petitioner in the store that morning. She did not know the man who was shot and entered the store, nor did she know anyone in the group of customers in the store that morning. (R.E. 6-16, PageID# 981-983, 986-987.)

After the evidentiary hearing, the trial court denied the petition for writ of error coram nobis. It rejected Boatwright's and Hardin's hearing testimony as not credible, after "listen[ing] to the witnesses' testimony and observ[ing] their demeanor on the stand." They "were both vague and inconsistent in their testimony." Boatwright "struggled to explain how the police were going to make a case against him for shooting Hartsell when he, Boatwright was a victim in the same shooting." Only later in his testimony did he "remember[] that it was actually armed robbery against petitioner the police were threatening to accuse him of." Hardin "simply says he was never 100% sure it was petitioner he saw running away from the scene of the shooting but over the years he has become 100% sure it was not petitioner." He "offers no reason for the change in his testimony," and the court found it not to be truthful. The court found that Turner's testimony was cumulative to other testimony presented by the defense to show that the petitioner was not at the store. (R.E. 6-15, PageID# 908-910.) On appeal, the

Tennessee Court of Criminal Appeals applied the trial court's credibility findings and affirmed, and the Tennessee Supreme Court denied discretionary review. *Lowery v. State*, E2016-00587-CCA-R3-CD, 2017 WL 3078313 (Tenn. Crim. App. Jul. 19, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017).

III. Federal Habeas Corpus Review

The petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee, which dismissed the petition as untimely and found that the witness affidavits did not qualify as new evidence that could excuse the late filing because they were previously presented in state court. *Lowery v. Parris*, No. 3:18-cv-00330, 2018 WL 11468415, at *2-*3 (E.D. Tenn. Nov. 19, 2018). But the Sixth Circuit reversed and remanded, concluding that the affidavits do not categorically fail to qualify as new evidence simply because the petitioner previously presented them in state court. *Lowery v. Parris*, 819 Fed. Appx. 420, 421 (6th Cir. Sep. 1, 2020).

On remand, the district court concluded that the affidavits qualify as new evidence, and it deferred to the trial court's credibility determinations about Boatwright's and Hardin's affidavits and testimony to conclude that this evidence was not reliable. The petitioner did not adequately explain the decade-long delay in procuring the recantation evidence, and the district court found the timing suspect because each witness was serving a lengthy prison sentence and had some form of contact with the petitioner in prison. This raised a question whether the witnesses had recanted

to avoid being labeled as "snitches." Furthermore, Hardin's affidavit resulted not from Hardin's own initiative but instead from a request made by another inmate that prepared the affidavit on the petitioner's behalf. For these reasons, the district court concluded that the trial court's credibility determinations are supported by the record and that the recanting evidence is not credible evidence under *Schlup*. The court found Turner's affidavit and testimony credible; however, the court noted that she was inside the store hiding behind the counter when the shootings happened outside. So the court concluded that petitioner had not proven under the totality of the evidence that it is more likely than not that no reasonable juror would convict him in light of that new evidence. *Lowery v. Parris*, No. 3:18-cv-330, 2021 WL 1700348, at *6-*9 (E.D. Tenn. Apr. 29, 2021).

The Sixth Circuit affirmed, noting that "[a]ppellate courts always owe significant deference to a trial judge's credibility determinations," which "are the only factual findings that matter here." *Lowery v. Parris*, No. 21-5577, 2023 WL 5236396, at *5 (6th Cir. Aug. 15, 2023). The court found that "[a] reasonable factfinder could take Boatwright's evasive answers to questions about the risks 'snitches' face in prison as evidence that Boatwright had an ulterior motive to recant truthful testimony." *Id*. (citing *McCroy v. Vasbinger*, 499 F.3d 568, 574 (6th Cir. 2007). And his concern that he would be charged for Hartsell's murder was implausible because the proof showed that his and Hartsell's shootings occurred in rapid succession by the same firearm. *Id*. Similarly, Hardin agreed to testify only after another inmate drafted his affidavit, and he

confirmed that the shooter looked like the petitioner. Both witnesses denied that the petitioner's brother committed the offense, and there were no other suspects. "A reasonable factfinder could therefore choose to believe Hardin's trial testimony over his recantation." *Id.* The court found that Turner's testimony "was not so damaging to the prosecution's case as to prevent any reasonable juror from voting to convict Lowery." *Id.* For these reasons, the petitioner did not satisfy the demanding standard for proving actual innocence under *Schlup*.

ARGUMENT

Summary Reversal Is Unwarranted Because the Decision Below Is Correct.

The petitioner asks this Court to expend its scarce judicial resources to summarily reverse the dismissal of his untimely habeas corpus petition because he has new testimonial evidence of actual innocence. (Pet. 2-5, 21-22.) In his view, this Court should ignore the state trial court's determination that his new testimonial evidence is not credible. (Pet. 22-27.) And if that initial suggestion is followed, he claims, this Court could then conclude it is more likely than not that no reasonable juror would have convicted him in light of that evidence. (Pet. 27-33.) But this all asks too much.

The resolution of a petition for writ of certiorari "may be a summary disposition on the merits." Sup. Ct. R. 16.1. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Those are

precisely the sort of errors the petitioner asserts, and that is reason enough to deny his petition. Furthermore, the lower federal courts rightly deferred to the state trial court's credibility determinations about live witness testimony and correctly concluded that, under the credible proof, the petitioner cannot establish his actual innocence under the demanding standard required by this Court's decisions.

The petitioner does not dispute that he filed his habeas corpus petition well beyond the one-year statute of limitations in 28 U.S.C. § 2244(d)(1). The only basis on which he seeks an excusal from the time limitation is his purported actual innocence. In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Court concluded that a habeas corpus petitioner may overcome the one-year statute of limitations if the petitioner is actually innocent under the standard applied in *Schlup v. Delo*, 513 U.S. 298 (1995). To meet the standard, a habeas corpus petitioner relying on new evidence "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. This standard "requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329. It is a "demanding" standard. *Perkins*, 569 U.S. at 386 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). "[T]enable actual-innocence gateway pleas are rare." *Id.* "The gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free

of nonharmless constitutional error.'" *Id*. at 401 (quoting *Schlup*, 513 U.S. at 316.)

"[A] credible showing of actual innocence may allow a petitioner to pursue his constitutional claims." *Id*. at 392. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. "[T]he newly presented evidence may indeed call into question the credibility of witnesses presented at trial," and "the habeas court may have to make some credibility assessments." *Id*. at 330. The court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Id*. at 332.

A. Deference applies to the state court factual findings rejecting the credibility of Boatwright's and Hardin's partially-recanted testimony.

Assessing whether the new testimony by Boatwright and Hardin is "reliable" and "credible" evidence to show actual innocence under *Schlup* requires deference to pertinent factual findings made by the state trial court on collateral review.[2] Under 28

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[2] The respective state and federal court collateral review proceedings are comparable. As the Sixth Circuit explained when rejecting the petitioner's alternative request for a second evidentiary hearing—an issue not raised in this Court—what the petitioner had to show at the evidentiary hearing on his error

U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" unless the habeas corpus petitioner rebuts the presumption of correctness by clear and convincing evidence. Several circuit courts have squarely decided that this deference to state-court factual findings mandated by 28 U.S.C. § 2254(e)(1) applies when a federal court is assessing actual innocence under *Schlup*. *See Cosey v. Lilley*, 62 F.4th 74, 82-83 (2nd Cir. 2023) (collecting cases). Thus, the state trial court's credibility determinations about Boatwright's and Hardin's new testimony are presumed correct unless rebutted by clear and convincing evidence.

"[D]eference does not imply abandonment or abdication of judicial review" and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "A federal court can disagree with a state court's credibility determination." *Id.* But to do so, the reviewing federal court must determine, under 28 U.S.C. § 2254(e)(1), whether "the factual premise was incorrect by clear and convincing evidence." *Id.*

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coram nobis petition was that "the admissibility of the newly discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial." *Lowery*, 2023 WL 5236396, at *6 (quoting *Freshwater v. State*, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004)). Although "that is a far more lenient standard than the federal one" under *Schlup*, "it goes to the same issue: the effect of the new evidence on a reasonable jury," on which "[t]he state trial court had already held an evidentiary hearing." *Id.*

The petitioner makes much of the Sixth Circuit's statement that "[a]ppellate courts *always* owe significant deference to a trial judge's credibility determinations." *Lowery*, 2023 WL 5236396, at *5 (emphasis added). But the deference codified in 28 U.S.C. § 2254(e)(1) applies to *any* "determination of a factual issue made by a State court." It does not necessarily follow that a habeas corpus petitioner can never overcome the required deference. However, a petitioner may rebut the presumption of correctness only with clear and convincing evidence.

On federal habeas corpus review, the petitioner relies on the same record he developed in state court on collateral review. As "clear and convincing evidence" to overcome the presumption of correctness afforded the trial court's credibility determinations about Hardin's and Boatwright's new testimony, the petitioner cites the very same testimony from these witnesses that the trial court found to lack credibility. (Pet. 22-24.) In effect, he asks the Court to accredit as "reliable" that testimony which the trial court heard and rejected. But "a reviewing court, which analyzes only the transcripts . . ., is not as well positioned as the trial court to make credibility determinations." *Miller-El*, 537 U.S. at 339. Also, the standard for reviewing state-court factual findings required by 28 U.S.C. 2254(e)(1) is an "arguably more deferential standard" than the standard for reviewing factual findings under 28 U.S.C. § 2254(d)(2). *Wood v. Allen*, 558 U.S. 290, 301 (2010).[3]

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[3] When a federal court considers a claim "adjudicated on the merits in State court proceedings," it reviews state-court factual findings for whether the decision was "based on an unreasonable

Even when applying the less deferential standard, this Court still gives great deference to credibility determinations made by a state trial court. *See Rice v. Collins*, 546 U.S. 333, 341-42 (2006) ("Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination.").

Here, the petitioner presents no proper basis to supersede the trial court's credibility determinations. Boatwright testified unequivocally at trial that the petitioner was the person who shot him. He explained that he knew the petitioner was the shooter because he saw the petitioner's face. He testified that someone told him that the shooter was known as "J.B." And according to Detective Ridenour, Boatwright reported that the shooter was "J.B." Boatwright also identified the petitioner as the shooter from a photographic lineup. (R.E. 6-1, PageID# 106-107, 109-111, 115, 121-122, 127-129; R.E. 6-2, PageID# 261-264.)

At the evidentiary hearing conducted over a decade later, Boatwright gave diametrically opposite testimony, with no persuasive explanation for the stark change. He swore that he did not see the shooter and, thus, could not say whether the petitioner was the shooter. He denied telling the detective that "J.B." committed the offense. He claimed that he identified the petitioner in a photographic lineup because officers pointed to the petitioner's photograph and because he

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determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

was afraid that he would be charged with robbery and murder if he did not do so. (R.E. 6-16, PageID 922-929, 934, 937-939, 941, 944-945, 949-950, 954-955.) He largely focused on the alleged threat of facing a murder charge but had no explanation for how he could have been prosecuted for Hartsell's murder when it involved the same gun used immediately before his own shooting. (R.E. 6-16, PageID# 938-939.) At the time of the evidentiary hearing, Boatwright faced a decades-long prison sentence and was confined in the same prison as the petitioner. And he acknowledged that "snitches" in prison "get stuff done to them" or are ostracized. (R.E. 9-16, PageID# 929-933.) As the Sixth Circuit rightly noted, "[a] reasonable factfinder could take Boatwright's evasive answers to questions about the risks 'snitches' face in prison as evidence that Boatwright had an ulterior motive to recant truthful testimony." *Lowery*, 2023 WL 5236396, at *5.

The trial court "listened to the witnesses' testimony and observed their demeanor on the stand," and it found that Boatwright was not credible. He was "vague and inconsistent" and "struggled to explain how the police were going to make a case against him for shooting Hartsell when he, Boatwright was a victim in the same shooting. He then remembered that it was actually armed robbery against petitioner police were threatening to accuse him of." (R.E. 6-15, PageID# 909.) A reasonable factfinder could reject Boatwright's credibility for those reasons. And applying 28 U.S.C. § 2254(e)(1), the petitioner certainly cannot point to any clear and convincing evidence that rebuts the trial court's presumptively correct rejection of Boatwright's new testimony as untruthful.

Hardin likewise identified the petitioner as the shooter from a photographic lineup and at trial. (R.E. 6-1, PageID# 131-136, 140-141.) But he recanted that identification without persuasive or credible explanation. He claimed that officers on the scene did not threaten him, but they accused him of either committing the offense or knowing who did. He was concerned about being charged because he was on bond. He claimed that when officers showed him a photographic lineup, he picked the photo that the officers pointed to as the shooter. He allegedly told the officers that the photo resembled the shooter but that he was not sure. Hardin claimed the officers directed him to initial that photograph, and he complied. (R.E. 6-16, PageID# 959-961, 969-970.) However, after having seen the petitioner closely in a prison setting during transport, he came to believe with 100 percent certainty that the petitioner was not the shooter, although he resembled the shooter. He testified that he did not think that the petitioner's brother, Fred Lowery, was the shooter. He further explained that a "jailhouse lawyer" approached him in prison on the petitioner's behalf with a recanting affidavit, which he signed after editing. At the evidentiary hearing, he was at the beginning of serving a 15-year sentence. He testified that he does not like "snitches" and that he is aware of instances when "snitches" in prison have been assaulted. (R.E. 6-16, PageID# 961-968, 976-978.)

The trial court found his testimony "vague and inconsistent" with his trial testimony. "Hardin simply says he was never 100% sure it was the petitioner he saw running away from the scene of the shooting but over the years he has become 100% sure it was not

petitioner. He offers no reason for the change in his testimony," and the court found it not to be truthful. (R.E. 6-15, PageID# 909-910.) A reasonable factfinder could reject Hardin's credibility. Like Boatwright, Hardin gave different testimony with no credible explanation for the change. And he did so only on the initiative of someone acting on the petitioner's behalf. He confirmed that the shooter resembled the petitioner. Like Boatwright, Hardin knew that "snitches" can be treated unfavorably in prison. A reasonable factfinder could reject the credibility of Hardin's new testimony, and the petitioner has not presented clear and convincing evidence to rebut the trial court's presumptively correct rejection of Hardin's new testimony as untruthful.

B. Turner's limited testimony does not prove the petitioner's actual innocence.

With the credibility of Boatwright's and Hardin's new testimony reasonably rejected, the only other new evidence presented—which the trial court adopted as truthful—is Turner's testimony that she worked at Kirk's Market on October 8, 1996, and that she did not see the petitioner in the store. She acknowledged that she hid behind the front counter when the shooting started, and the trial evidence was that the shooting happened outside, except for when the petitioner reached into the doorway of the store as Boatwright fled inside. (R.E. 6-16, PageID# 981-983, 986-989.) And it was consistent with other trial proof offered by the defense to establish that the petitioner was not at the store. As the Sixth Circuit correctly determined, Turner's testimony "was not so damaging to the

prosecution's case as to prevent any reasonable juror from voting to convict Lowery." *Lowery*, 2023 WL 5236396, at *5. This limited testimony is insufficient to meet the "demanding" standard for actual innocence required by *Schlup*.

CONCLUSION

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
Counsel of Record
500 Dr. Martin L. King Jr. Blvd.
P.O. Box 20207
Nashville, Tennessee 37202-0207
John.Bledsoe@ag.tn.gov
(615)741-4351

Counsel for Respondent