NO. 21-970

In the Supreme Court of the United States

SCOTT CROW, DIRECTOR,

Petitioner,

v.

KARL FONTENOT,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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This is a fact-intensive case. However, the legal question before this Court is a discrete one. Petitioner asks this Court to hold that evidence is "new" for purposes of an actual innocence gateway claim only if it was not reasonably available at the time of trial. Respondent's guilt is, for now, beside the point.[1]

Because the facts are largely irrelevant in this proceeding, Petitioner will not address Respondent's points in order and thereby assist him in his attempt to muddy the waters. First, Petitioner will show that there is a split among the circuits that needs to be resolved. Second, Petitioner will address Respondent's

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[1] Petitioner maintains that Respondent is guilty. Pet.6-8. However, the parties' dispute on that point can be addressed on remand, under the proper standard.

contention that a newly presented test is the correct one. Third, Petitioner will demonstrate that Respondent's argument that the evidence in his case was "new" under either test is wholly contradicted by the record.

I. THE CIRCUITS ARE SPLIT REGARDING THE PROPER TEST.

Respondent admits the existence of a circuit split but claims 1) the Third Circuit has not held that evidence supporting an actual innocence claim must be newly available and 2) the differences between the two tests will rarely be outcome-determinative. BIO.23-26. Respondent is incorrect.

On the first point, it is true that, in *Reeves v. Fayette SCI*, 897 F.3d 154, 163 (3d Cir. 2018), the Third Circuit claimed to have not answered the question, pointing to statements in other cases as "dicta[.]" However, the court did not disavow its prior cases. Instead, the court adopted a newly presented test for petitioners who claim trial counsel was ineffective. *Reeves*, 897 F.3d at 163.

Reeves thus carved out an exception to the general rule in the Third Circuit. Nevertheless, the general rule remains. Just last year, the Third Circuit held that evidence of innocence was not new because it was available to the petitioner at the time of trial. *Wallace v. Mahanoy*, 2 F.4th 133, 153 (3d Cir. 2021); *see also Sistrunk v. Rozum*, 674 F.3d 181, 191 (3d Cir. 2012) (evidence was known to the petitioner); *Goldblum v. Klem*, 510 F.3d 204, 226 n.14 (3d Cir. 2007) ("Evidence is not new if it was available at trial[.]").

Further, while the Fifth Circuit has stated that it has not chosen a test, its recent decisions "have included language arguably suggesting an inclination toward a

newly discovered standard." *Reeves*, 897 F.3d at 162 n.6; *see Floyd v. Vannoy*, 894 F.3d 143, 156 (5th Cir. 2018) (fingerprint comparison conducted before trial but "withheld from both the prosecution and the defense" was "newly-discovered"). In fact, the Fifth Circuit *has* held that evidence that was "always within the reach of [petitioner's] personal knowledge or reasonable investigation" is not new. *Hancock v. Davis*, 906 F.3d 387, 389–90 (5th Cir. 2018) (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)) (alteration adopted).

The circuit split is not "even more lopsided", BIO. 23, than indicated in the petition.

In addition, Respondent's argument that successful claims will be rare, regardless of the test, BIO.25, also misses the mark. In a review of approximately 57 court of appeals cases on Westlaw involving actual innocence gateway claims, Petitioner has identified 8 cases in which such claims were successful.[2] *Finch v. McCoy*, 914 F.3d 292, 302 (4th Cir. 2019); *Floyd v. Vannoy*, 894 F.3d 143, 160 (5th Cir. 2018); *Jones v. Calloway*, 842 F.3d 454, 462–63 (7th Cir. 2016); *Larsen v. Soto*, 742 F.3d 1083, 1099 (9th Cir. 2013); *Rivas v. Fischer*, 687 F.3d 514, 547 (2d Cir. 2012); *Cleveland v. Bradshaw*, 693 F.3d 626, 642 (6th Cir. 2012); *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005); *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997).[3] In three

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[2] The natural language search terms were: "actual innocence evidence new if not presented at trial or newly discovered discoverable due diligence". There were a total of 77 results, however, 21 involved second or successive petitions, 5 involved freestanding actual innocence claims, and 1 was a proceeding under 42 U.S.C § 1983. These cases are not included.

[3] Only one of these cases was from a circuit applying the newly available standard.

other cases, the courts remanded for an evidentiary hearing on the petitioners' actual innocence gateway claims. *See Jaramillo v. Stewart*, 340 F.3d 877, 883 (9th Cir. 2003); *Majoy v. Roe*, 296 F.3d 770, 778 (9th Cir. 2002); *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997).[4] Thus, almost 20 percent of cases resulted in at least an evidentiary hearing, and 14 percent of the petitioners were successful in avoiding procedural barriers to review.

Respondent clearly understates the extent to which actual innocence gateway claims are successful. Further, all but one of the cases above involved, at least in part, evidence that was available at the time of trial. *See Finch*, 914 F.3d at 297 (clarification of autopsy report); *Jones*, 842 F.3d at 456 (confession of another individual before the petitioner's trial); *Larsen*, 742 F.3d at 1089, 1091 (testimony from an eyewitness who was with the petitioner and another witness who contacted the petitioner before trial with information); *Rivas*, 687 F.3d at 518 (review by a different pathologist); *Cleveland*, 693 F.3d at 635-36 (potential alibi witness and flight records); *Souter*, 395 F.3d at 583-84 (information regarding the characteristics of the murder weapon and photographs of the victim's clothes); *see also Moore v. Aldridge*, No. CIV-09-985, 2019 WL 8757206, *8 (W.D. Okla. Dec. 12, 2019) (unpublished) (finding innocence based on new experts regarding cause of death); *cf. Griffin v. Johnson*, 350 F.3d 956, 961 (9th Cir. 2003) ("The distinction between "newly discovered" evidence and "newly presented" evidence is significant here[.]"). It therefore appears likely that imposition of a newly

[4] Once again, only one of these cases was from a circuit applying the newly available standard.

available test would have led to a different result in many of these cases.

Respondent is simply incorrect that narrowing the actual innocence exception will "rarely make a difference." BIO.25.

II. THE TENTH CIRCUIT'S CHOICE OF TESTS WAS OUTCOME-DETERMINATIVE.

Respondent argues the test applied by the Tenth Circuit is irrelevant because he is innocent under any standard. Respondent is incorrect.

Respondent notes the Tenth Circuit "did not explain, however, whether its selection of that test would have affected the outcome of the case." BIO.10. Respondent's argument is undermined by his own acknowledgement that the court believed it "had to 'pick a side[.]'" BIO.10 (quoting Pet.App.93a). It defies logic that the court would have felt it necessary to answer this question if the answer were irrelevant to its decision. The Tenth Circuit declines to pass on questions that are not outcome-determinative. *See, e.g., Baca v. Colorado Dep't of State*, 935 F.3d 887, 945 n.26 (10th Cir. 2019), *rev'd on other grounds*, 140 S.Ct. 2316 (2020); *West v. Dobrev*, 735 F.3d 921, 924 n.3 (10th Cir. 2013); *Morgan v. City of Albuquerque*, 25 F.3d 918, 920 (10th Cir. 1994).

In addition, Respondent fails to acknowledge the facts readily apparent from the Tenth Circuit's opinion and/or available in the record which demonstrate the evidence at issue was available.[5]

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[5] Petitioner is not suggesting the State lacked a duty to disclose favorable material evidence. But that question is distinct from the matter at issue here—whether Respondent reasonably could have obtained the evidence of his alleged innocence himself.

A. Alibi Defense

Perhaps no category of evidence better illustrates the absurdity of Respondent's argument than his claim that his own whereabouts on the night of the murder was not reasonably available. No one was in a better position to know of the alleged alibi than Respondent.

To the extent Respondent suggests his communication with counsel was insufficient, counsel made records regarding their extensive, almost-daily conversations about the case (J/T XI 2530); (Dkt. 113-22, at 4-5). What's more, there was evidence available to counsel independent of Respondent. As Respondent admits, BIO.11, his counsel was aware of Mr. Ward's October 1984 interview in which he informed police that he and Respondent were at the party (Tr. VIII 34-35). And evidence of the party was introduced at the joint preliminary hearing—including in the form of Respondent's own confession—joint trial, and Respondent's second trial (PH Tr. III 493, 682; PH Tr. IV 664; PH Tr. V 969). *See also* Pet.App.99a, 102a.

Respondent misses the mark with his claim that Mr. Ward's statement "would not have been persuasive on its own." BIO.19 n.7. The point is that Respondent and his attorney were aware of the party. Respondent reasonably could have obtained all the evidence he now possesses.

B. Obscene Phone Calls

Respondent makes the same mistake with respect to evidence that Mrs. Haraway was receiving disturbing telephone calls. Before Respondent's second trial, a defense investigator interviewed Anthony Johnson, who said that Mrs. Haraway asked him where she could buy a gun in light of some phone calls she had

been receiving (ROA Vol. II, 30). Assuming *arguendo* more evidence was needed, BIO.21, Respondent has not even attempted to show that a reasonable investigation would not have uncovered additional information regarding the calls.

C. James Moyer Evidence

The next item of evidence is a 2012 affidavit in which James Moyer claims to be 95% certain that he did not see Respondent at McAnally's the night of the murder. *See* Pet.App.22a, 33a-34a. The Tenth Circuit recognized that Mr. Moyer's affidavit "matches a statement he gave to a defense investigator in 1985, prior to both trials[.]" Pet.App.112a. Indeed,

> During the September 1985 joint trial, the defense introduced the tape of a conversation between Mr. Moyer and private investigator Richard Kerner that occurred on August 28, 1985. On the tape, Mr. Moyer states that Mr. Bevel, not Mr. Fontenot, was the man he saw in McAnally's with Mr. Ward:
>
> > Mr. Kerner: And the tall one that was in the convenience store, then, is not the one that's in jail at the present time—not Fontenot?
> >
> > Mr. Moyer: Not the one I saw.

Pet.App.113a. It is simply indisputable that the information in Mr. Moyer's affidavit was available at the time of Respondent's 1988 retrial.

D. Karen Wise Affidavit

Respondent also relies on a 2009 affidavit from Karen Wise in which she claims there were four men, rather than two, in J.P.'s the night of the murder, and that Respondent and Mr. Ward were not the ones who

made her nervous. The other two men were known to her by name. Thus, a simple interview of Ms. Wise by defense counsel would have revealed this information if it were true. Indeed, Ms. Wise volunteered at Respondent's retrial that the "'two boys that are in question here, they were not the only boys in the game room during that whole time.' *Id.* at 579[.]" Pet.App.119a.

Moreover, Ms. Wise's affidavit, which suggests she was intimidated into not disclosing the other two men, is extremely suspect. Ms. Wise's affidavit claims the prosecutor told her not to bring up the other two men when she met with him "[p]rior to the first trial[.]" This alleged conversation does not explain why Ms. Wise previously agreed at preliminary hearing that "the only two persons in the store at 8:30 was [sic] this man that you described as being blonde and whoever was with him" and coworker Jack Paschal (PH Tr. I 162, 171, 175, 182). Ms. Wise told Mr. Paschal *these two men* were making her nervous and asked if he knew who they were (PH Tr. I 170; 6/8/1988 Tr. 165). Mr. Paschal confirmed that Ms. Wise was afraid of the two men, who were the only people in the store, and asked if he knew them (Ward Trial 6/2/1989 Tr. III, part 1 54, 56-57, 64; 6/8/1988 Tr. 215-17).

Also, Ms. Wise's affidavit claims that she did not want to help with composite drawings immediately after Mrs. Haraway's abduction because "police wanted drawings of only two men." But Respondent and Mr. Ward were not identified as suspects until *after* Ms. Wise's sketches were released. BIO.3-4.

Ms. Wise's affidavit fails to establish that she had credible information to offer before trial.

E. Pickup Truck Descriptions

Respondent claims there may have been two grey primered pickups on the night of Mrs. Haraway's murder, one at J.P.'s and one at McAnally's.[6] Respondent has failed to show a reasonable investigation would not have uncovered these alleged discrepancies. In fact, there were discrepancies in descriptions of the truck at preliminary hearing (PH Tr. I 151, 203-04).

F. Medical Examiner Evidence

The state district court made a factual finding that Respondent "had access to [the] Medical Examiner report since 1986[.]" Pet.App.510a. Respondent fails to rebut this factual finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Respondent claims the state court "did not address the critical dispute" as to whether he had access to all, or part, of the medical examiner's report. BIO.23 n.8. But the state court found, without qualification, that he had access to the report.

The state district court's finding is bolstered by the Tenth Circuit's decision:

> On May 27, 1988, around ten days prior to the start of the new trial, Mr. Butner met with Dr. Larry Balding, an OCME forensic pathologist, regarding Ms. Haraway's remains. Dr. Balding's contemporaneous notes state 'Mr. Butner here to discuss case representing Mr. Fontenot as court appt. defense. I showed him our file & we discussed my findings. I told him it was possible she was stabbed but [there] was no

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[6] The Tenth Circuit found this evidence to be of minimal value. Pet.App.129a.

> evidence of it on skeletal remains.' Ex. 46, Vol. 23 at 54.

Pet.App.39a. *See also* Pet.App.156a-157a n.51 ("The State's position . . . also draws record support from notes by Dr. Balding documenting meetings with Ms. Hull in July 1986, *see* Ex. 46, Vol. 23 at 76 (reporting that Ms. Hull 'looked thru the case, took some notes'), and Mr. Butner in May 1988, *see id.* at 54 (reporting that 'I showed [Mr. Butner] our file & we discussed my findings')."). Significantly, the information regarding the mark on Mrs. Haraway's pelvis (and the doctor's opinion that it indicated she had given birth) was *on the same page* as information regarding a mark on a vertebra that was evaluated as a possible stab wound (ROA Vol. XXIII, 48). It strains credulity that trial counsel was aware of the mark on the vertebra but not the one on the pelvis.

Respondent's argument that he did not have this evidence is also severely undermined by his failure to include the medical examiner's report in his *Brady* claim. *See* Pet.App.156a-157a n.51. This tacit admission, and the state district court's unrebutted factual finding, compel the conclusion that this evidence is not newly available.

III. THE EQUITABLE ACTUAL INNOCENCE EXCEPTION MUST BE DEFINED NARROWLY.

Respondent argues his preferred test is the correct one. But that is the very question Petitioner asks this Court to answer. Thus, that Petitioner and Respondent differ in their interpretations of *Schlup v. Delo*, 513 U.S. 298 (1995) is hardly a reason to deny review. *Compare* Pet.16-22 (explaining why *Schlup* and *McQuiggin v. Perkins*, 569 U.S. 383 (2013) support a newly available

standard) *with* BIO.27-28 (arguing *Schlup* "supports the 'newly presented' standard").

Respondent claims that "[r]equiring that evidence of innocence be 'newly presented' furthers that rationale [avoiding incarceration of an innocent person] by ensuring that the claim of innocence 'is not based solely on evidence a jury has already found sufficient to convict[.]'" BIO.27 (quoting *Schlup*, 513 U.S. at 324). But newly available evidence was, by definition, not presented at trial.

Respondent is correct that "[t]he risk of unjustly incarcerating an innocent person is present regardless" of which test is used. BIO.27. However, the actual innocence exception is an equitable doctrine. *See Schlup*, 513 U.S. at 319-20. There is nothing inequitable about a rule which prohibits a habeas petitioner who failed to present available evidence at trial—like his own alibi—from using a claim of innocence to avoid Congress's efforts at promoting finality and respect for state courts.[7] *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (Congress revised habeas statutes to promote finality and federalism); *Schlup*, 513 U.S. at 324 (recognizing, before habeas statues were amended, that actual innocence gateway claims pose "a threat to scarce judicial resources and to principles of finality and comity"). Accordingly, the doctrine should be extremely narrow.

This Court recognized as much in *Schlup*, 513 U.S. at 324, but Petitioner has shown that the lower courts need more guidance. A newly available requirement would strike the right balance between the important

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[7] Those who claim their attorneys were ineffective for failing to discover and/or present such evidence have an obvious remedy in *Strickland v. Washington*, 466 U.S. 668 (1984).

State interests at stake, and the important interest in ensuring innocent persons are not incarcerated.

* * * * *

Petitioner has shown that the Tenth Circuit decided an important federal question in a way that conflicts with other United States courts of appeals. Certiorari should be granted.

Respectfully submitted,

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