No. 25-664

In the Supreme Court of the United States

CHADWICK DOTSON, PETITIONER

v.

JUSTIN MICHAEL WOLFE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether exculpatory evidence qualifies as "new" for purposes of the actual-innocence gateway to federal habeas review where the evidence was previously unavailable due to prosecutorial misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 144 F.4th 218. The opinions of the district court (Pet. App. 49a-56a, 57a-76a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2025. On October 1, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 4, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from an extraordinary course of prosecutorial misconduct that several judges have described as "egregious" and "abhorrent to the judicial process." Pet. App. 2a, 45a, 47a-48a (citations omitted). Twenty-five years ago, the Commonwealth of Virginia prosecuted respondent for capital murder based on testimony that it had coerced from its key witness by threatening him with the death penalty. When the witness recanted his fabricated testimony, both the district court and the court of appeals held that respondent was entitled to habeas relief. But rather than release respondent or provide him with a fair trial, the Commonwealth *again* coerced the witness by threat of death penalty—this time into withdrawing his recantation and invoking his Fifth Amendment right not to testify in any retrial of respondent. Lacking that crucial evidence and faced with additional capital and life-sentence-eligible charges beyond the ones the Commonwealth initially brought, respondent pleaded guilty. As the court of appeals explained, "the Commonwealth has done everything in its power" over the course of this case "to ensure [respondent] dies in prison, eschewing the Constitution, ethical strictures, and [respondent's] own repeated and consistent assertions of actual innocence." *Id.* at 3a.

The petition all but ignores that history and context. According to petitioner, this case presents a straightforward legal question about the type of "new" evidence necessary to satisfy the actual-innocence gateway to habeas review of a procedurally defaulted claim, first recognized in *Schlup* v. *Delo*, 513 U.S. 298 (1995). But as the court below made clear, "the question in this case cannot be resolved just by parsing the nature of the *Schlup* standard";

it turns on the case's unique "context" in which exculpatory evidence was deliberately made unavailable to respondent by prosecutorial misconduct. Pet. App. 37a.

Petitioner offers no persuasive reason why the Court should grant review. Petitioner claims that this case implicates a longstanding conflict among the courts of appeals about the standard to determine whether evidence is "new" for purposes of the actual-innocence gateway. But there is no conflict among the lower courts on how to apply the "new" evidence standard where the evidence was made unavailable due to prosecutorial misconduct. And any purported conflict on the broader legal standard would not warrant review in any event given the underdeveloped state of the doctrine. Petitioner is also incorrect on the merits. His proposed standard for "new" evidence contravenes the basic rationale for the actual-innocence gateway. And his primary argument in support of that standard—a concern about "sandbagging"—makes little sense in general and is particularly incoherent when prosecutorial misconduct made the evidence unavailable. Nor has petitioner shown that the question presented is especially important or that this case is a good vehicle to resolve it. Petitioner himself suggests that the actual-innocence gateway is often litigated, which safely allows the Court to await a future petition presenting the question unencumbered by the unique context of this case. The petition for certiorari should be denied.

A. Background

Federal law has long allowed a state prisoner to challenge his conviction by filing a habeas petition in federal court. See 28 U.S.C. 2254; *Williams* v. *Taylor*, 529 U.S. 362, 374-375 (2000). Federal habeas serves a critical role by guarding against "extreme malfunctions in the state criminal justice systems," but it is also circumscribed by

various statutory and court-fashioned procedural limitations. *Shinn* v. *Ramirez*, 596 U.S. 366, 377 (2022) (internal quotation marks and citation omitted). As is relevant here, the Antiterrorism and Effective Death Penalty Act of 1996 provides a one-year statute of limitations for filing a federal habeas petition. 28 U.S.C. 2244(d)(1). In addition, under the doctrine of "procedural default," federal courts "generally decline to hear any federal claim that was not presented to the state courts consistent with the State's own procedural rules." *Shinn*, 596 U.S. at 378 (internal quotation marks, citation, and alterations omitted).

Although those requirements serve important "principles of comity and finality," the Court has recognized that they sometimes must "yield to the imperative of correcting a fundamentally unjust incarceration." *Schlup*, 513 U.S. at 320-321 (internal quotation marks and citation omitted). In *Schlup*, the Court held that a sufficient showing of "actual innocence" may serve as a "gateway" through which a federal habeas petitioner may "pass" to have a procedurally defaulted constitutional claim "considered on the merits." *Id.* at 314-315 (internal quotation marks and citation omitted). Such a showing of innocence is "not itself a constitutional claim"; it is a procedural basis for having a procedurally defaulted constitutional claim considered in habeas. *Ibid.* (internal quotation marks and citation omitted).

To make a sufficient threshold showing of actual innocence under *Schlup*, a prisoner must offer "new reliable evidence" that was "not presented" in the original criminal case in state court, and he must show that it is "more likely than not that no reasonable juror would have convicted him in the light of th[at] new evidence." 513 U.S. at 324, 327; accord *House* v. *Bell*, 547 U.S. 518, 536-537 (2006). The Court has subsequently held that the same

standard applies in the context of guilty pleas, see *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998), and that it may excuse a prisoner's failure to satisfy the one-year statute of limitations for filing a federal habeas petition, see *McQuiggin* v. *Perkins*, 569 U.S. 383, 386 (2013).

B. Respondent's State Prosecution

In March 2001, Daniel Petrole was murdered outside of his townhome near Bristow, Virginia. At the time, Petrole supplied high-grade marijuana to drug dealers in Northern Virginia. A few days later, police received a tip that Owen Barber IV, a marijuana dealer in the area, had murdered Petrole. When questioned by police, Barber initially denied his involvement, but federal authorities later arrested him. While in custody, Barber confessed to the crime, but he claimed that respondent—a teenage marijuana dealer who bought his supply from Petrole—had paid Barber to carry out the murder. See 565 F.3d 140, 144-146 (4th Cir. 2009).

The Commonwealth charged respondent with the capital offense of hiring Barber to kill Petrole, using a firearm in committing a felony, and conspiring to distribute marijuana. At trial, Barber was the prosecution's "key witness" and the "only witness to provide any direct evidence" regarding respondent's involvement in Petrole's death. 565 F.3d at 144. Barber testified that respondent had accrued significant debt purchasing marijuana from Petrole and that Barber and respondent together planned the murder. In exchange for murdering Petrole, respondent purportedly promised Barber $10,000, gifted him a half-pound of marijuana, and forgave Barber's debts. Barber also testified that one of their mutual friends, J.R. Martin, declined Barber's invitation to participate in the crime but allowed Barber to use Martin's car to follow Pe-

trole home. Martin testified at trial that, when he told respondent that he knew about the murder, respondent forgave a $600 debt and supplied him with discounted marijuana. See *id.* at 144-146.

Respondent also testified in his own defense. While he admitted to selling marijuana, he denied any involvement in Petrole's murder. Respondent explained that Barber may have testified falsely because of respondent's refusal to send Barber money when Barber was evading the police and because of respondent's recent sexual relationship with Barber's girlfriend. The jury found respondent guilty on all three charges, and the trial court accepted their recommendation of a death sentence. See 565 F.3d at 146-149.

C. Respondent's First Habeas Petition

1. After exhausting his available state post-conviction remedies, respondent filed a habeas petition in federal court. Weeks after the petition was filed, Barber signed an affidavit recanting his prior testimony as fabricated and attesting that respondent "had nothing to do" with Petrole's murder. See C.A. App. 1162-1174.

Barber's affidavit also recounted the Commonwealth's role in securing his prior false testimony. Barber stated that two Commonwealth detectives (Sam Newsome and Brenda Walburn) attempted to interview Barber without counsel. Barber stated that Detective Newsome told him that the Commonwealth "already knew" that respondent hired him to kill Petrole, and that either he or respondent "would end up telling the story and the other one would end up with capital murder." C.A. App. 1169. Barber attested that the detectives "were the first to mention" respondent's purported role to Barber and that he "did not suggest that story." *Ibid.*

Barber further stated that, after his arraignment, Detectives Newsome and Walburn "repeatedly" told him that "the prosecutors knew that [respondent] had hired [him] to kill Danny Petrole, had linked [his] gun to the killing, and would pursue capital murder against either [respondent] or [him]." C.A. App. 1169. Those overtures were made outside of formal interviews and without Barber's counsel present. Barber's counsel later told Barber that either Barber or respondent "would certainly be convicted of capital murder," and he advised Barber "strongly and repeatedly to implicate" respondent. *Id.* at 1169-1170.

Faced with the choice between falsely testifying or facing the death penalty, Barber attested that he agreed to cooperate by telling the Commonwealth "what [it] wanted to hear": namely, that respondent hired him to kill Petrole. C.A. App. 1172. In April 2001, Barber stated that he met with Detectives Newsome and Walburn and "made up a story" based partially on the true events of Petrole's murder but with "lies woven in to turn the story into a murder for hire." *Ibid.* In exchange, Barber signed a plea agreement for non-capital murder and secured a further "oral agreement" under which the Commonwealth would recommend leniency in sentencing based on Barber's "cooperation." *Id.* at 1172-1173. Barber ultimately received 60 years in prison, 22 of which were suspended. Pet. App. 59a.

According to Barber, the Commonwealth then worked to ensure that Barber's fabricated testimony would hold up in court. Barber attested that, against his wishes, the prosecution arranged for meetings between Barber and Martin to allow them to "coordinate [their] testimony," with Barber "t[elling] the false story" and Martin "correct[ing] points with which he disagreed." C.A. App. 1173.

While Barber stated that he generally "deferred" to Martin, an attorney for the Commonwealth, Richard Conway, would occasionally "step[] in and suggest[] a way" to reconcile their disparate accounts. *Id.* at 1173.

2. The day after Barber signed his affidavit, respondent amended his federal habeas petition. The amended petition included Barber's affidavit and provided additional affidavits corroborating Barber's account. For example, Barber's former cellmate attested that, in 2003, Barber admitted that he testified falsely against respondent at trial. See C.A. App. 1132-1138. Likewise, Barber's former roommate and the supplier of the murder weapon explained that he told Commonwealth prosecutors in a formal interview before respondent's trial that Barber had "confessed to * * * act[ing] alone"—an interview that the roommate believed had been recorded. *Id.* at 1140. In addition, a private investigator hired on respondent's behalf submitted an affidavit detailing his conversations with various witnesses, which generally corroborated Barber's affidavit and indicated that the Commonwealth had recordings of exculpatory witness interviews. See *id.* at 1142-1152.

Respondent's amended habeas petition raised three arguments relevant to subsequent proceedings. First, respondent raised his actual innocence as a procedural "gateway" under *Schlup* for the adjudication of his constitutional claims, which he had not properly raised in state court. Second, he argued that the prosecution violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence, including Barber's former roommate's statements and evidence that Barber's story had changed over time. Finally, respondent claimed that the prosecution had violated *Napue* v. *Illinois*, 360 U.S. 264 (1959), and *Giglio* v. *United States*, 405 U.S. 150

(1972), by knowingly presenting false testimony. See Pet. App. 11a-12a.

In April 2006, Barber sought to recant his sworn statements in an unsworn, handwritten letter. In response, respondent requested an evidentiary hearing to assess Barber's credibility. The district court denied the amended habeas petition without holding a hearing. See Civ. No. 05-432, 2008 WL 371117 (E.D. Va. Feb. 8, 2008). The court of appeals reversed and remanded, holding that the district court failed appropriately to address respondent's *Schlup* argument. See 565 F.3d at 155-156, 163-172.

3. On remand, the district court authorized discovery and conducted an evidentiary hearing. Barber testified under oath consistently with his affidavit, including that Commonwealth prosecutors made clear what Barber "h[ad] * * * to say" to avoid "getting the chair." Pet. App. 13a-14a, 17a. Following the evidentiary hearing, the district court found, as relevant here, that Barber's recantation was "credible"; that the prosecution "coordinated witness testimony through a series of joint meetings" with Barber and other witnesses; that the prosecution "failed to disclose the tapes of multiple recorded meetings with key witnesses" because it believed that disclosure might enable counsel "to fabricate a defense around" the provided material; and that the prosecution "withheld evidence of Barber's personal dealings" with Petrole, including claims that Barber owed Petrole money and that Petrole "had a hit out on Barber." 819 F. Supp. 2d 538, 547-549, 566 n.24 (E.D. Va. 2011).

The district court also found that the prosecution had failed to disclose a report authored by Detective Newsome "describ[ing] his interactions with Barber during his initial arrest and transportation." *Id.* at 548 n.8. In that report, Detective Newsome wrote that he told Barber that the Commonwealth "knew he had killed Petrole

* * * for someone else" and that implicating the "higher up" (who Detective Newsome believed to be respondent) could be the "difference" between "execution or life in prison." *Ibid.*

Based on that evidence, the district court granted respondent's habeas petition, vacated all three of respondent's convictions, and ordered the Commonwealth either to retry him within 120 days or to release him unconditionally. See Civ. No. 05-432, Dkt. 220. The court of appeals affirmed. See 691 F.3d 410, 426 (4th Cir. 2012).

4. Four days after the court of appeals issued its mandate, Detective Newsome and two Commonwealth attorneys (including Conway) made an unannounced visit to Barber in prison to "intimidate[]" him away from repeating his recantation at respondent's pending retrial. See Civ. No. 05-432, 2012 WL 13103658, at *8 (E.D. Va. Dec. 26, 2012). The prosecution secretly recorded that "browbeating." *Id.* at *8 n.3; Pet. App. 19a. Amid appeals to scripture, God, and the conscience of Barber's deceased mother, the prosecution "threaten[ed]" that Barber's testimony would "breach[] [his] plea agreement" and expose him to "be tried again" for capital murder. 718 F.3d 277, 296-298 (4th Cir. 2013) (Thacker, J., concurring in part and dissenting in part). The following day, the two Commonwealth attorneys recused themselves from respondent's case.

Those events gave rise to further state and federal proceedings concerning the Commonwealth's actions. When called to testify in state court, Barber, under the advice of counsel, invoked his Fifth Amendment privilege against self-incrimination. In federal court, Barber's counsel testified to Barber's intention to invoke his Fifth Amendment privilege in any retrial of respondent, noting that counsel's advice "w[ould] not change" absent a "new

development," such as a grant of immunity. Pet. App. 21a-23a.

The district court—believing that the Commonwealth's actions had "incurably frustrated" the court's habeas intervention by "permanently crystaliz[ing]" the constitutional defects in respondent's conviction—ordered respondent to be unconditionally released and barred his reprosecution. 2012 WL 13103658, at *13-*14. The court of appeals vacated that order in a divided decision, reasoning that it was "speculative" whether and how Barber would testify. See 718 F.3d at 289, 291 (majority opinion); *id.* at 299-300 (Thacker, J., concurring in part and dissenting in part).

D. Respondent's State Reprosecution

The Commonwealth subsequently filed an ex parte motion to appoint a special prosecutor of their selection, which the trial court granted. C.A. 1302-1303. Despite conducting "no additional investigation," the special prosecutor sought, and the grand jury returned, a superseding indictment alleging six new charges in addition to the original indictment's three. Pet. App. 20a-21a; C.A. App. 413. Those new charges included capital murder by a person engaged in a continuing criminal enterprise, and additional felonies that carried life sentences. Pet. App. 20a-21a. After the trial court rejected a vindictive prosecution claim, respondent—"[c]oncluding he had no hope of a fair trial, and without his star witness," Pet. App. 25a—pleaded guilty to first-degree murder, a firearm charge, and conspiracy to distribute marijuana, see C.A. App. 416, 546-547.

Respondent appealed, arguing that his plea was involuntary because of prosecutorial misconduct and vindictive prosecution. The Virginia Court of Appeals dismissed his claims as unpreserved, see C.A. App. 418-422; the Virginia

Supreme Court denied discretionary review; and this Court vacated the judgment and remanded in light of *Class* v. *United States*, 583 U.S. 174 (2018). See 586 U.S. 1063 (2019). On remand, the Virginia Court of Appeals again ruled against respondent on preservation grounds, and both the Virginia Supreme Court and this Court denied review. See Pet. App. 26a.

E. Respondent's Second Habeas Petition

1. On June 22, 2022—one day after the one-year limitation period expired, see 28 U.S.C. 2244(d)(1)—respondent filed a second federal habeas petition. While the petition was pending, Barber signed a new declaration. In it, Barber explained why he refused to testify on respondent's behalf in any retrial and how he would have testified if the Commonwealth's officials had not threatened to repudiate his plea agreement and retry him for capital murder. Explaining his previous vacillation as a product of the Commonwealth's intimidation, Barber reaffirmed his multiple recantations of his original trial testimony and stated again that respondent "had nothing to do with [Petrole's] killing." C.A. App. 570; see C.A. App. 570-577.

Based on that declaration, respondent filed an amended habeas petition. He asserted both a vindictive-prosecution claim and a due-process claim. Pet. App. 29a-31a. Respondent also sought to use actual innocence as a gateway through any preservation issues and his untimely filing of his federal habeas petition. In support, respondent attached another declaration from Barber's lawyer, attesting that Barber's decision not to testify in respondent's retrial was "final and obvious" absent immunity, which the Commonwealth had never offered. See C.A. App. 2146-2148; Pet. App. 31a.

The district court granted petitioner's motion to dismiss respondent's amended habeas petition. Pet. App.

57a-76a. The court initially held that a showing of actual innocence could not excuse respondent's untimely filing. The court also held that, even if it could, Barber's declaration was not "new" evidence because respondent knew the contents of Barber's potential testimony when he entered his plea. *Id.* at 67a-74a. On reconsideration, the district court acknowledged that a showing of actual innocence would allow respondent to overcome the statute of limitations, but the court reaffirmed that Barber's declaration was not "new" evidence. The court further held that Barber's declaration was not "reliable" because of Barber's multiple recantations. *Id.* at 49a-56a.

2. The court of appeals reversed in a unanimous opinion. Pet. App. 1a-48a.

The court first held that Barber's latest declaration was "new" evidence for purposes of the actual-innocence gateway because it was "reasonably unavailable" to respondent at the time of his guilty plea due to "abhorrent" and "egregious" prosecutorial misconduct. Pet. App. 2a, 38a-41a, 47a. Although the court acknowledged a circuit conflict on the standard for "new" evidence and adopted the majority rule that any "newly presented" evidence is "new," the court explained that the question in this case could not be resolved "just by parsing the nature of the *Schlup* standard." *Id.* at 37a. Instead, resolving the case required consideration of the case's unique "context." *Id.* at 37a-38a.

In context, the court of appeals held, Barber's declaration was "new" because it "upset th[e] status quo" by converting Barber from an "unavailable witness" into one "who, even if not called at trial, was willing to provide a contemporaneous declaration exculpating [respondent]." Pet. App. 38a. A contrary finding, the court reasoned, would "ignore[] the pivotal event" of Commonwealth agents "show[ing] up unannounced at Barber's jailhouse

door and coerc[ing] him into exercising his Fifth Amendment privilege." *Id.* at 39a.

The court of appeals also held that Barber's latest declaration was "reliable" because any "alleged vacillation" by Barber was "entirely attributable to the Commonwealth's coercive tactic of threatening him with the death penalty if he did not cooperate." Pet. App. 42a (internal quotation marks and alteration omitted). "To hold the consequence of the Commonwealth's coercive tactics against Barber's credibility," the court explained, would have "defie[d] fundamental principles of due process and justice." *Id.* at 45a.

The court of appeals further held that it was "more likely than not" that a reasonable jury presented with Barber's latest declaration would have acquitted respondent. Pet. App. 46a-48a. The court emphasized "Barber's multiple 'credible' recantations, his assertions that [respondent] had nothing at all to do with the crime, the weakness of the Commonwealth's case, the history of the Commonwealth's egregious misconduct, and the strength of [respondent's] claims challenging the voluntariness of his plea." *Id.* at 48a. The court of appeals thus held that respondent had made a sufficient showing of actual innocence to excuse the procedural barriers in his case, and it remanded the case for the district court to resolve his substantive constitutional claims on the merits. *Ibid.*

ARGUMENT

The decision below does not warrant the Court's review. Petitioner argues that the court of appeals' decision presents an opportunity to resolve a circuit conflict about what evidence qualifies as "new" for purposes of the actual-innocence gateway to habeas review. But none of the decisions cited by petitioner resolves the question

whether evidence is "new" where it was previously unavailable due to prosecutorial misconduct. And any conflict that does exist would not warrant the Court's review at this time in any event.

Petitioner's arguments on the merits fare no better. Petitioner misapprehends the actual holding of the court below, and his arguments lack any basis in the underlying rationale for the actual-innocence gateway or in this Court's precedents. Nor has petitioner shown that the question presented is especially important or that this is a good vehicle to resolve it. To the extent the question presented warrants review at all, the Court should await a better vehicle and deny the petition here—as it has repeatedly done with previous petitions raising questions about the "new" evidence standard. See, *e.g.*, *Crow* v. *Fontenot*, 142 S. Ct. 2777 (2022) (No. 21-970); *Hancock* v. *Davis*, 587 U.S. 1063 (2019) (No. 18-940); *State Correctional Institution at Fayette* v. *Reeves*, 587 U.S. 1070 (2019) (No. 18-543).

A. The Decision Below Does Not Squarely Implicate The Conflict Identified By The Petition

Petitioner argues that the Court should grant review to adopt the minority approach in a lopsided circuit conflict about the meaning of "new" evidence for purposes of the actual-innocence gateway to habeas relief. According to petitioner (Pet. 16-27), a handful of courts require a criminal defendant to identify "newly *discovered*" evidence, while most courts allow a defendant to rely on any "newly *presented*" evidence. This case does not squarely implicate any such conflict, and that asserted conflict would not warrant the Court's review in any event.

1. Petitioner cites (Pet. 18-21) decisions from three courts of appeals—the Third, Fifth, and Eighth Circuits—as purportedly adopting the "newly discovered"

standard in published decisions. As a preliminary matter, two of those courts have expressly stated that they have not definitively decided what qualifies as "new" evidence. In particular, the Third Circuit has explained that, despite "dicta" in earlier cases, it has not "resolved the meaning of new evidence in the actual innocence context." *Reeves* v. *Fayette SCI*, 897 F.3d 154, 163, 165 n.11 (2018), cert. denied, 587 U.S. 1070 (2019). The Fifth Circuit has likewise declined to "weigh in on the circuit split concerning what constitutes 'new' evidence." *Hancock* v. *Davis*, 906 F.3d 387, 389 (2018), cert. denied, 587 U.S. 1063 (2019) (internal quotation marks and citation omitted).

In addition, decisions from the Third, Fifth, and Eighth Circuits suggest that those courts might reach the same conclusion as the court of appeals below on the facts of this case. For example, in *Reeves*, the Third Circuit held that evidence qualifies as "new," even if it could have been previously discovered or presented, where the defendant "asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence." 897 F.3d at 164. The Third Circuit viewed that "limited approach"—which petitioner suggests is correct, see Pet. 34-35—as necessary to avoid the "inequity" and "injustice of incarcerating an innocent individual." *Reeves*, 897 F.3d at 163-164 (internal quotation marks and citation omitted). Under that reasoning, there is good reason to think that the Third Circuit would adopt a similar approach where prosecutorial misconduct previously made the relevant evidence unavailable.

Similarly, the Fifth Circuit has assumed without deciding that the denial of a defendant's counsel of choice could render previously unpresented evidence "new" for purposes of the actual-innocence gateway. See *Mendoza* v. *Lumpkin*, No. 21-20501, 2022 WL 3657188, at *3 (Aug.

25, 2022). In so doing, the panel analogized to the principle that,"[w]here the underlying constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway." *Ibid.* (quoting *Gomez* v. *Jaimet*, 350 F.3d 673, 679-680 (7th Cir. 2003)); but see *Tyler* v. *Davis*, 768 Fed. Appx. 264, 265 (5th Cir. 2019) (declining to recognize a special rule for determining whether evidence is "new" in the context of ineffective assistance of counsel).

The Eighth Circuit's precedents likewise suggest that it may reach the same conclusion as the decision below in the context of prosecutorial misconduct. Although the Eighth Circuit has held that evidence must be "newly available" to qualify as "new" for purposes of the actual-innocence gateway, see, *e.g.*, *Amrine* v. *Bowersox*, 238 F.3d 1023, 1028-1029, cert. denied, 534 U.S. 963 (2001), it has also recognized that the "new" evidence standard "does not require a defendant to root out information that the State has kept hidden," *Jimerson* v. *Payne*, 957 F.3d 916, 927 (2020) (citing, *inter alia*, *Kidd* v. *Norman*, 651 F.3d 947, 952 (8th Cir. 2011) (analyzing whether evidence was "new" for purposes of the actual-innocence gateway), cert. denied, 568 U.S. 838 (2012))). As the Eighth Circuit explained, the State "cannot play 'hide and seek' with information it was required to disclose and then accuse defense counsel of lacking due diligence." *Ibid.*[1]

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[1] In a footnote (Pet. 20 n.4), petitioner cites an unpublished order from the D.C. Circuit. See *Adams* v. *Middlebrooks*, 640 Fed. Appx. 1, 3-4 (D.C. Cir. 2016). That non-binding disposition did not purport to take a side in the circuit conflict about the meaning of "new" evidence. Instead, the Court reasoned that, because the defendant could have obtained the relevant evidence years earlier, the "unexplained

In short, it is unclear whether the courts even allegedly on petitioner's side of the circuit conflict would disagree with the decision below if confronted with a case in which the relevant evidence was made unavailable due to prosecutorial misconduct. See Pet. App. 47a-48a. For that reason alone, this case does not present a clean conflict warranting the Court's intervention.

2. Petitioner also has not shown that the broader reasoning of the decision below conflicts with those of other courts. Although petitioner frames the circuit conflict as between courts that require "newly discovered" evidence and those that require only "newly presented" evidence, see, *e.g.*, Pet. 16-17, petitioner obscures the more complex state of the law in the lower courts.

The courts of appeals purportedly on petitioner's side of the conflict have not adopted a pure "newly discovered" standard. Rather, they have considered *both* whether the evidence could previously have been "discovered" by the defendant *and* whether it was previously "available" to him. For example, the Eighth Circuit has explained that evidence is "new" if it was "not available at the time of trial through the exercise of due diligence." *Jimerson*, 957 F.3d at 927. Applying that standard, the Eighth Circuit has rejected claims of actual innocence where the evidence at issue could have been "presented" in earlier proceedings—that is, where the evidence was previously "available" to the defendant. *Kidd*, 651 F.3d at 951, 953; *Amrine*, 238 F.3d at 1028-1029.

Similarly, although the Fifth Circuit has not formally adopted a position about the meaning of "new" evidence, the court has considered both whether evidence was

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delay in presenting [the] new evidence" undermined his argument that he had produced "evidence of innocence so strong" that it "create[d] a lack of confidence in the outcome of his trial." *Id.* at 4 (quoting *McQuiggin* v. *Perkins*, 569 U.S. 383, 399 (2013)).

"newly discovered" and whether it was "previously unavailable" in deciding whether the actual-innocence gateway was available. *Hancock*, 906 F.3d at 389-390 & n.1. The court has rejected the "new" designation where the defendant failed to show that the evidence was previously "unavailable" to him. *Id.* at 390; see *Fratta* v. *Davis*, 889 F.3d 225, 232 (5th Cir. 2018), cert. denied, 586 U.S. 1080 (2019); *Moore* v. *Quarterman*, 534 F.3d 454, 461, 464-465 (5th Cir. 2008). And although one decision from the Third Circuit has suggested that a court should look to whether the evidence was "previously known" to the criminal defendant, that analysis was based on the statutory language in 28 U.S.C. 2244(d)(1)(D), and not any meaningful analysis of the appropriate standard for the actual-innocence gateway. Compare *Sistrunk* v. *Rozum*, 674 F.3d 181, 189 (2012), *with id.* at 191-192. As already noted, see p. 16, the Third Circuit has more recently clarified that it has not definitively resolved the meaning of "new" evidence in the actual-innocence context. *Reeves*, 897 F.3d at 163.

Consistent with those decisions, the decision below appropriately focused on whether the evidence at issue was previously "unavailable" to respondent. Although petitioner emphasizes (Pet. 15, 22) one part of the decision in which the court of appeals purported to adopt the majority position requiring only "newly presented" evidence, petitioner largely ignores the decision's actual reasoning. Specifically, the court below held that Barber's declaration was "new" evidence because it was "reasonably unavailable" to respondent at the time of his guilty plea due to prosecutorial misconduct. Pet. App. 41a. As the court summarized its holding, Barber's declaration was "new evidence because it rendered Barber available to [respondent] as an exculpatory witness when Barber had previously been unavailable pursuant to his invocation of

his Fifth Amendment privilege." *Id.* at 3a-4a. That reasoning does not implicate any conflict between courts that require "newly presented" evidence and those that require "newly discovered" evidence, because Barber's testimony was unavailable to respondent in his retrial.

3. In passing, petitioner invokes (Pet. 25) "another wrinkle" in this case based on the fact that respondent is challenging a guilty plea. Petitioner contends (*id.* at 25-26) that there is additional disagreement among lower courts on how to assess "new" evidence in the context of guilty pleas. But if anything, that additional complication weighs against this Court's review, because the alleged disagreement among lower courts is entirely underdeveloped, consisting primarily of statements from unpublished decisions and concurring opinions. See *ibid.* This Court should either await a case that does not present an added "wrinkle" that could impede review or allow for further percolation on the additional asserted conflict.

B. The Decision Below Is Correct

Petitioner also argues (Pet. 30-37) that the Court's review is warranted because the court of appeals erred on the merits. Petitioner is incorrect.

1. As a preliminary matter, petitioner's merits arguments mistakenly assume that the decision below turned on a showing of "newly presented evidence, regardless of whether that evidence was available or discoverable at earlier stages of the case." Pet. 31. The decision below turned on the unique "context" of this case, which involves exculpatory evidence that was "reasonably unavailable" to respondent due to prosecutorial misconduct. Pet. App. 38a, 41a; see also p. 13, *supra*. Petitioner never explains why *that* holding was erroneous. And if petitioner is willing to accept an exception to his proposed standard for ineffective assistance of counsel, see Pet. 34-35, it is hard to

see why an exception for prosecutorial misconduct would not follow from the same logic. If anything, the case for such an exception is even greater in the context of prosecutorial misconduct that prevents a defendant from presenting the relevant evidence at trial.

2. Even assuming that the court of appeals' adoption of the "newly presented" standard was outcome-determinative here, that standard properly reflects the balance struck by the actual-innocence gateway and this Court's precedents.

The actual-innocence gateway recognizes that "principles of comity and finality" must sometimes "yield to the imperative of correcting a fundamentally unjust incarceration" where the evidence of innocence is "so strong that a court cannot have confidence in the outcome of the trial." *Schlup* v. *Delo,* 513 U.S. 298, 316, 320-321 (1995) (internal quotation marks and citation omitted). The inquiry thus focuses on whether the reviewing court has compelling reasons to believe that the prior proceedings may have resulted in the conviction of an innocent person. Requiring "newly presented" evidence furthers that rationale by ensuring that the claim of innocence is not based solely on evidence "already found sufficient to convict the petitioner." *Fontenot* v. *Crow*, 4 F.4th 982, 1033 (10th Cir. 2021), cert. denied, 142 S. Ct. 2777 (2022). By contrast, whether the defendant could have "discovered" the evidence with greater diligence is "beside the principal point of avoiding [the] manifest injustice" of a wrongful conviction. *Ibid.*

In addition, the actual-innocence gateway is meant to apply when a defendant cannot satisfy the "standard equitable exceptions," which typically require "some excuse for the delayed presentation of a claim." *Fontenot*, 4 F.4th at 1032. Requiring a showing of diligence to invoke the actual-innocence gateway thus "makes scant sense,"

because it is relevant only when the habeas petitioner was not otherwise "reasonably diligent" in pursuing his claims. *McQuiggin* v. *Perkins*, 569 U.S. 383, 398-399 (2013).

This Court's precedents reflect those principles. For example, in *Schlup*, the Court explained that a criminal defendant must come forward with "new reliable evidence * * * that was not presented at trial," and it used the "newly presented" formulation throughout in discussing the type of required evidence. 513 U.S. at 324, 330, 331-332. The Court also treated as "new" evidence that was not "presented" at trial but could have been "discovered" at the time: namely, affidavits from a prison official who testified at trial and from inmates at the relevant facility who were interviewed by law enforcement before trial. See *id.* at 307-308, 310-312, 316-317, 331 & nn.25, 26. The Court's decision in *House* v. *Bell*, 547 U.S. 518 (2006), is to the same effect: there, both the majority and the partial dissent described the actual-innocence standard as whether the defendant offered "new reliable evidence * * * that was not presented at trial." *Id.* at 537 (citing *Schlup*, 513 U.S. at 324); *id.* at 556 (Roberts, C.J., concurring in the judgment in part and dissenting in part) (same).

3. Petitioner's contrary arguments lack merit.

Petitioner primarily argues (Pet. 3, 31-33) that a "newly discovered" standard is necessary to prevent "sandbag[ging]" by defendants. But it borders on the nonsensical to worry about a criminal defendant making a "tactical choice" to withhold exculpatory evidence, Pet. 32, where (as here) the *government* coerced the key witness into asserting his Fifth Amendment right not to testify. And even as a general matter, it would be a bizarre and extraordinary gamble for a criminal defendant to with-

hold key exculpatory evidence from trial based on the expectation that (1) his federal constitutional rights will be violated, (2) he will procedurally default that constitutional claim, and (3) the withheld evidence will overcome the rigorous standard of the actual-innocence gateway. In any event, courts may consider a prisoner's diligence as part of the assessment of whether "actual innocence has been convincingly shown," because "unexplained delay" will "undermine the credibility of [an] actual-innocence claim," even if it is not a "threshold inquiry." *Perkins*, 569 U.S. at 399-400.

Petitioner relatedly contends that defendants will withhold exculpatory evidence for other strategic reasons, such as "to avoid impeachment, rebuttal, or the presentation of conflicting accounts." Pet. 32. But there is no reason to think that such untested "new" evidence would "raise[] sufficient doubt about [the defendant's] guilt to undermine confidence in the result of the trial." *Bell*, 547 U.S. at 537. After all, respondent's evidence would be subject to adversarial testing at the resulting *Schlup* hearing, after which point the court would review "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id.* at 537-538 (internal quotation marks and citation omitted).

Petitioner next cites (Pet. 24, 32) Justice O'Connor's concurring opinion in *Schlup*, which referred in a single sentence to "newly discovered evidence of innocence" in summarizing the holding of the majority opinion. 513 U.S. at 332. But Justice O'Connor joined in full the majority opinion, which repeatedly referred to "newly presented" evidence and ultimately relied on such evidence. See p. 21, *supra*. And in *House*, both the majority and the separate opinions viewed the relevant question as whether the

new evidence had been "presented at trial." See p. 22, *supra*.

Finally, petitioner contends (Pet. 32) that the "newly discovered" standard is necessary to ensure that the actual-innocence gateway remains a "rare" exception applied only in the "extraordinary case," *Schlup*, 513 U.S. at 321. But as the Court has explained, "new reliable evidence" that "raise[s] sufficient doubt about [the defendant's] guilt" is already "unavailable in the vast majority of cases," regardless of whether it could have been previously discovered. *Id.* at 316, 324. To that very point, a majority of circuits have long applied the "newly presented" standard, see Pet. 21-25, and petitioner has offered no evidence that successful actual-innocence claims have inundated courts in those jurisdictions.[2]

C. The Question Presented Does Not Warrant The Court's Review In This Case

Petitioner also has not shown that the question presented is particularly important or that this case is a suitable vehicle for considering it.

1. Petitioner argues (Pet. 27-29) that the standard for "new" evidence is important because of a State's interest in the finality of criminal convictions. But the Court has already explained that the actual-innocence standard "accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the over-

[2] Although petitioner claims that his petition concerns only the legal standard for "new" evidence, he repeatedly questions (Pet. 13, 15, 35-36) the court of appeals' holding that respondent had made a sufficient factual showing of his actual innocence. Petitioner has not sought review of the lower court's careful, fact-bound holding as to that issue, and it would not warrant review in any event. See Sup. Ct. R. 10, 14.1(a); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993).

riding individual interest in doing justice in the extraordinary case," *Schlup*, 513 U.S. at 322 (internal quotation marks and citation omitted)—without imposing any diligence requirement, see p. 21, *supra*. And again, a majority of courts of appeals have long applied a "newly presented" standard, and petitioner has offered no reason to think that courts in those jurisdictions have experienced a flood of successful actual-innocence claims.

Petitioner relatedly invokes (Pet. 27-29) the State's interest in the finality of guilty pleas. But the fact that this case arises in the context of a guilty plea makes it ill-suited for addressing the asserted conflict on the standard for "new" evidence. See p. 20, *supra*. In any event, both this Court and the court below have recognized that the State's interest in the finality of guilty pleas must give way in certain cases, such as where the government engaged in "egregiously impermissible conduct" that was "material" to the defendant's choice to plead guilty, rendering the plea involuntary. Pet. App. 47a; see also *Brady* v. *United States*, 397 U.S. 742, 755 (1970). That is exactly the case here.

Petitioner further notes (Pet. 29-30), without substantiation, that the standard for "new" evidence arises frequently in the thousands of habeas petitions filed each year. Even if true, that fact cuts against petitioner, not for him: it means that the Court is essentially guaranteed to have another, better opportunity to address the question presented in a future case (as it has numerous times in the past, see p. 15, *supra*).

2. Petitioner also argues (Pet. 37-38) that this case is a good vehicle to resolve the question presented. That argument does not withstand even the most minimal scrutiny. As already explained, the case involves the unique circumstances of "abhorrent" and "egregious" conduct by

prosecutors using the threat of the death penalty to pressure the prosecution's key witness into invoking his Fifth Amendment right not to testify at respondent's retrial, depriving respondent of crucial testimony that he was not involved in the underlying murder. See Pet. 2a, 45a, 47a-48a. It is thus far from clear that adopting the minority view in the asserted circuit conflict—under which courts consider both whether evidence was "newly discovered" and whether it was previously "available"—would be "outcome-determinative" here. See Pet. 37; pp. 16-18, *supra*. Nor is the state of the law in the lower courts "ingrained and mature" (Pet. 38), except insofar as the majority of courts have long rejected petitioner's position without disrupting the system of federal habeas review.

* * * * *

In the end, the petition should be denied because it does not implicate any conflict among the courts of appeals; the court below correctly held that respondent provided "new" evidence establishing his actual innocence; and the case neither raises a question of particular importance nor presents a suitable vehicle for addressing the meaning of "new" evidence in the actual-innocence context. And given the egregious prosecutorial misconduct that gives rise to this case, it would be an eminently reasonable exercise of "judicial discretion," Sup. Ct. R. 10, for the Court to decline to expend its limited resources to save the Commonwealth from the consequences of its previous wrongdoing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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