No. 25-664

IN THE
Supreme Court of the United States

CHADWICK DOTSON,
Petitioner,
v.

JUSTIN MICHAEL WOLFE,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In 2005, Justin Wolfe discovered purported evidence of his actual innocence: the accomplice who testified against him in his original trial recanted, both in a declaration and in testimony in Wolfe's federal habeas proceedings, and alleged that Commonwealth officers intimidated him into offering the false testimony. After federal courts found the accomplice's testimony credible, they gave Wolfe an opportunity to present that evidence at a new trial in 2012. But despite knowing about the purported evidence of his actual innocence and having multiple vehicles available to introduce it—whether through the accomplice's declaration, the transcript of the accomplice's testimony in federal court proceedings, or cross-examination of the Commonwealth officers involved—Wolfe declined to present that evidence at trial. Instead, he chose to plead guilty.

Wolfe waited to take his second bite at the apple until after he filed an untimely habeas petition, which was denied as procedurally defaulted. Only then did Wolfe return to Barber's recantation—introducing a second Barber declaration, which contained no exculpatory facts about Wolfe that were not already recorded in Barber's declaration or testimony.

Wolfe's failure to introduce the purported evidence of his actual innocence at his re-trial, despite having discovered the evidence and having means available to present it, makes this case a clean vehicle to address the split that all parties agree exists: whether a newly "presented" or newly "discovered" standard should govern the *Schlup* actual innocence gateway.

ARGUMENT

I. The parties agree that circuits are divided on whether to apply a newly "discovered" or "presented" standard

The parties' disagreement is about the question presented here, not about whether a circuit split exists on Petitioner's question presented. Because all parties agree the circuits are divided on whether "new" evidence capable of opening the *Schlup* actual innocence gateway must be newly "discovered" or merely newly "presented," this Court should grant certiorari on that question, which is squarely presented here.

The Fourth Circuit was unequivocal that it viewed the *Schlup* gateway as applying to any evidence of actual innocence that is newly "presented," regardless of whether it has been known for years. App. 36–37a. And the court plainly relied on that holding to award Wolfe a new hearing. Yet Wolfe contends that the rule emerging from the Fourth Circuit's decision is that there is some new actual innocence gateway applies to claims based on evidence of actual innocence that was known but "was made unavailable due to prosecutorial misconduct." BIO 3. That is not the question presented here, and it does not accurately depict the Fourth Circuit's decision.

It may well be that, where known evidence of actual innocence was made completely unavailable due to prosecutorial misconduct, *some* gateway permits the claim to proceed. But that is not this case, even if the evidence was not available in the form Wolfe wanted—live testimony—because of purported prosecutorial misconduct. Here, the purported evidence of Wolfe's actual innocence—Barber's recanta-

tion of his testimony from the first trial, and the Commonwealth's role in eliciting Barber's testimony—still *was available* at the time of Wolfe's retrial. Given that scenario, the Fourth Circuit did not rule on the question Wolfe wishes this case presented. Instead, it ruled that, under *Schlup*, Barber's second declaration containing the purportedly exculpatory testimony was "new" evidence because it "converted Barber from an unavailable witness, pursuant to his decision to invoke his Fifth Amendment privilege, into a witness who, even if not called at trial, was willing to provide a contemporaneous declaration exculpating [Wolfe]." App. 38a.

The Fourth Circuit *could* have created a new actual innocence pathway based on prosecutorial misconduct. Had it done so, the question presented here would be entirely different. But it did not. The Fourth Circuit claimed *known* evidence was "new" under *Schlup* because it was not available in the form Wolfe wanted to present it. App. 38a, 41a. By doing so, it joined five circuits that have ruled similarly, and it rejected three circuits' reasoning that known evidence is not "new." That is precisely why this case is a good vehicle to resolve the question about whether the newly "presented" or "discovered" standard should apply.

Wolfe acknowledges that a circuit split exists on this issue, and that at least the Eighth Circuit has adopted a newly "discovered" standard. BIO 15–16.

Wolfe debates whether the Third and Fifth Circuits' precedent fall on the newly "discovered" side of the split. BIO 15–16. Though a split exists regardless of whether those courts have entered the fold, Petitioner notes that the Tenth Circuit, in its effort to

address the circuit split on this very question, placed both courts in the newly "discovered" or "available" category, citing the same cases invoked in the petition for certioriari. *Fontenot v. Crow*, 4 F.4th 982, 1032 (10th Cir. 2021). Even if this Court disagrees with Petitioner about where to draw the line between the circuits, it should grant certiorari here to resolve the undisputedly present disagreement among the circuits.

The Tenth Circuit fairly characterized the split on this issue as five to three, contrary to Wolfe's objections. To start, the Tenth Circuit correctly described the Third Circuit's rejection of the newly "presented" standard in *Hubbard v. Pinchak*, 378 F.3d 333 (3d Cir. 2004). Where the defendant's only "new" evidence of actual innocence was "his own sworn testimony," the Third Circuit explained that the "late-proffered testimony is not 'new' because it was available at trial," and the defendant "merely chose not to present it to the jury." *Id.* at 340. "That choice," the court held, "does not open the gateway." *Id.*

Likewise, while acknowledging the Fifth Circuit has "nominally declin[ed] to weigh in," *Fontenot*, 4 F.4th at 1032 (citing *Hancock v. Davis*, 906 F.3d 387, 389–90 (5th Cir. 2018)), the Tenth Circuit fairly captured the Fifth Circuit's seeming embrace of the newly "discovered" standard in *Hancock*. There, the Fifth Circuit explained that "[e]vidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [a petitioner's] personal knowledge or reasonable investigation.'" *Hancock*, 906 F.3d at 390 (citation and quotation marks omitted). Thus, Fifth Circuit precedent precludes the position Wolfe presses here:

that known, available evidence of actual innocence that the defendant failed to present can constitute "new" evidence sufficient to open the *Schlup* gateway.

But it really does not matter who is right between the Tenth Circuit and Wolfe. Even under Wolfe's view, the circuits are divided, with some courts unwilling to wade into a decision. This Court's guidance is needed regardless of who is right on how the divide sits.

II. Wolfe's misapprehension of the question presented here infects his arguments against applying the newly "discovered" standard

A. Prosecutorial misconduct did not foreclose Wolfe from presenting evidence of his innocence at re-trial

This case also is a strong vehicle because it squarely presents *why* the newly "discovered" standard makes more sense than the newly "presented" standard. If the evidence's existence is known to the defendant, but the defendant squandered the opportunity to introduce that evidence before the state trial court despite having means to present it, then federal courts should not second guess the defendant's own decision.

Contrary to Wolfe's suggestion that Petitioner elides the history and context of this case, BIO 2, Petitioner's position does not turn on any dispute about the record. Even assuming the accuracy of the facts from the BIO, the circuits are intractably divided on the question presented. The BIO states:

- In 2005, Barber signed an affidavit recanting his prior testimony as fabricated. The 2005

Barber affidavit stated that: (1) Wolfe "had nothing to do" with Petrole's murder; (2) the detectives "were the first to mention" Wolfe's purported role to Barber and advised Barber "strongly and repeatedly to implicate" Wolfe or else "certainly be convicted of capital murder"; and so (3) Barber agreed to cooperate by telling the Commonwealth "what [it] wanted to hear," i.e., 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." BIO 6–7 (citations and quotation marks omitted).

- Barber also offered sworn testimony in an evidentiary hearing in federal court, testifying consistently with his 2005 affidavit, including that Commonwealth prosecutors made clear what Barber "h[ad] * * * to say" to avoid "getting the chair." BIO 9 (citations and quotation marks omitted).
- After the evidentiary hearing, the district court found, among other things, that Barber's recantation was "credible" and that the prosecution "coordinated witness testimony through a series of joint meetings" with Barber and other witnesses. BIO 9 (citations and quotation marks omitted).
- Shortly after the Fourth Circuit ordered the Commonwealth to retry Wolfe within 120 days or release him unconditionally, a detective and two Commonwealth attorneys visited Barber in prison to "intimidate[]" him away from repeating his recantation at Wolfe's pending retrial. That interview was recorded and introduced into evidence along with Barber's

motion to enforce. BIO 10 (citations and quotation marks omitted).

- In support of Wolfe's motion to enforce, Barber's counsel testified that Barber intended to invoke his Fifth Amendment rights and would not testify at Wolfe's re-trial absent a grant of immunity. BIO 10.

Assume further that all of this evidence tended to show Wolfe's actual innocence. The problem with Wolfe's argument is that all of that evidence *was known and available* to Wolfe at the time of his re-trial. When Barber invoked his Fifth Amendment rights, his former testimony in Wolfe's federal court proceedings became admissible. Va. Rule 2:804(b)(1). So did Barber's statements against interest—that he perjured himself in Wolfe's state court trial, and that he did so to avoid jeopardizing his own plea deal—in his 2005 affidavit and 2012 recorded interview statements. Va. Rule 2:804(b)(3). What is more, Wolfe could have cross-examined the various detectives and prosecutors about the intimidation alleged in the 2005 affidavit and evidentiary hearings, with both the court findings crediting Barber's recantation and the recording as impeachment evidence lying in wait.

Instead of introducing any of the available evidence that purportedly showed his innocence, Wolfe chose to plead guilty. [CA.JA381–82, 1289]. Even after doing so, Wolfe could have raised his habeas claims in a timely filed petition. But he did not. [CA.JA7; CA.JA1243–88].

And so Wolfe took a second bite at the apple, this time with another declaration that Barber executed in

2023. [CA.JA570–77]. The 2023 Barber affidavit disclosed no new exculpatory information about Wolfe. Barber instead explained why he was unwilling to testify at the re-trial: the detective and Commonwealth's attorneys purportedly had intimidated him, in the very interview that Wolfe already had a recording of at the time of his re-trial. *Ibid.* In other words, it is undisputed that there was no new evidence of actual innocence in the 2023 Barber affidavit.

B. The newly "discovered" standard maintains the individual's interest in ensuring justice while respecting the finality of state convictions.

The newly "discovered" standard best balances the important state interest in finality of state convictions against the individual's interest in ensuring justice. Wolfe's contrary arguments, particularly in the context of this case, all rely on the Fourth Circuit's incorrect reasoning that Barber's testimony regarding Wolfe's actual innocence was "new" evidence because it was not available to him at trial in the form that he preferred. Because the information about Wolfe's purported innocence was available to be introduced at the time of trial in other forms, the reasons for excusing his procedural default fall apart.

For example, Wolfe's ability to introduce the purported evidence of actual innocence makes this case materially different from those in which a criminal defendant is unable "to root out information that the State has kept hidden." BIO 17 (quoting *Jimerson v. Payne*, 957 F.3d 916, 927 (8th Cir. 2020)). In those cases, the relevant evidence would not have been "discovered" by the defendant. Not so here.

Likewise, Wolfe conjures up examples of cases where criminal defendants successfully invoked the *Schlup* gateway in which evidence could have been discovered, but was not. *Schlup v. Delo*, 513 U.S. 298, 307–308, 310–312, 316–317, 331 & nn.25, 26 (1995). It seems self-evident that evidence that *could have* been discovered is a far cry from evidence that is *known*. Because the evidence Wolfe describes was not discovered, the newly "discovered" standard allows defendants to present those claims just as well as the newly "presented" standard. But that is not this case. This case would not require the Court to impose a standard that asked whether the defendant could have discovered the evidence with greater diligence. It asks only the purest form of the question: whether the *Schlup* gateway applies to defendants who *did* discover the evidence and failed to present it anyway.

Wolfe contends that the newly "discovered" standard would result in manifestly unjust outcomes where outside forces interfered with a defendant's ability to present the evidence of actual innocence. Petitioner has already embraced that exceptions to the newly "discovered" rule may well be warranted in such contexts. Pet. 34–35. For example, in "the context of reaching an ineffective assistance of counsel claim based on counsel's failure to investigate or present at trial such exculpatory evidence," the Third Circuit has recognized that the assessment of an actual innocence claim should not "be strictly limited to newly discovered evidence." *Reeves v. Fayette SCI*, 897 F.3d 154, 162 (3d Cir. 2018), *as amended* (July 25, 2018). But no such exception is warranted here, nor did the Fourth Circuit create one. Wolfe has not claimed that his counsel provided ineffective assistance in failing to present the purported evidence

of his actual innocence. He has instead blamed the conduct of Commonwealth officials. And at least on the facts of this case, the reason that a broad exception for prosecutorial misconduct "would not follow from the same logic" as an ineffective assistance exception (BIO 21) is that, absent an ineffective assistance issue, Wolfe *could have* presented the purported evidence of his actual innocence at trial, even assuming that prosecutorial misconduct occurred.

Petitioner acknowledges that, like in the ineffective assistance context, an exception may be appropriate where prosecutorial misconduct renders the evidence completely unavailable, rather than unavailable in the defendant's preferred form. See *supra* at 2–3. But this case falls on the latter side of that divide. And that distinction is particularly important where the defendant's preferred vehicle for the evidence is testimony from a witness whose constitutional right against self-incrimination is implicated—testimony that will often be unavailable to the defendant, even in cases where no one alleges prosecutorial misconduct. Encouraging defendants to put the evidence available to them before the state trial court appropriately recognizes that court's role as the proper finder of fact in criminal cases.

Unlike the newly "discovered" standard, the newly "presented" standard creates incentives for unproductive and wasteful behavior. Consider cases where criminal defendants are convicted based on testimony of friendly accomplices who accept plea deals to testify against them. Post-conviction, the accomplice could submit a heartfelt-but-phony declaration attesting to his friend's innocence to help reopen his defaulted habeas claims—at any time, as many times as the pair

wants, and no matter how many times the friend subsequently pleads guilty because of his inability to persuade a jury of his innocence—so long as the accomplice invokes his Fifth Amendment rights to avoid testifying at the re-trial. Under the newly "presented" standard, there is no reason that cycle could not continue endlessly. That cannot be the right outcome in a system where the state "trial is the paramount event for determining the guilt or innocence of the defendant," and "[f]ederal courts are not forums in which to relitigate state trials." *Herrera* v. *Collins*, 506 U.S. 390, 401, 416 (1993) (quotation marks omitted).

Wolfe protests that no criminal defendant would decline to put on evidence of his actual innocence and plead guilty instead. BIO 22–23. But that is exactly what happened here. When criminal defendants could have presented the evidence of their innocence but chose not to do so, it makes little sense to inflict the blow on finality or devote the resources required to reopen the gateway to their federal habeas claims. The Fourth Circuit waded into the divide by ruling that evidence known for years before trial was "new" because it was not available in the defendant's preferred form at trial. This Court's intervention is necessary to clarify the law and allow for finality in criminal proceedings.

CONCLUSION

The petition should be granted, and the judgment below should be reversed.

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