OCTOBER TERM, 2025

No. 25-6683

IN THE SUPREME COURT OF THE UNITED STATES

RODERICK LESHUN RANKIN,
Petitioner,

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

— CAPITAL CASE —

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REPLY ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT *SCHLUP* DOES NOT IMPOSE A THRESHOLD "DUE DILIGENCE" REQUIREMENT FOR EVIDENCE THAT THE PETITIONER IS INNOCENT.

Respondent contests much of Roderick Rankin's exculpatory evidence and urges the Court to cast it aside. As Respondent would have it, the Court should allow the lower courts' disagreement about the meaning of "new" evidence under *Schlup v. Delo*, 513 U.S. 298 (1995), to "percolate" beyond the two decades it has already been brewing – and presumably beyond the date that Respondent hopes to carry out Rankin's execution. BIO 15–26. That suggestion is misguided for the reasons explained below.

A. Respondent's Factual Contentions Are Without Merit and Do Not Dispel the Need for a *Schlup* Hearing.

The district court was right in one critical respect: "Rankin has presented sufficient evidence in the deposition of Pastor Augustine Bailey to warrant a hearing." A109. Respondent takes issue with much of Rankin's evidence, but without undermining his modest request for a hearing under *Schlup*. The *Schlup* standard, after all, "does not require absolute certainty about the petitioner's guilt or innocence." *House v. Bell*, 547 U.S. 518, 538 (2006). The Court in *House* held the standard to be satisfied even though the case was "not a case of conclusive exoneration"; "[s]ome aspects of the State's evidence . . . still support an inference of guilt"; and the alternative-perpetrator evidence was "by no means conclusive," such that, "[i]f [it were] considered in isolation, a reasonable jury might well disregard it." *Id.* at 552, 553–54; *see also Wolfe v. Johnson*, 565 F.3d 140, 155–56 (4th Cir. 2009)

(remanding *Schlup* issue for an evidentiary hearing even though the essential affidavit relied upon by petitioner to demonstrate his innocence was subsequently disavowed by the affiant and the district court had previously found the affiant incredible).

Respondent complains that Rankin "conveniently" attempts to "blame a dead man," so that Rodney's confession and the witness statements corroborating it are "highly suspect." BIO 18. For support, Respondent relies on Justice O'Connor's concurrence in *Herrera v. Collins*, 506 U.S. 390 (1993). But Justice O'Connor rejected the prisoner's claim for separate reasons not present here. Those reasons include: Herrera offered his innocence claim after his execution was scheduled, i.e., "at the 11th hour with no reasonable explanation for the nearly decade-long delay" (unlike Mr. Rankin, who came forward with Pastor Bailey's account shortly after she revealed it, and before which she kept Rodney's confessions confidential); the various witness accounts contradicted each other (unlike Mr. Rankin's evidence); and the new evidence did not explain the prisoner's pre-custodial written confession (unlike the evidence here: that Rodney set up his brother and let Mr. Rankin "take the fall" because he was "slow" and "easy to manipulate"). A147–48, 182; *Herrera*, 506 U.S. at 422–24 (O'Connor, J., concurring).

Respondent's attacks on Rodney's confessions to Pastor Bailey fare no better. Rodney could not have been wearing the shoes from the murder scene, Respondent insists, because police had already seized the blood-stained shoes from Rankin's home. BIO 19. But blood was not definitively identified on the size-12 Reeboks seized

from under Rankin's couch. TR 1196–97, 1495. Furthermore, forensics could not match those shoes to the shoeprint impression on the Halfords' front door. TR 1328–31. Respondent simply assumes that the shoes worn by Rodney could not have been worn during the crime, and that Rodney was too shrewd to wear such inculpatory evidence in public. BIO 19. Those arguments would be better directed to the district court at an evidentiary hearing.

Next Respondent dismisses Rodney's admission that he planned for his younger brother to "take the fall," because Rankin had already confessed to the police by the time Rodney spoke with Pastor Bailey. BIO 19. But that does not mean that Rankin's custodial confession *alone* clinched Rodney's plan to blame his brother. *See* Dist. Dkt. No. 104-2 at 122 ("Rodney said that his plan was to blame everything on Shun so that he, Rodney, would be able to *remain* out of prison to take care of Elaine and the family." (emphasis added)). To the contrary, Rodney continued to insert himself into his brother's relationship with trial counsel. Rodney "came to my office on more than one occasion to provide me with 'facts' that I knew he had made up," counsel explained. A235. "He was trying to control our investigation and view of the case." *Id.*

Concerning the pair of size-12 Reeboks seized from Rankin's home, Respondent elsewhere argues that the shoes were found under the couch where Rankin was sleeping when the police arrived, that blood was found on the shoes, and that Rankin admitted that the seized shoes were his. BIO 6, 28. In fact, the trial testimony showed that the police seized *two* pairs of shoes from Mr. Rankin's home. TR 1149. One pair

was partially under the bottom edge of the couch on which Rankin was sleeping, and the other pair (the size-12 Reeboks) was "stuck further underneath." TR 1175, 1246. The evidence does not establish, then, that Rankin owned or wore the size-12 Reeboks from under the couch – even ignoring Rankin's proof that he wore size-14 shoes. The Rankins lived in a cramped home in which "people were living on top of one and other [sic]," and the two brothers' clothes were interspersed. TR1449 ("I hang my clean clothes in the closet in my brother's room."); Dist. Dkt. No. 104-4 at 14. For that matter, the crime lab was unable to determine whether the small stain on the seized shoe was actually blood. TR 1196–97, 1495.

Respondent makes similar arguments about the jeans. BIO 6, 28. Contrary to Respondent's suggestion, Rankin did *not* specifically testify that the blood-stained jeans belonged to him rather than his brother. He testified that all six pairs were behind his dresser and that he had planned to take them to the cleaners. TR 1449. The trial testimony did not differentiate the shorter blood-stained jeans from the five longer pairs that were found behind the same dresser. *Id.* Indeed, the testimony did not describe the blood-stained jeans *at all*, because defense counsel moved to exclude them without grasping that they were Rodney's size instead of Rankin's. *See Rankin v. State*, 948 S.W.2d 397, 401 (Ark. 1997) (A117); A243 (trial counsel admits that he "overlooked" the issue of the differently sized jeans).

Similarly unavailing is Respondent's reliance on Rankin's custodial confession. BIO 18. The Court recognizes that intellectually disabled defendants are especially vulnerable to the danger of false confessions. *Atkins v. Virginia*, 536 U.S. 304, 320

(2002). The confession in this case is seven minutes long, consists mostly of Rankin's responses to yes-or-no questions, and took place after two and a half hours of unrecorded interrogation during which Rankin repeatedly proclaimed his innocence. TR 1253–55, 1269–70; Dist. Dkt. No. 104-5 at 45–50; A103. It is unsurprising that defense counsel "never believed that the so-called 'confession' of my client was reliable or accurate." A241.

Rankin's confession also conflicted with the physical evidence. Rankin told the detective that he "got scared" and "started shooting" after "everybody start[ed] running out." Dist. Dkt. No. 104-5 at 48. The forensic evidence, however, shows that all three victims suffered contact gunshot wounds to the head; Mr. Halford's body was found on his bed, Ms. Halford's body was at the foot of the bed, and Zena's body was found in a doorway between the hall and a bathroom. TR 1017, 1031, 1128-29, 1301, 1341–46. There was no evidence that the shooter randomly fired shots within or throughout the house and no evidence that the victims were running out of it.

Respondent also argues that police found in Rankin's home a VCR, CDs, and other items that were linked to the murder weapon, i.e., that all the items were taken from the same burglarized home. BIO 18; TR 1151, 1179, 1210–12, 1396–97. But Rodney and Rankin *both* lived in the home where the burglarized items were found. Rule 37 TR 199. Those items implicate Rodney as much as they do Rankin.

In sum, it is unremarkable that Respondent disputes Rankin's evidence: "The record in successful *Schlup* claims is rarely cut and dry." *Gable v. Williams*, 49 F.4th 1315, 1323 (9th Cir. 2022). Rankin is entitled to a hearing.

B. The Circuits Are More Sharply Divided than Respondent Contends.

Respondent insists that a mere four circuits have "squarely rejected" the Eighth Circuit's requirement of newly and diligently discovered evidence. BIO 22. But Respondent misreads the Sixth Circuit's opinion in *Cleveland v. Bradshaw*, 693 F.3d 626 (6th Cir. 2012), as well as the Second Circuit's opinion in *Rivas v. Fischer*, 687 F.3d 514 (2d Cir. 2012). The Sixth Circuit analyzed *Schlup* exactly as Rankin did in his petition. Specifically, *Cleveland* observed that some of the evidence considered in *Schlup* was available to defense counsel, who could have interviewed eyewitness John Green before trial. *See* 693 F.3d at 636. *Schlup* assessed that evidence without requiring it to be newly available. *Id.* And, contrary to Respondent's argument, the Second Circuit in *Rivas* defined "new evidence" under *Schlup* as "evidence not heard by the jury." 687 F.3d at 543. There are indeed six circuits that "squarely reject" the rationale taken below.

That includes the Ninth Circuit. Respondent imputes ambivalence to the Ninth Circuit on the question of whether Justice O'Connor's concurrence narrowed *Schlup*'s requirement of "newly presented evidence" to "newly discovered evidence." BIO 22–23. Nevertheless, the Ninth Circuit has uniformly held that evidence is "new" under *Schlup* when it was not presented at trial. *See Gable*, 49 F.4th at 1322 ("New evidence under *Schlup* does not actually have to be newly discovered."); *Griffin v. Johnson*, 350 F.3d 956, 959, 963 (9th Cir. 2003) (considering psychiatric records obtained by defense counsel but not presented to the trial court); *Sistrunk v. Armenakis*, 292 F.3d 669, 673 n.4, 676 (9th Cir. 2002) (en banc) (considering photographs of defendant's

penis, which were excluded at trial). There is nothing to the contrary in *Chestang v. Sisto*, 522 F. App'x 389 (9th Cir. 2013), cited by Respondent. BIO 23 n.5. Adhering to this Court's opinion in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the court in *Chestang* merely discounted the *credibility* of certain evidence on account of "unexplained delay." 552 F. App'x at 391. It did not rule that such evidence is not "new" under *Schlup*.

C. The Ruling Below Conflicts with This Court's Precedents.

Respondent relies on a strained reading of Justice O'Connor's concurrence in *Schlup*. BIO 23–26. Without elaboration, Justice O'Connor wrote that the Court's opinion requires the prisoner to offer "newly discovered evidence of innocence." *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring). Because four justices dissented from *Schlup*, Respondent argues, Justice O'Connor's view "could even be considered controlling" under *Marks v. United States*, 430 U.S. 188, 193 (1977), and would better serve the interests of federalism, comity, and finality. BIO 23–24. Respondent also offers three unpublished decisions in support of the *Schlup* concurrence theory: *Pratt v. Filson*, 705 F. App'x 523 (9th Cir. 2017); *Bonner v. Willis*, No. 10-21670-CIV, 2011 WL 836929 (S.D. Fla. Mar. 3, 2011); and *Jackson v. Chatman*, No. 1:13-CV-2270-MHS-JFK, 2014 WL 12521304 (N.D. Ga. Jan. 13, 2014). *Id.*

Respondent is wrong, several times over. First, the Court in *McQuiggin* has already interpreted and applied *Schlup* as Rankin does. *McQuiggin* expressly rejects any "threshold" requirement of diligence, and it instead directs courts to consider the timing of the prisoner's evidence when assessing its reliability. *See id.* at 398–99;

accord Schlup, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). Respondent points out that *McQuiggin* described the showing of innocence needed for review of an untimely habeas claim instead of a defaulted one. BIO 26. But the Court equated the two standards. *See McQuiggin*, 569 U.S. at 393. In doing so, the Court considered the same policy concerns invoked by Respondent, while weighing them against the Writ's core purpose:

> Focusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception—i.e., ensuring "that federal constitutional errors do not result in the incarceration of innocent persons."

Id. at 400 (quoting *Herrera*, 506 U.S. at 404).

Second, Respondent's unpublished authorities are inapt and unpersuasive. The *Bonner* and *Jackson* cases were litigated by pro se prisoners, who were ill-equipped to contest their jailers' misguided invocations of Justice O'Connor's concurrence. Moreover, the decision in *Bonner* preceded *McQuiggin* by two years. As for *Jackson*, the Eleventh Circuit affirmed by finding Jackson's exculpatory evidence non-probative, without addressing or endorsing the district court's restrictive gloss on *Schlup* and "new" evidence. *See Jackson v. Chatman*, 589 F. App'x 490, 491–92 (11th Cir. 2014). Finally, the Ninth Circuit's opinion in *Pratt* merely questioned whether Justice O'Connor had narrowed *Schlup* to "newly discovered evidence of innocence" – a proposition that conflicts with Ninth Circuit precedent. *See Pratt*, 705 F. App'x at 525. The Ninth Circuit abides by that precedent to this date: "We assess

any evidence that is newly presented, as in not presented at trial." *Gable*, 49 F.4th at 1322 (citation and quotation omitted).

Third and more fundamentally, Respondent misreads *Schlup* and misapplies *Marks*. The rule of *Marks* applies when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." 430 U.S. at 193. But the Court in *Schlup* was not fragmented. Justice O'Connor joined the majority opinion, and she offered her remarks in response to the two dissents. *See* 513 U.S. at 332, 334. At no point did Justice O'Connor differentiate what she termed "newly discovered evidence of innocence," *id.* at 332 (O'Connor, J., concurring), from the majority's requirement of exculpatory evidence "that was not presented at trial." *Id.* at 324. To the contrary, she joined the majority opinion that relied on "particularly relevant" exculpatory evidence that Schlup could have discovered before trial, that is, if defense counsel had troubled to interview eyewitness Green. *Id.* at 310, 310 n.21, 316. By assenting to the majority opinion in *Schlup*, Justice O'Connor necessarily rejected the reasoning below, which is that "[e]vidence is 'new' if it was unavailable at trial and 'could not have been discovered earlier through the exercise of due diligence.'" A13 (quoting *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997)).

II. THE COURT BELOW FAILED TO CONSIDER, FROM TRIAL COUNSEL'S PERSPECTIVE AT THE TIME, THE TOTALITY OF EVIDENCE THAT COUNSEL NEGLECTED TO INVESTIGATE AND PRESENT ON THE QUESTION OF RODNEY'S GUILT.

Ignoring trial counsel's admission that he failed to investigate his own belief that Rodney committed the murders, A231–32, Respondent urges that Rankin's ineffective-assistance claim stems from "the sudden willingness of Rankin's friends

and family to blame Rodney decades after the murders." BIO 28. That is untrue. Witnesses explain that trial counsel either failed to interview them at all or failed to ask them about Rodney's guilt, and that they would have offered the same evidence at the time of trial if asked. *See* Dist. Dkt. No. 147-1 at 6 (Bessie Henderson); Dist. Dkt. No. 104-4 at 6 (Yolanda Davis); *id.* at 10 (Stephanie James); *id.* at 17 (Doris Ellis); *id.* at 23 (Miracle Spicer); *id.* at 30 (Dalton Rankin). Much as the cold record does not compel the Eighth Circuit's inference of a "lack of evidence pointing to Rodney," A17, without the benefit of a hearing, it does not justify Respondent's charge of a recent fabrication.

Neither is it true that trial counsel was "imminently [sic] reasonable," BIO 28, in winning a motion in limine to exclude evidence about the blood-stained pants. Counsel did not know that, from among the six pairs of pants that were seized from behind Rankin's dresser, the blood-stained pair were several inches shorter than the others – corresponding with the fact that Rodney was not "nearly as tall" as Rankin. Dist. Dkt. No. 104-4 at 22, 37–38. Trial counsel "personally examined the pants on which the human blood stain was found," but he did not compare the size of those pants with that of the others seized by police. A243. Counsel admits that he simply "overlooked" the issue of the differently sized pants. *Id.* Counsel's strategy therefore lacked the benefit of a reasonable investigation.

Also without merit is Respondent's suggestion that 28 U.S.C. § 2254(e)(2) precludes Rankin from obtaining a hearing on the merits of his claim, even if he is innocent under *Schlup*. BIO 27. The Court has already held otherwise: the

restrictions of § 2254(e)(2) – including the "threshold for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court" – do not apply to "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." *House*, 547 U.S. at 539. That is because "[t]he miscarriage of justice exception . . . survived AEDPA's passage intact and unrestricted." *McQuiggin*, 569 U.S. at 397. The miscarriage of justice exception, then, is separate and distinct from the cause-and-prejudice framework of *Martinez v. Ryan*, 566 U.S. 1 (2012), which remains subject to § 2254(e)(2) when ineffective post-conviction counsel has failed to develop the facts in state-court proceedings. *See Shinn v. Martinez Ramirez*, 596 U.S. 366, 384–85 (2022). It makes no difference that the district court ruled that § 2254(e)(2) bars the merits evidence in this case. *See* BIO 27; A67. The Eighth Circuit reserved the question and considered that same evidence when deciding the merits. A16–17, A16 n.11. Rankin need not have pressed the issue in his petition for writ of certiorari, which seeks review of the Eighth Circuit's judgment.

III. THE COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN *HAMM V. SMITH*.

Respondent urges that Rankin forfeited any argument that the Eighth Circuit or the state courts should have averaged his pretrial IQ scores of 66 and 72 instead of selecting one score over the other. BIO 29–30. But that is not the issue. Rankin explained in his petition that he is intellectually disabled under the clinical standards that govern an Eighth Amendment claim pursuant to *Atkins*, as opposed to the non-clinical standards employed by the Arkansas courts several years before *Atkins*'

issuance. Pet'n at 14–15, 25–27. The *Atkins* claim cannot have been "adjudicated on the merits in State court proceedings" in 1997 for purposes of 28 U.S.C. § 2254(d), and as held below (A10), without the benefit of clinical standards that govern from 2002 and onward. This Court's forthcoming decision will address one aspect of those clinical standards, that is, whether an *Atkins* determination "may consider the cumulative effect of multiple IQ scores." *Hamm v. Smith*, 145 S. Ct. 2776 (2025). If the answer is yes, then an *Atkins* claim depends on criteria different from those that governed Rankin's statutory claim in state court.

Respondent demonstrates the importance of clinical standards when defending the state court's pre-*Atkins* ruling on adaptive functioning. BIO 31–32. Respondent argues that "testimony from the various experts and Rankin's teacher established that his adaptive functioning was satisfactory." *Id.* at 31. But Respondent does not dispute that *no* expert specifically assessed Rankin's adaptive functioning before trial. TR 1627, 1630, 1702; *Rankin*, 948 S.W.2d at 404 (A120). Even state examiner David Nanak testified that a diagnosis of "mental retardation" requires a specific evaluation of adaptive behavior, as opposed to the "impression" he drew from his "brief interview" with Mr. Rankin:

> [B]efore you can label anybody retarded, you have to perform an adaptive behavior assessment. That can be a formal or an informal evaluation. But one has to be in place before you can give that diagnosis. . . . I did not perform the behavioral assessment to make the diagnosis.

TR 1627, 1630, 1702.

Contemporaneous clinical standards support Nanak's view, requiring a qualified practitioner's assessment of the person's adaptive skills "as determined

either by formal comparison to a normative sample [i.e. testing] or through professional judgment." Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 49 (9th ed. 1992). Nanak specifically denied having made a qualifying "professional judgment," *id.*, because his "impression" lacked "the behavioral assessment to make the diagnosis." TR 1630. Neither may adaptive deficits be disproven from a teacher's lay and "wholly nonclinical" observations, *Moore v. Texas*, 581 U.S. 1, 20 (2017), as Respondent wrongly suggests. BIO 31.

The same inattention to clinical standards underlies Respondent's invocation of 28 U.S.C. § 2254(e)(1). BIO 31–32. That provision requires a federal court to presume the correctness of "a determination of a factual issue made by a State court." But the "factual issue" decided by the Arkansas Supreme Court is that Rankin was not "mentally retarded" as measured by the non-clinical standards that governed his pre-*Atkins* statutory claim. That "factual issue" is distinct from whether Rankin is intellectually disabled under the clinical standards that govern an Eighth Amendment claim.

Respondent additionally misapprehends Rankin's request for a post-*Hamm* remand. A grant-vacate-and-remand does not require a showing that the Eighth Circuit made a "specific error" when ruling that the state court adjudicated the merits of his *Atkins* claim before *Atkins* existed. BIO 29. It suffices that *Hamm* may shed light on that question. An intervening decision of this Court justifies a GVR when it suggests that "the decision below rests upon a premise that the lower court would

reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A ruling in *Hamm* is likely to fit that description.

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, the Court should hold this case pending its decision in *Hamm v. Smith*, No. 24-872.

Respectfully submitted,

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