No. 22-7270

IN THE
SUPREME COURT OF THE UNITED STATES

LAMONT MCKOY,

Petitioner,

v.

TODD ISHEE, Secretary, North Carolina Department of Adult Correction,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(e)(1) applies to gateway claims of actual innocence.

2. If so, whether the Fourth Circuit correctly applied the statute here.

3. Whether Petitioner fails to establish a gateway claim of actual innocence under *Schlup v. Delo* even if 28 U.S.C. § 2254(e)(1) *does not* apply.

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INTRODUCTION

Respondent respectfully asks this Court to deny the petition for a writ of certiorari. More than thirty years ago, Petitioner was convicted of first-degree murder in North Carolina state court. Petitioner is now released from prison and parole. He presents a petition arising from an unpublished opinion of the U.S. Court of Appeals for the Fourth Circuit affirming the dismissal of his habeas petition under 28 U.S.C. § 2254. Petitioner, however, raises predominantly factual disputes—disputes that have been repeatedly resolved against him by the courts in the best position to address evidentiary conflicts. Petitioner advances no compelling reasons for the Court to comment on his legal questions at this time, no conflict among the federal courts of appeals, no violation of the Court's precedents, and no error in the Fourth Circuit's decision below, which involves case-specific and complex issues of fact. Further review is unwarranted.

STATEMENT OF THE CASE

A. The murder

In 1991, a jury convicted Petitioner for the murder of Myron Hailey. A year earlier, on January 26, 1990, the police discovered Hailey's body slumped over in the driver's seat of his blue, four-door Honda Accord, down an embankment off Rowan Street in Fayetteville, North Carolina. (JA 68-69, 1468-69) The damage to and orientation of the vehicle showed Hailey had been driving east on Rowan Street, a direction away from the Haymount Hill neighborhood and towards the Grove View Terrace neighborhood in Fayetteville. (JA 68-69, 2119-22) Two bullets had penetrated

the rear of Hailey's car—one through the trunk lid and the other through the left rear turn signal. (JA 1472-73) One of the bullets, a .357 caliber Winchester Silvertip (JA 1475-76), traveled through Hailey's body and into the dashboard before falling to the floor. (JA 1743) The second bullet was found lodged between the driver's seat and Hailey's body, having grazed but not penetrated his back. (JA 1473) Hailey died due to blood loss from the penetrating bullet wound. (JA 1497)

Detective Michael Ballard of the Fayetteville Police Department (FPD), the lead investigator on the case, learned a few days after the murder that Bobby Lee ("Strawberry") Williams, Jr., a friend of Hailey's who lived in Haymount Hill, witnessed the shooting. Ballard found Williams, who agreed to talk to the police and provided a statement on February 20, 1990. (JA 136-40) In the statement, Williams explained that he encountered Hailey near Bryan and Branson Streets on the night of January 25, 1990. (JA 136) Williams said Hailey showed him thirteen or fourteen bags of cocaine rocks he had purchased. (JA 136) After tasting one of the rocks, Williams said, he knew it was fake and offered to help Hailey find and confront the seller. (JA 137) Williams stated they walked to the Branson Street arcade and looked inside but did not see the seller. (JA 137) A short time later, back on the street, Hailey saw "Saybo"—Petitioner's street name—and Williams confronted him about the fake cocaine. (JA 137) According to Williams, the three men walked behind the Thompson house, where Petitioner produced and exchanged a new bag of cocaine rocks with Hailey. (JA 138) After confirming the new rocks were real, Williams said, he began

to walk home and heard Hailey get into his car and start it up. (JA 138) Williams said he heard someone say, "Don't do it Saybo" about three times, heard gunfire, and turning back, saw Petitioner and other men running down a path. (JA 138) Williams said he followed behind the men, and coming out near Davis and Arsenal Streets, he saw Petitioner shoot at Hailey's car, saw a hole in Hailey's trunk, heard a woman in the car with Hailey scream, and watched as the car swayed as Hailey drove away. (JA 139) A month later, Williams amended his statement to clarify a detail about where his girlfriend was at the time of the shooting. (JA 310)

In March 1990, Ballard encountered Petitioner during an unrelated traffic stop, and Petitioner agreed to speak with Ballard in his patrol car. (JA 1597) During the conversation, Petitioner made statements and exhibited behavior that implicated him in Hailey's murder.[1] (JA 1597-1601) Petitioner was thereafter indicted for first-degree murder. (JA 2594)

B. The trial and direct appeal

At trial in 1991, Williams provided an account consistent with his pretrial statement: he testified that on the night of January 25, 1990, he was walking in Haymount Hill when he encountered Hailey carrying several Ziploc bags of what appeared to be crack cocaine. (JA 1503-05) Hailey gave Williams a rock, and after

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[1] Ballard said he did not arrest Petitioner at that time because he was in the midst of the investigation and wanted to interview the woman he believed was in the car with Hailey at the time of the shooting. (JA 1626-27)

tasting it, Williams told Hailey it was "beet" or fake cocaine. (JA 1506) Williams then offered to help Hailey find and confront the seller. (JA 1506-06, 1532)

According to Williams, he walked with Hailey towards Branson Street, stopping to "peek[ ] through the door" of the neighborhood arcade to see if the seller was inside. (JA 1506, 1529) Roughly ten minutes later, Hailey saw Petitioner standing near the corner of Bryan and Branson Streets. (JA 1506-07, 1529) Williams said he confronted Petitioner, stating, "[Y]ou can give my brother his mother fucking money back or the real stuff." (JA 1508) Williams testified that Petitioner then walked behind a house on Bryan Street, known as the "Thompson house," produced a plastic bag, and exchanged bags with Hailey who confirmed the new bag contained real cocaine. (JA 1508-09) Williams said he then left. (JA 1509)

Williams testified that as he was walking home, he heard a gunshot and someone say, "Don't do it, don't do it." (JA 1509, 1544, 1583) The gunshot came from the direction of Bryan Street near the Thompson house where Hailey's vehicle—a blue, four-door Honda Accord—was parked on the side of the road. (JA 1510, 1515) Williams said he turned around and quickly walked back to the corner of Bryan and Branson Streets to see who was shooting. (JA 1545) Williams said he saw Petitioner, James ("Cat") Mitchell, Charmaine Evans, and Anthony Lee ("Ant Lee") Everette running through a path that connects Bryan Street to Davis Street. (JA 1510-11, 1546) Williams followed behind the men but took a shortcut. (JA 1511, 1546)

Williams testified that he saw Petitioner shoot at Hailey's vehicle when Hailey turned left onto Davis Street. (JA 1511, 1518) Williams said Petitioner had either a .9 millimeter or .357 firearm and was standing approximately twenty to twenty-five feet away from Hailey's vehicle at the time. (JA 1511) Sparks flew from the rear of Hailey's vehicle before it started to weave down the street. (JA 1511-12) Williams explained that he did not immediately report the incident because he was on probation and believed he could be violated for his involvement. (JA 1569, 1576, 1606)

Williams openly admitted that at the time of the shooting he was on parole for robbery and manslaughter. (JA 1502) He also admitted he was familiar with cocaine and rock cocaine because he previously dealt the drug. (JA 1505-06, 1521-22) Williams read his February 20, 1990 statement to the jury, and admitted he amended the statement a month later. (JA 1559-63, 1582-84) Williams testified under oath that he was promised nothing for his testimony and did not anticipate or receive money in exchange for his cooperation. (JA 1588)

The defense showed Williams had a significant criminal history in Georgia and North Carolina. (JA 1521-23) The defense also highlighted numerous perceived inconsistencies between Williams's written statement and trial testimony, including whether Williams heard someone say, "Don't do it Saybo," before the first gunshot; whether he ran down the path with his girlfriend or alone; whether he knew which way Hailey's vehicle traveled after the first shot; and what clothing Hailey was wearing at the time of the shooting. (JA 1558-75)

Ballard testified regarding Petitioner's behavior and statements made in the patrol car in March 1990, explaining that during the encounter, he told Petitioner his name had come up as being Hailey's shooter, and Petitioner responded, "I don't even shoot at cars." (JA 148, 1597) Ballard said he told Petitioner that was a lie because Petitioner shot at a different vehicle a few days earlier. (JA 1597) According to Ballard, Petitioner smiled and said he did not know what Ballard was talking about. (JA 1598) Ballard said he told Petitioner a man drove up to the Thompson house to purchase drugs but took them without paying, and Petitioner replied, "I know it." (JA 1599) Ballard said Petitioner told everyone to move away and shot at the vehicle as it drove away, but others told him to quit shooting at cars because he had "shot at one already and a man was killed." (JA 1599) According to Ballard, Petitioner responded with a smile, "I know it." (JA 1599)

Ballard then accused Petitioner of shooting Hailey:

> I then stated the night you shot Myron Hailey, you did so because he ripped you off. [Petitioner] replied with a smile on his face, I know it. I stated that Hailey got into his car and started driving away, and he shot him, bamb, bamb. [Petitioner] replied, I know it. I then said you, Ant Lee, Cat, Chairman ran through the path, came out the corner of Davis and Arsenal [and] when Hailey turned down Davis, you shot again, and Hailey started swerving from side to side. McKoy replied, I know it.

(JA 1600)

Ballard testified that he told Petitioner that he, Ant Lee, Cat, and Charmaine would go "down for it," and Petitioner did not reply but was still smiling. (JA 1600) However, when Ballard suggested that Petitioner's friends would "roll" or snitch on

him, Petitioner became angry, responding, "[T]hey might roll on me, but I ain't saying anything." (JA 1600) Ballard testified that he asked Petitioner if he was innocent of the allegations and Petitioner did not reply. (JA 1600) Petitioner then smiled and asked if he could leave. (JA 1600) Ballard said he responded affirmatively, and Petitioner made the unsolicited statement, "[Y]ou don't even know what kind of bullet it was." (JA 1601) Ballard said he replied, "it was a .357," and Petitioner immediately quit smiling and got out of patrol car. (JA 1601)

Ballard testified that he and Williams went to Bryan and Branson Streets together and Williams showed him the route he took when he followed Petitioner during the shooting. (JA 1593) Ballard said there were no obstructions in the path Williams showed him. (JA 1621, 1629) Ballard explained that an unspent .357 caliber Winchester silvertip bullet was also recovered on the ground at the corner of Bryan and Branson Streets, though, he agreed he could not rule out that the bullet came from a different shooting. (JA 78, 1483, 1632-33)

Petitioner presented evidence at trial that a different man, Dennis Fort, shot Hailey near Bryan and Branson Streets in Haymount Hill on the night in question. Leslie Finley testified that on the night Hailey was murdered, there was a conflict between two gangs that sold drugs in the area, several people were outside shooting, and she saw the blue vehicle Hailey was driving circling the area. (JA 1650-56) Finley testified that she saw Fort pull out a long gun, like a rifle or shotgun, and shoot at

Hailey's vehicle. (JA 1652) She also testified that Fort shot out a transformer on the corner of Bryan and Branson Streets, causing the lights to go out. (JA 1654, 1662)

Erwin Jones testified that he saw a blue vehicle in Haymount Hill on the night of January 25, 1990, and the vehicle passed him several times near Bryan and Branson Streets. (JA 1677) Jones said around 8:00 or 9:00 p.m., he heard "a whole bunch of shooting" and the lights went out. (JA 1679) He could not see who was standing outside, but he did not see Petitioner. (JA 1682-83) Evidence at trial showed that Jones told the police in a pretrial statement that Petitioner and several other men were shooting at a blue vehicle on the night in question. (JA 1686-87)

In rebuttal, Williams testified that the lights went out on the corner of Bryan and Branson Streets from approximately 10:00 to 11:00 p.m. on the night of the shooting, clarifying that he did not encounter Hailey until later in the night after the lights came back on. (JA 1725) Judy Meshaw, an employee at the Public Works Commission, testified that the Commission received a call from city dispatch at 10:01 p.m. about the power outage at Bryan and Branson Streets on January 25, 1990, and a crew went out, discovered a transformer had been shot, and repaired the damage and restored power between 11:15 and 11:30 p.m. that night. (JA 1728) In addition, Special Agent Thomas Trochum from the North Carolina State Bureau of Investigation testified that the .357 caliber Winchester Silvertip bullet recovered from Hailey's vehicle could only have been fired from a .357 revolver based on its five lands and grooves. (JA 1744-45)

The jury found Petitioner guilty of first-degree murder under the felony-murder rule. (JA 1762, 1776) Petitioner was sentenced to life in prison. (JA 1778)

Petitioner appealed in the North Carolina Supreme Court, arguing that the trial court committed reversible error and improperly expressed an opinion on the evidence when it instructed the jury there was evidence "tending to show" that Petitioner "admitted the facts relating to the crime charged in this case." *State v. McKoy*, 417 S.E.2d 244, 246 (N.C. 1992). The court rejected Petitioner's argument and affirmed his conviction. *Id.* at 247. Petitioner did not petition for a writ of certiorari in this Court.

C. State post-conviction proceedings

In April 1998, Petitioner filed a *pro se* motion for appropriate relief (MAR) in state court, arguing in relevant part that his appellate counsel provided ineffective assistance by failing to present new evidence on direct appeal. (JA 2535-93) At the evidentiary hearing on the MAR in September 2001, Petitioner's attorney introduced a complete copy of the testimony elicited in a 1995 federal case, *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998),[2] in which William ("Rat-Rat") Talley and his co-

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[2] The Fourth Circuit vacated Talley's federal drug trafficking convictions and remanded for a new trial due to prosecutorial misconduct when the prosecutor argued during closing that Talley murdered a man in a drug deal gone sour. *Wilson*, 135 F.3d at 298-99 ("Talley was not on trial for murder, and there was no evidence that he had actually killed anyone.") Agent Scott Fox later testified at the federal evidentiary hearing in Petitioner's case that the prosecutor in Talley's case "exaggerated what [evidence] he had in the federal court." (JA 1973)

defendants, members of the "Grove View Terrace Court Boys," were charged with drug trafficking offenses. (JA 893) During the federal trial, Ronald Perkins and Kelly Debnam testified that they saw Talley fire a gun at a vehicle one night after a drug deal went bad. (JA 501-503, 593) Neither witness knew what happened to the driver, but they believed he had been hit by gunfire and claimed they later saw the vehicle down an embankment off Murchison Road. (JA 503, 594) Perkins and Debnam provided no date or time for when the shooting occurred. (JA 501-03, 593-94)

Petitioner also introduced a federal investigative report on Talley and his co-defendants, which stated that Anthony Perkins, Ronald's brother, told investigators he was present in Grove View Terrace during a shooting and recalled the events his brother reported. (JA 614) Craig Roberts also told investigators that he saw Talley fire a gun at an individual driving a vehicle, he believed the driver was killed, and he believed someone from Haymount Hill was wrongly convicted for the shooting. (JA 616) Neither A. Perkins nor Roberts, however, identified a time or date of Talley's purported shooting and neither man identified Hailey as the victim. (JA 614-16)

The court also considered a September 5, 1995 letter from the federal prosecutor in Talley's case, John Bennett, to the state prosecutor, John Dickson, along with a memorandum from State Bureau of Investigation Agent Scott Fox describing the evidence in the federal case. (JA 950) In the letter, Bennett opined that the evidence in the federal case did not "provide[ ] enough evidence to charge Talley with the murder [of Myron Hailey], nor d[id] it provide enough evidence to exonerate

Lamont McKoy." (JA 950) Petitioner did not subpoena any of the federal witnesses from Talley's case to testify at the evidentiary hearing.

After considering the evidence from the hearing, the state MAR court denied Petitioner's motion, finding the following facts:

> 5. That the only similarity of the alleged Talley shooting and the evidence presented in the McKoy prosecution was the fact that both instances involved shooting at an automobile in Fayetteville.
>
> 6. That Grove View Terrace and Branson Street (Haymount Hill area) are a substantial distance apart and are not geographically similar in any way. Grove View Terrace is a public housing area while Branson Street (Haymount Hill area) is a single family neighborhood located approximately three to four miles west of the Grove View Terrace public housing area.
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> 7. That the federal trial transcript of the Talley trial and the law enforcement reports introduced into evidence at this hearing refer to the Talley shooting as occurring in Grove View Terrance not Branson Street or the Haymount area.
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> 8. That the alleged new evidence of a shooting similar to the one for which the defendant was convicted would not be beneficial to the defendant in that the only similarity to the defendant's case is that a shooting at an automobile took place at some unknown date and time in the City of Fayetteville.

(JA 2599-2600) The North Carolina Court of Appeals and the North Carolina Supreme Court denied Petitioner's requests for review. (JA 2602-04)

In 2013, Petitioner filed a second MAR, which the state court summarily denied based on statutory procedural bars. (JA 1323-25)

D. Federal habeas proceedings

In 2015, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, arguing the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), because it (1) withheld evidence that FPD was present in Haymount Hills for a time on the night of Hailey's murder, (2) failed to correct Williams's false testimony, and (3) withheld two CrimeStoppers tips that suggested Talley murdered Hailey. (JA 21-35, 60-64, 2347)

In November 2019, the district court held an evidentiary hearing. Evidence at the hearing showed that FPD received CrimeStoppers tips on January 27 and 28, 1990. (JA 1890-94) In the first tip, the caller stated that "Rat-Rat" did the shooting and someone named Irvin Cook saw it. (JA 1890) In the second tip, an unknown caller said he knew who killed the man in the vehicle on Rowan Street and named "Rat-Rat" as the individual responsible. (JA 1894) The officer who received the second tip noted that the caller sounded intoxicated. (JA 1894)

Ballard testified at the federal evidentiary hearing that he was aware of the two tips and followed up on them in 1990 but discovered no other reports of a shooting in Grove View Terrace on the night of Hailey's murder. (JA 2181-84) Ballard testified that the tips had always been in the investigative case file and that Petitioner had open file discovery during his trial. (JA 1608, 2219)

In addition, an attorney for Petitioner testified that she reviewed the FPD's open-file, the tips were not in the file, and she did not learn about the tips until March 2018. (JA 2041-44) She admitted, however, that a defense investigator found Irvin Cook and Cook denied knowing anything about the shooting. (JA 2059-60) The defense identified two other potential witnesses to a Grove View Terrace shooting as a result of the tips, but neither person identified a shooter. (JA 2469-74) One of these witnesses was also adamant that the vehicle involved was white and believed the incident could have happened in the 1980s. (JA 1984-85)

Evidence at the hearing also included an FPD incident card, showing the police were dispatched to Bryan and Branson Streets on January 25, 1990, at 9:43 p.m. and the call was cleared at 12:41 a.m. (JA 337, 2078-80); the FPD investigative report for the case, which estimated the murder occurred between the hours of "2300 and 2400," or 11:00 p.m. and 12:00 a.m. (JA 144-45, 2165); a statement from Mary Ann Quinn, the owner of the arcade in Haymount Hill, that she closed the arcade at 9:30 p.m. on January 25, 1990, because the power went out (JA 2166); and evidence that Robert Parker, a former FPD officer who assisted with Hailey's murder investigation, was convicted on corruption charges in an unrelated case, had an affair with a woman in Grove View Terrace while working undercover, and once tipped off the Court Boys about a drug raid (JA 1994-97).

The magistrate judge recommended dismissal of Petitioner's claims because they were untimely and procedurally barred, and Petitioner could not meet the actual

innocence standard in *Schlup v. Delo,* 513 U.S. 298 (1995). (App. 65a-82a) The district court adopted the magistrate judge's recommendation and dismissed the petition. (App. 11a-23a)

The Fourth Circuit granted a certificate of appealability in May 2022. On December 13, 2022, the Fourth Circuit affirmed the district court's decision in an unpublished opinion. (App. 10a) Petitioner's arguments on appeal boiled down to three factual disputes: Petitioner argued (1) his statements to Ballard in March 1990 *could not* be construed as a confession; (2) the January 27 and 28, 1990 tips and the evidence obtained during the federal investigation of Talley proved Talley, not Petitioner, murdered Hailey; and (3) Williams was not credible in light of Petitioner's new evidence. (App. 8a)

Regarding issue one, the Fourth Circuit noted the North Carolina Supreme Court rejected Petitioner's same argument on direct appeal, citing the portion of the state court's opinion in which it concluded that, if the jury believed Ballard's testimony, "it reasonably *could have* found that the defendant had admitted shooting the victim as the victim drove away in his car." (App. 9a (citing *McKoy*, 417 S.E.2d at 246) (emphasis added)) This determination, the Fourth Circuit said, is "presumed to be correct" under 28 U.S.C. § 2254(e)(1). (App. 9a) However, the Fourth Circuit also reasoned that Ballard testified again at the federal evidentiary hearing about his interaction in the patrol car with Petitioner, and the district court determined Ballard's testimony was consistent throughout the case and credible. (App. 9a)

As for issue two, the Fourth Circuit observed that Petitioner presented evidence suggesting Talley was involved in *a* shooting involving a vehicle, but considering the record as a whole, the evidence failed to exclude Petitioner as Hailey's shooter on January 25, 1990, as opposed to "suggesting two different incidents." (App. 9a) And regarding issue three, the court noted that the jury found Williams credible at the time of trial, and further concluded that Williams's testimony "still stands" and that he provided eyewitness testimony of "[Petitioner] shooting into the rear of Hailey's car." (App. 10a)

REASONS FOR DENYING THE WRIT

I. This Court should decline to review the Fourth Circuit's decision.[3]

Petitioner asks this Court to grant certiorari to consider whether and how 28 U.S.C. § 2254(e)(1) applies to gateway claims of actual innocence. Further review, however, is unwarranted at this time. Petitioner identifies no conflict among the federal courts of appeals on this question; those having considered the issue agree that the statute applies in the context of gateway claims of actual innocence. The Fourth Circuit's decision also does not offend *House v. Bell*, 547 U.S. 518 (2006) or *McQuiggin v. Perkins*, 569 U.S. 383 (2013), neither of which addressed what deference is owed to a state court's factual findings. Furthermore, Petitioner cannot

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[3] Petitioner does not challenge in his certiorari petition the lower courts' determinations that, if he cannot satisfy the *Schlup* standard, his habeas claims are untimely, procedurally barred, and should therefore be dismissed.

establish a gateway claim of actual innocence even if § 2254(e)(1) *does not* apply, making this a poor vehicle to clarify the application of § 2254(e)(1). Further review is unwarranted.

A. The Fourth Circuit's decision does not implicate a conflict warranting this Court's review.

A claim of actual innocence presented on federal habeas review, if proved, serves as a procedural gateway to allow a federal court to reach the merits of a petitioner's otherwise defaulted or time-barred constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 315 (1995); *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). To establish the claim, a petitioner must present "new reliable evidence" and show that, "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 329. Section 2254(e)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that, in federal habeas proceedings instituted by state prisoners, "a determination of a factual issue made by a State court shall be presumed to be correct," and the presumption can only be rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Reaching the questions presented by Petitioner would require this Court to address whether § 2254(e)(1) applies in the context of gateway claims of actual innocence. There is no conflict on this question. The federal courts of appeals having addressed the issue agree that the statute applies. *See, e.g.*, *Cosey v. Lilley*, 62 F.4th 74, 82 (2d Cir. 2023) ("We now join our sister circuits in holding that, in the context of a gateway claim of actual innocence under *Schlup*, a federal habeas court must

presume that a state court's factual findings are correct, rebuttable only upon a showing of clear and convincing evidence of error."); *Goldblum v. Klem*, 510 F.3d 204, 221 n.13 (3d Cir. 2007); *Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010); *Teleguz v. Pearson*, 689 F.3d 322, 331 (4th Cir. 2012) ("[W]hen a state court has made a factual determination bearing on the resolution of a *Schlup* issue, the petitioner bears the burden of rebutting this presumption by clear and convincing evidence.") (quotation marks and citation omitted); *Reed v. Stephens*, 739 F.3d 753, 772 n.8 (5th Cir. 2014); *Carr v. Warden, Lebanon Corr. Inst.*, 401 F. App'x 34, 38 (6th Cir. 2010) (unpublished); *Story v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010); *Fontenot v. Crow*, 4 F.4th 982, 1018 (10th Cir. 2021). Petitioner also concedes the absence of any circuit split on this issue. (Pet. p. 30)

Petitioner identifies no conflict among the federal courts of appeals that requires resolution.

B. The Fourth Circuit's opinion does not offend *House v. Bell* or *McQuiggin v. Perkins*.

In *Schlup*, this Court held that a federal habeas petitioner asserting the actual innocence exception (historically referred to as the miscarriage-of-justice exception), which allows a federal court to entertain the merits of an otherwise defaulted habeas claim, must satisfy the more-likely-than-not standard from *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[A] constitutional violation has probably resulted in the conviction of one who is actually innocent[.]") rather than the more demanding, clear-and-convincing standard from *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) ("[A

petitioner] must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty . . . ."). *Schlup*, 513 U.S. at 327 ("To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.") Both *House* and *McQuiggin* held, in different contexts, that the passage of AEDPA in 1996 left intact the actual innocence standard adopted in *Schlup*. *House v. Bell*, 547 U.S. 518, 539 (2006); *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013). Petitioner contends that applying § 2254(e)(1) here, requiring clear and convincing evidence to defeat the state court's factual findings, violates the proposition from *Schlup* that the more-likely-than-not standard, rather than the clear-and-convincing standard, strikes the right balance between societal and individual interests in the context of actual innocence claims. Neither *House* nor *McQuiggin*, however, addressed § 2254(e)(1) and what deference may be owed to a state court's factual findings.

House, 547 U.S. at 539, addressed in the context of a gateway claim of actual innocence what deference is owed to a *federal district court's* factual findings underlying its decision to deny habeas relief. The Court held that a petitioner need not present clear and convincing evidence to rebut the district court's findings, and thus to pass through the actual innocence gateway, because *Schlup*'s standard does not address a district court's independent judgment about whether reasonable doubt exists, but rather assesses the likely effect of new evidence on reasonable jurors

applying the beyond-a-reasonable-doubt standard. *Id.* at 539-40. *House* does not address what deference is owed to a *state court's* factual findings.

The statutory provision at issue—namely § 2254(e)(1)—and the interests of comity, finality, and federalism are distinct when assessing the role of deference to a factual determination made by a state court compared with a federal district court on habeas review. Congress designed AEDPA in general and § 2254(e) in particular to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Section 2254(e)(1) plainly serves to conserve judicial resources, reflecting Congress's view that when facts have already been resolved by a state court, do-overs are generally not permitted on federal habeas review. The statute also respects principles of federalism because it recognizes that setting aside a state court's factual findings intrudes on the state's interest in administering and enforcing its criminal law. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system.").

Like *House*, *McQuiggin* also did not address what deference is owed to a state court's factual findings. *McQuiggin*, 569 U.S. at 386, addressed whether a petitioner asserting a claim of actual innocence can overcome the one-year limitations period imposed by AEDPA. Ruling in the affirmative, this Court explained that, although Congress included language in AEDPA incorporating a stricter miscarriage-of-justice standard in the context of § 2244(b)(2)(B) (second or successive petitions for habeas

corpus) and § 2254(e)(2) (evidentiary hearings held in federal court), nothing in AEDPA precludes a federal court from applying the exception, unaltered as set forth by *Schlup*, in the context of *first* petitions seeking federal habeas relief. *McQuiggin*, 569 U.S. at 397. *McQuiggin* does not address whether deference may be owed to findings of fact made by a state court within or as a subset of the broader question whether a petitioner can satisfy *Schlup*'s actual innocence standard.

Petitioner identifies no violation of this Court's precedents that should be corrected.

C. The Fourth Circuit's decision is correct.

To satisfy the *Schlup* standard, a petitioner must show that it is more likely than not, "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. A *Schlup* claim involves evidence the jury did not have before it, so "the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record," and to "assess the likely impact of *all* the evidence." *House*, 547 U.S. at 518-19 (quotation marks and citations omitted).

Petitioner argues the Fourth Circuit failed to apply correctly the actual innocence standard from *Schlup* because, invoking § 2254(e)(1), the court deferred to non-existent state-court factual findings that (1) Petitioner confessed, and (2) Williams was credible. Petitioner overstates the role § 2254(e)(1)—mentioned only once by the Fourth Circuit—played in the opinion. Petitioner asked the Fourth

Circuit to find that his statements to Ballard could not be construed as an admission. Rejecting this argument, the Fourth Circuit noted that the North Carolina Supreme Court made the opposite determination, concluding based on the evidence that a reasonable juror "could have found that the defendant had admitted shooting the victim as the victim drove away in his car." *McKoy*, 417 S.E.2d at 246. The relevant determination, therefore, was not that Petitioner confessed, but that his statements could be construed as a confession by a reasonable juror. But the Fourth Circuit also considered the evidence anew, explaining that Ballard testified regarding the patrol-car interaction again at the federal evidentiary hearing and his testimony was consistent throughout the case and credible. (App. 9a) The court thus reviewed the probabilistic impact of the overall, newly supplemented record as required by *Schlup*.

The same goes for the Fourth Circuit's conclusion that a reasonable juror would likely credit Williams's testimony. The Fourth Circuit observed that the original jury credited Williams's testimony at trial—and this was despite evidence of Williams's drug use, substantial criminal history, and perceived inconsistencies between his pretrial statement and testimony. (App. 10a) The court also indicated, however, that it considered the evidence weighing on Williams's credibility in light of the newly supplemented record, stating that Williams's testimony "still stands that he witnessed [Petitioner] shooting into the rear of Hailey's car." (App. 10a) Petitioner cannot show the Fourth Circuit failed to assess the probabilistic impact of the overall, newly supplemented record.

Nor can Petitioner claim error in the Fourth Circuit's opinion based on a due-process violation in state court, because he has not established that any violation occurred. Ballard was adamant that the CrimeStoppers tips were always included in the investigative case file, and Petitioner had open access to the file during his trial. (JA 1608, 2219) Petitioner's habeas attorney testified she did not know whether Petitioner's trial attorney was aware of the tips. (JA 2057) The tips also only served to identify Talley as a possible shooter, but Petitioner was clearly aware of this fact because he handwrote a letter to the FPD, stating that before trial he heard someone named William "Rat-Rat" Talley had committed Hailey's murder. (JA 2050) Petitioner's attorney acknowledged that she was aware of the letter. (JA 2050) Petitioner was also aware before trial of the police presence in Haymount Hill on the night of Hailey's murder, because in the statement given March 20, 1990, Evans reported that police were present in Haymount Hill, they patted him down twice, and the shooting occurred after they left the area. (JA 117-18) Petitioner was also clearly aware at the time of trial that government employees—agents from the Public Works Commission—were present in Haymount Hill around the time of the shooting because they and FPD responded jointly to the same issue: a shot-out transformer at the corner of Bryan and Branson Streets. (JA 1728) Petitioner has not established a violation of due process that would undermine the Fourth Circuit's decision.

II. This case is a poor vehicle to address the questions presented because those questions do not affect the outcome of this case.

The Fourth Circuit's opinion is unpublished and therefore not binding on future courts. More important still, review is unwarranted because, assuming no deference is or should have been given under § 2254(e)(1) to any state-court factual determinations, Petitioner still cannot meet the highly demanding *Schlup* standard.

A. Petitioner cannot establish a gateway claim of actual innocence under *Schlup* even if § 2254(e)(1) *does not* apply.

1. Williams provided credible eyewitness testimony.

Williams's eyewitness testimony was reliable and corroborated by substantial other evidence in the record. Williams provided consistent accounts before and during trial that he helped his close friend Hailey confront Petitioner about selling Hailey counterfeit crack cocaine, and afterwards, Williams saw Petitioner chase and shoot at Hailey's car. (JA 1506-11, 1528-30) Sparks flew from the back of Hailey's vehicle, indicating it had been hit, and Williams described the weapon Petitioner was holding as possibly a .357 caliber handgun. (JA 1511-12) Before trial, Williams underwent two polygraph examinations. During the first, no deception was indicated when Williams answered that he saw Petitioner shoot at Hailey's vehicle and that he was not withholding any information about the shooting. (JA 2606) The second indicated Williams was being truthful with a plus five score. (JA 2610, 2613)

Petitioner fails to establish a motive for Williams to lie. He suggests Williams anticipated receiving money in exchange for providing false testimony, but the record

belies that claim. At trial, Williams testified under oath that he was promised and received nothing for his testimony and cooperation. (JA 1588) After Williams testified for the State, Senior Assistant District Attorney John Dickson also wrote a letter to the North Carolina Parole Commission, requesting that Williams be allowed to transfer his parole to Georgia due to numerous threats against Williams and his family. (JA 2630) Dickson confirmed in the letter that Williams never asked for any deal or favorable treatment in exchange for his testimony. (JA 2630)

Williams also testified despite repeated threats Petitioner made against his life. In January 1991, while out on pretrial bond, Petitioner approached Williams's eleven-year-old daughter on the street and told her he was going to kill Williams. (JA 2632-33) Around the same time, Petitioner also saw Williams inside a gas station and told him, "That was some fucked up shit that [you] did," and "I didn't think another black man would tell on another black man to a cracker." (JA 2177) Petitioner threatened that his friend would "get" Williams and, if he did not "get any time," he would go after Williams himself. (JA 2177) About a month later, Petitioner came to Williams's house, saying, "[Y]ou think you are a bad ass and nobody was gonna fuck with you." (JA 2177-78) Petitioner then approached Williams in Williams's driveway and assaulted him with a bicycle fender. (JA 2178)

Physical evidence corroborated Williams's account of the shooting. Bullet holes in the back of Hailey's vehicle were consistent with Williams's account (JA 1472-73), as was evidence that Hailey was driving away from Haymount Hill and towards

Grove View Terrace when his car crashed. (JA 68-69, 73) A .357 caliber Winchester Silvertip bullet was recovered from the floor of Hailey's car and a second .357 caliber Winchester Silvertip bullet was recovered from the ground in a vacant lot at the corner of Bryan and Branson Streets, the same location Williams said Petitioner was standing on the night of Hailey's murder. (JA 1475-76, 1483, 1630, 1744-45)

Williams's testimony was also corroborated by several other witnesses who gave statements to Ballard during his investigation but did not testify at trial. In a statement by James ("Cat") Mitchell, Mitchell stated that Petitioner shot at a vehicle from the woods, but he claimed his head was turned when the shooting happened. (JA 149) Mitchell also said that Petitioner "would carry [out] all his business behind Mr. Thompson's house and beat the guys up and shoot at their cars when they left." (JA 106) He further stated that if Petitioner was broke, he would sell "bad dope" and "shoot[ ] at cars after ripping people off[.]" (JA 106-07)

In a written statement by Charmaine Evans, Evans explained that multiple shootings occurred in Haymount Hill on the night Hailey was murdered. (JA 117) Evans said the lights went out because a transformer was shot, and the police came to the area, even patting Evans down for weapons on two occasions as he walked that night. (JA 117) Evans said he went to Anthony Lee's house and stayed there until the police left the area. (JA 117) According to Evans, after the police left, he was standing at the corner of Bryan and Branson Streets acting as a lookout at Petitioner's request when he saw a vehicle pull up in front of a yellow house. (JA 118) Evans said he heard

Petitioner saying, "He beat me. He beat me." (JA 118) Evans said Petitioner then started shooting at the vehicle, which was driven by a Black male in his early thirties. (JA 118-19) Evans said Petitioner stashed the gun behind a trash can but retrieved it a few minutes later and walked away on Bryan Street.[4] (JA 118)

In a statement by Charles Williams, Jr., C. Williams indicated Petitioner was standing at the intersection of Bryan and Branson Streets between 11:00 p.m. and 12:00 a.m. on January 25, 1990, with Anthony Lee and another Black male. (JA 145) According to C. Williams, about thirty minutes later, he heard a gunshot, looked out his window, and saw the same three men running up Bryan Street chasing a vehicle. (JA 145) C. Williams said he heard two additional gunshots but lost sight of the men after they passed a yellow house. (JA 145)

In a statement by Kimmy ("Kubbie") Johnson, Johnson said that he witnessed Petitioner shoot at Hailey's vehicle around midnight. (JA 145) According to Johnson, Hailey pulled up in front of a yellow house on Bryan Street to purchase drugs. (JA 145) Petitioner then retrieved a .357 caliber handgun from behind the house and sold Hailey "beet" or fake cocaine. (JA 145) Johnson said Hailey realized the cocaine was fake and confronted Petitioner with a second man who convinced Petitioner to give

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[4] Evans later recanted his statement (JA 128), but the statement nevertheless has probative value in that it corroborates Williams's testimony and demonstrates that the shooting occurred after the police left the area that night.

Hailey real cocaine. (JA 145) When Hailey returned to his vehicle and began to drive away, Petitioner shot at him twice. (JA 145) Johnson explained that Petitioner ran through a path to the corner of Arsenal and Davis Streets with Anthony Everette, James Mitchell, and Charmaine Evans. (JA 145) According to Johnson, when Petitioner got to Davis Street, he shot at the vehicle once more. (JA 145)[5]

One of Petitioner's own witnesses at the federal evidentiary hearing offered testimony that buttresses Williams's account. Retired Sergeant Tracy Campbell testified he was familiar with Petitioner and knew he had a reputation for being a violent, armed drug dealer in Haymount Hill. (JA 2097) Campbell testified that Petitioner would cheat people by selling them counterfeit drugs. (JA 2098) He further testified that Petitioner had shot at cars "many times" in that area. (JA 2098)

Petitioner's evidence does not discredit Williams's testimony. Evidence that police were present at Haymount Hill for a time on the night of January 25, 1990, does not prove Petitioner's innocence because the shooting easily could have happened after the police left the area; a precise timeline of events was never placed before the jury. Williams testified that he encountered Hailey at an unspecified time after 11:30 p.m. (JA 1725), and Ballard testified that he estimated the time for the

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[5] The morning the police found Hailey's body, an unidentified man also called to report a breaking and entering and said he heard four shots "coming from the direction of what he believed to be Haymount Hill area" at 3:30 a.m. in the morning. (JA 73)

murder was between 11:00 p.m. and 12:00 a.m., but he explained this was only an approximate timeline with no degree of certainty. (JA 2165-66) In Evans's initial statement, he also stated that Petitioner did not shoot Hailey until after the lights came back on and after the police left the area. (JA 117-18)

Evidence that the neighborhood arcade closed at 9:30 p.m. on the night in question also does not demonstrate Petitioner's innocence. The arcade owner, Quinn, reported that she closed the arcade around 9:30 p.m. on January 25, 1990, because the power went out. (JA 73, 2166) But she also said she knew a shooting occurred at Bryan and Branson Streets that night, and it was not unusual for people to hang around the arcade when it was closed because the area was known for illicit narcotic sales. (JA 2166-67) Quinn did not indicate one way or the other whether she reopened the arcade after power was restored. (JA 73, 2166) Ballard also testified at the federal evidentiary hearing that he interviewed others who said they went to the arcade after the lights went out and people were up and down the street all night. (JA 2167)

2. Petitioner's statements and behavior in Ballard's patrol car are reasonably construed as an admission of guilt.

Ballard testified at Petitioner's trial that he confronted Petitioner during a traffic stop with the information he learned from Williams. (JA 1597) When Ballard accused Petitioner of shooting at Hailey twice as he drove away from a drug deal, Petitioner responded "I know it" with a smile on his face. (JA 1600) Ballard suggested that Petitioner, along with Ant Lee, Cat, and Charmaine were "going down" for Hailey's murder. (JA 1600) Petitioner did not reply but was still smiling. (JA 1600)

Ballard asked Petitioner directly if he was innocent of these allegations and he did not reply. (JA 1600) Petitioner's demeanor changed however when Ballard suggested his friends would "roll" on him and informed Petitioner that he knew the caliber of the bullet that killed Hailey was .357. (JA 1600) Petitioner became angry and ended the interview. (JA 1600) Ballard testified that he did not believe Petitioner was "smarting off" during their conversation. (JA 1612)

At the federal evidentiary hearing, Ballard again testified regarding this interaction with Petitioner, explaining his belief that Petitioner had implicated himself, but that he did not arrest Petitioner at the time because he was in the midst of his investigation and wanted to interview a woman he believed was in the vehicle with Hailey. (JA 2173) The district court found Ballard's testimony consistent throughout the case and credible. (App. 18a, 76a) Petitioner's statements, and perhaps more importantly, his behavior during the interaction with Ballard, considered anew, are reasonably construed as an admission of guilt.

3. Evidence Talley was involved in a shooting does not demonstrate Petitioner's innocence.

None of the evidence Petitioner introduced from witnesses who implicated Talley in a shooting at Grove View Terrace provided a specific date or time for when the shooting occurred. (JA 613, 902) Moreover, none of the witnesses from Talley's federal case testified under oath in Petitioner's case, none of their statements were subject to cross-examination, and several of the witnesses had substantial incentive to assist the government and testify against Talley because they themselves faced

federal charges. (JA 385, 583-84, 943) In addition to the witness statements from Talley's case presented at the state 2001 MAR evidentiary hearing, in 2007, Bernard McIntyre averred in an affidavit obtained as part of the ongoing federal investigation that he knew Hailey and was familiar with his blue Honda Accord. (JA 619) McIntyre claimed he saw Talley shoot at Hailey's vehicle. (JA 619) McIntyre's statement, however, was obtained nearly two decades after the shooting, was not subject to cross-examination, and also did not provide a date or time of the purported shooting. A purported statement from James Smith in 2010 suffers from the same defects as McIntyre's statement. (JA 621-22)

The Fourth Circuit vacated Talley's federal convictions because it concluded the prosecutor committed misconduct by suggesting Talley shot a man in a drug deal gone wrong. *Wilson*, 135 F.3d at 298-99. And SBI Agent Fox testified at the federal evidentiary hearing in this case that the prosecutor in Talley's case "exaggerated what [evidence] he had . . . ." (JA 1973)

The CrimeStoppers tips suggested Talley was involved in a shooting, but the first tip identified an eyewitness, Cook, who later said he knew nothing about the shooting, and the second tip came from a caller who sounded intoxicated (JA 2059, 1894). Ballard also testified that he followed up on the tips in 1990, but there were no reports of a shooting in Grove View Terrace on the night of January 25, 1990. (JA 2181-84) The defense learned of two other potential witnesses to a shooting in Grove View Terrace as a result of the CrimeStoppers tips, but neither of these witnesses

identified a shooter, and one of the witnesses was adamant the car involved was white and believed the incident occurred in the 1980s. (JA 1984-85)

To the extent Petitioner argues Parker's involvement in the investigation of Hailey's murder somehow corrupted his case, his claims are based purely on speculation and conjecture. Considering the whole record anew, giving no deference to any previous determination by a state court under § 2254(e)(1), Petitioner still cannot establish it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329. Consequently, even assuming error in the Fourth Circuit's application of § 2254(e)(1), Petitioner is not entitled to relief.

B. Review would require the Court to resolve case-specific and complicated issues of fact.

Petitioner asks this Court to resolve what are predominantly factual disputes, disputes that have already been thoroughly vetted and resolved—each time against Petitioner—by the lower courts in the best position to address evidentiary conflicts. Petitioner advances no compelling reason to disturb those factual findings here.

CONCLUSION

The actual innocence standard is "demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (citations omitted). Petitioner cannot satisfy that demanding standard. The petition for writ of certiorari should be denied.

Respectfully submitted, this the 4th day of August, 2023.

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