No. 12-941

In the
Supreme Court of the United States

WILLIAM ERNEST KUENZEL,
Petitioner,

v.

KIM T. THOMAS, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Respondents.

Reply Brief On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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INTRODUCTION

The lower courts required Kuenzel not only to undermine the prosecution's evidence of guilt, but to also proffer a positive and affirmative showing of innocence. Those courts required such a showing because they mistakenly read Schlup's standard as affixing a strong presumption of correctness to the trial jury's resolution of disputed facts and finding of guilt—an insurmountable hurdle absent new, *affirmative* proof of innocence. As both the petition and brief of *amici curiae* explain, neither the text of Schlup nor the reasoning this Court applied in Schlup and House erect such additional barriers to federal review of procedurally defaulted claims presented in a first habeas petition.

Because Schlup "is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," reviewing courts should permit doubts about the accuracy of the jury's verdict. Herrera v. Collins, 506 U.S. 390, 404 (1993). If not, Schlup review becomes a Herrera test or a Jackson inquiry.

In its Opposition, the State defends those courts that impliedly or expressly integrate a strong presumption of guilt into the Schlup analysis. The State argues that, once convicted, courts must always presume that a fair trial was had, regardless of what evidence was then unknown or whether the constitutional reliability of that trial has been subject to collateral review. This position is illogical and unfair when applied to applicants seeking first-time review of procedurally defaulted claims, and

antithetical to the principles underpinning this Court's established dominion over *habeas corpus*, both pre- and post-AEDPA.

Recognizing that issues worthy of further review exist as to the application of Schlup, the State retreats to factual dissertations to convince this Court that this case is an unworthy vehicle. That Venn led the police to a burned shotgun shell, or that "wadding" was recovered from Offord's body is not inculpatory "physical evidence" because Kuenzel's only connection to this evidence is, as the State admits, "Venn's testimony". Id. p.3. Regarding the disinterested eyewitness testimony, the State suggests that: (i) as to Harris, "her 'judgment' she saw the two men" is *greater*, rather than lesser evidence than "I saw two men"; and (ii) the testimony of Harris, who could not identify Kuenzel, is somehow corroborated by other witnesses, who also could not identify Kuenzel. Id. p.4.

Rather than addressing what the trial jury heard, besides Venn, to convict Kuenzel, the State tells this Court the timeline of a toilet repair was implausible and that Kuenzel wrote down what Venn told investigators. Id. pp.4-5. The balance of the State's evidentiary recitations relate to post-trial events, a co-worker's testimony the prosecutor apparently thought flawed or of insufficient relevance to introduce at trial, and hapless, inexcusable efforts by unsophisticated people to obtain relief from a perceived failure of justice. What the State touts as "the most significant indicia of Kuenzel's guilt", Opp. p.21, does not undermine Kuenzel's Schlup claim. By painting over cracks in a hollow presumption, the

State demonstrates that no stronger material is available.

With full regard to the "evidence" the State discusses, Kuenzel remains "probably innocent" because, on balance, the total evidence makes it *likely* that no reasonable juror *would* believe Venn; Venn lied to the police and at trial, changed his story after being placed at the scene by multiple disinterested witnesses minutes before the crime, cannot explain the presence of Ms. Offord's blood on his pants, possessed a .16 gauge shotgun, and had a motive. The new evidence also identifies Venn's 13-year old girlfriend as the person he visited before arriving at the crime scene, and includes police notes detailing Venn's interaction with the man Venn initially told the police he spoke with in his vehicle at the store. Kuenzel's alibi testimony is no less implausible than Venn's testimony, there is *no* physical evidence connecting Kuenzel to the crime, and new evidence known to the State but withheld until 2010 reveals Harris's "judgment" to be without probative value. The prosecution's case is too weak to prevent first-time collateral correction of obvious constitutional error because of procedural default.

To be sure, no Schlup case will ever present a "perfect" vehicle because persons against whom no evidence can be presented are rarely charged or are acquitted at trial. Mistakes are made, Amicus pp.1-3, and Alabama's indigent defense system in the late 1980's was particularly susceptible to error. See, e.g., Maples v. Thomas, 132 S. Ct. 912, 917-18 (2012); (R.136-21 and R-136-22).

Schlup's demanding standard imposes a heavy "burden." But such "burden" does not extend to overcoming a misplaced "presumption" that fundamentally alters the threshold inquiry. Unless Schlup applicants must always proffer Herrera-like evidence, this Court should grant certiorari to explain why and how the probably innocent, like Kuenzel, may enter the Schlup gateway to have defaulted claims adjudicated on the merits. This case offers an ideal vehicle to do so because it crisply illustrates the importance of applying, and the consequences of failing to apply, the proper standard.

ARGUMENT IN REPLY

I. COURTS ARE SHARPLY DIVIDED ON THE TWO NATIONALLY-IMPORTANT QUESTION PRESENTED

A. The First Question Presented.

Schlup plainly requires applicants to satisfy the demanding burden of producing "new reliable evidence" that would likely convince any properly-instructed juror to harbor a reasonable doubt. Schlup v. Delo, 513 U.S. 298, 316-27 (1995). There is nothing in Schlup or House indicating that Footnote 42 properly imposes a presumption of guilt that further limits the gateway standard. The resolution of this question is critical because the existence of any presumption, or no presumption, defines the lens through which evidence under Schlup is viewed. The State fails to meaningfully address, let alone refute, many of Kuenzel's arguments. Compare Petition pp.22-40, with Opp. pp. 21-29.

Instead, the State defends applying a presumption of guilt by construing the Petition to argue for "no less than an overruling of this part of Schlup." Opp. p.23 (citing Schlup, 513 U.S. at 326 n.42). To the contrary, Kuenzel seeks to advance Schlup's directive by promoting clarity and uniformity among the circuits.

The Opposition illustrates the need that certiorari be granted. For example, the State—like the lower courts—selectively removes the words "more likely than not" from the Schlup standard, and substitutes the word "could" for "would". See, e.g., Opp. p.24 ("The petitioner must show not simply that *a single juror* could harbor reasonable doubts about his guilt, but that *no reasonable juror* could vote to convict him.") (emphasis in original). See also Opp. pp.10, 22, 29; (11a-14a, 54a-55a, 58a-59a). Those amendments do not spring from Schlup but restrict its reach in an unauthorized manner, and in so doing, elevate the gateway showing to precisely the levels that this Court expressly rejected. See Schlup, 513 U.S. at 315-16 (distinguishing Herrera claims); id. at 330 (rejecting Jackson review); House, 547 U.S. 518, 538 (2006) (distinguishing Jackson claims).[1]

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[1] The State purports to challenge Kuenzel's statement (Pet. p.19 n.5) that the Eleventh Circuit's decision in this case already has been interpreted to suggest that Schlup requires the proffer of *affirmative* proof of innocence, as opposed to the more inclusive and flexible showing of compelling reasonable doubt, regardless of its form. See Opp. pp.20-21 n.4 (citing Mikell v. Terry, No. 10-cv-0735, 2012 WL 6214622, *19 (N.D. Ga. Oct. 25, 2012)). Yet, the State's footnote confirms and foreshadows the expanding division flowing from opinions directing courts to "look[] at the evidence in the light of whether

Another indication of the misunderstanding surrounding Schlup is found in the State's approach to reviewing the evidence. See generally Opp. pp.3-15. The State first describes every item in the light most favorable to its position, operating on the basis that the jury would resolve every disputed issue of fact against the defendant. From that deferential posture, the State then asks whether each piece of new evidence, on its own, prevents a finding of guilt. See, e.g., Opp. pp. 10-13. As the Amicus notes, this Jackson-like approach is easier than the holistic review Schlup contemplates and, given the binary response it elicits, is also far less likely to prevent injustice. See Amicus pp. 16-25.

The need for clarification also is highlighted by the Second Circuit's recent opinion in Rivas v. Fischer, 687 F.3d 514 (2d Cir. 2012). Although Rivas presented compelling new forensic evidence that the murder likely occurred one day later, when Rivas had an alibi, this evidence did not *affirmatively* prove Rivas's innocence. Yet, the Second Circuit granted relief, while acknowledging a close case with "troubling" guilt evidence remaining, including inculpatory witness testimony, supposed statements from Rivas implying guilt and Rivas's suspicious behavior upon learning of the victim's death. Id. at 523, 545. Had Rivas's Schlup claim been subject to a presumption of guilt, relief likely would have been denied.

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it show[s] that the petitioner did not commit the crime." Id.

Despite the State's contention, (Opp. p.25), there is nothing complicated about conducting a neutral review of the total evidence. Schlup asks what jurors likely would believe based on the total record before it, and courts are instructed to weigh the relative strength of the prosecution evidence against the relative strength of the defense evidence. Courts evaluate whether the defense demonstrates compelling reasonable doubt; meaning, reasonable doubt that is probably evident to any juror. Whatever the appropriate standard for successive petitions, imposing the added burden of overcoming a strong presumption of guilt is inappropriate in the context of a *first* habeas petition, where, like here, the underlying trial may have been infected by outcome determinative constitutional error.

B. The Second Question Presented.

The companion question presented concerns *what* evidence qualifies as "new evidence" under Schlup. As the State recognizes, the district court found that Kuenzel's evidence was not "new" because much of it theoretically could have been presented, but was not—i.e., the State concealed April Harris's grand jury testimony until 2010, yet it existed in 1988 and thus does not, according to the lower court, qualify as "new." (44a-45a.) The State's present reliance upon evidence that it possessed at trial, but elected not to present to the trial jury—i.e., co-worker hearsay statements—underscores the interrelation between these questions. Here, almost every item of new evidence Kuenzel relies upon was "not presented" at trial because of constitutional error. This case presents an appropriate opportunity to repair the fragmented jurisprudence surrounding this issue.

II. THIS CASE OFFERS AN IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED[2]

This case presents the paradigmatic example of why the gateway must remain a viable option to excuse procedural defaults, and cannot be limited in the manner applied by the lower courts. Venn's testimony is essential to conviction, and his already-questionable credibility is now severely compromised, as is the basis for Harris's opinion that she saw Kuenzel with Venn. In fact, the direct evidence known today tells a complete and compelling narrative of what transpired between 8 p.m., the time when Kuenzel claims Venn dropped him off, and 11:05-11:20, the time of the murder.[3]

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[2] The State's suggestion of vehicle problems is unfounded. Opp. pp.27-28. Each of the Questions Presented is properly before this Court. See Yee v. Escondido, 503 U.S. 519, 534-35 (1992); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 330-31 (2010). All parties and the Eleventh Circuit addressed 60(b)-related issues and, even if exhaustion applied to Schlup evidence—which it does not, because Schlup is not itself a claim for relief—the State concedes exhaustion. See Opp. p.15 n.2.

[3] Aside from one aspect of Venn's motive—his need for $500 to pay his attorneys' retainer fee on November 16, 1987, one week after the crime—every single fact supporting the case that Kuenzel would today present in his defense at trial is established through the testimony of independent witnesses, direct physical evidence, or Venn's own words. And every item of record evidence has been meticulously cited to the lower courts. See Appellant's CA11 Brief, pp.27-35.

Well-documented constitutional error ravaged the fairness of Kuenzel's trial,[4] and the total evidence makes it unlikely that any juror would convict upon the prosecution's evidence and original theory. (194a-215a.) According to House, the prosecution's present inability to prove its case as submitted to the trial jury is one indication of Schlup's satisfaction. See House, 547 U.S. at 531-33, 541-553.

A. The Evidence Relied Upon By The State Is C Limited Probative Value.

The State now fundamentally departs from its prior factual arguments in an effort to create distance between the jury's conviction and Venn, the prosecution's star witness. In a clear shift, the State contends—for the first time—that Venn's testimony is not the central evidence in the case, and that the Petition and Amicus overlook "the most pertinent facts in this case", Opp. p.1, and "much of the most significant indicia of Kuenzel's guilt." Id. p.21.

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[4] Kuenzel's trial counsel concedes his ineffectiveness, (171a-179a.), and it is unclear how any party could credibly argue that trial counsel's failings were the product of reasonable strategic decisionmaking. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932). The Brady violations, too, are amply documented. The police notes of Venn's original statements were withheld (see, e.g., 180a-184a) and the State acknowledged its failure to disclose Harris's grand jury testimony before the district court (R.127-1 ¶¶ 2-9)—an error that itself warrants habeas relief. See Smith v. Cain, 132 S. Ct. 627, 630-31 (2012). See also Banks v. Dretke, 540 U.S. 668 (2004); Kyles v. Whitley, 514 U.S. 419 (1995). The State's post-trial loss of the alleged murder weapon and Venn's pants, (see, e.g., R.36 ¶ 46; R.45-9), provides yet another basis for relief.

Upon closer inspection, however, this evidence claimed to have been ignored, while superficially evocative, is of limited, if any, probative value. See Opp. p.22. Kuenzel's attempted escape from jail and his mother's subornation of perjury and witness tampering—which, notably, occurred *after* Kuenzel's (wrongful) conviction—are suggestive of many conclusions. The quality of other evidence is vastly overstated. Hearsay statements allegedly made to co-workers that are now characterized as proof of Kuenzel "effectively admitting his guilt", id. p.22, say nothing of the sort, and were of such limited value that the prosecution introduced them only during sentencing. Additionally, the inability of undercompensated and ill-experienced trial counsel to locate a woman with whom Kuenzel had a one-night-stand does not establish perjury.

Not all evidence is created equal, and the foregoing "evidence" fails to resuscitate the prosecution's flawed case; it does not directly inculpate Kuenzel, bolster Venn's testimony or challenge the new evidence that was withheld and/or undiscovered at trial. While "other evidence" may be considered as circumstantial evidence of guilt, its probative value, here, is limited. See, e.g., House, 547 U.S. at 553-54 (granting Schlup relief despite crediting substantial "other evidence" suggesting guilt and the district court's conclusion that Paul House, having testified at an evidentiary hearing, "was not a credible witness") (internal citation omitted).

B. Additional Circumstantial Evidence Not Mentioned By The State Suggests Innocence

If post-trial circumstantial evidence of guilt is properly considered under Schlup, other evidence suggesting that Kuenzel's claim of innocence is valid should be considered. See Holland v. U.S., 348 U.S. 121, 140 (1954) (discussing circumstantial evidence).

First, Kuenzel consistently has maintained his innocence for over two decades, and rejected a plea deal on that basis. (See, e.g., 173a-174a.)

Second, Kuenzel's conduct in prosecuting his collateral appeals has been consistent with that of an innocent victim. For example, he waived many claims that might be the centerpiece of other habeas applicants' petitions—the introduction of extraneous, prejudicial evidence (R.36 ¶¶ 101-12); improper use of a pre-sentence investigation report (id. ¶¶ 137-43); Kuenzel's shackling on the second day of his two-day trial (id. ¶¶ 144-47); and juror misconduct claims (id. ¶¶ 151-56)—to focus attention squarely upon his strongest grounds for relief. (See, e.g., 6a n.1.)[5]

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[5] The State complains about the prejudice it suffers when it is forced to "litigat[e] criminal cases years after convictions." Opp. p.26. But a petitioner's ability to build a case for Schlup innocence deteriorates to the same extent as the State's ability to defend its original verdict. Witnesses for the State do not die or move away any faster than witnesses whose testimony can help establish probable innocence. Moreover, because the petitioner bears the burden of proof in habeas proceedings, the passage of time and degradation of evidence ultimately benefit the State more than they do a petitioner. The State's advancement of this argument is all the more surprising given

Third, Kuenzel waived his attorney-client privilege before the district court. (R.135 pp.36-37.) In his final submission during 60(b) proceedings, Kuenzel volunteered to "produce anything and everything contained in the file maintained by his counsel." (Id.) As explained to the district court, Kuenzel "has nothing to hide from as he had nothing to do with the crime for which the State of Alabama seeks to exact the ultimate price of his life." (Id. p.37.)

CONCLUSION

It must be acknowledged that Kuenzel was unrepresented by counsel in March 1993, when the state courts determined his statute of limitations expired. Kuenzel filed in October 1993, shortly after pro bono counsel intervened and within two years of this Court's certiorari denial. But the state courts ultimately held that the Alabama statute's reference to "Supreme Court" meant the state supreme court. Although the State leans heavily upon the deference accorded to its time limitations, unlike nearly every other state in the country, "Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings." Maples, 132 S. Ct. at 918.

In sum, Kuenzel's position is that, when constitutional infirmities in the trial going to a substantial claim of possible innocence have been

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the multiple, material documents it withheld from Kuenzel until 2010, thereby preventing Kuenzel from investigating this evidence at an earlier time.

procedurally defaulted in a first habeas petition, access to merits review should not hinge upon a presumption of guilt that presupposes the underlying trial's reliability. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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