No. 11-10271

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

RICKY L. KIDD,

Petitioner,

vs.

JEFF NORMAN, Superintendent,
Southeast Missouri Correctional Center,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED 1

Whether a habeas petitioner's evidence of actual innocence, presented as a procedural gateway to reach a defaulted claim of ineffective assistance of counsel pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), must be ignored solely because the allegedly ineffective trial counsel could have found and presented it?

At issue in Mr. Kidd's case is the power of federal habeas courts to respond to "the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 465 U.S. 107, 135 (1982). Respondent agrees "that there is a split among the circuits regarding whether evidence is 'new' under the *Schlup* standard," but suggests this split should be allowed to persist indefinitely because substantial claims of innocence are extremely rare, and the conflict herein "will impact a very small percentage of habeas actions," Brief in Opposition to Writ of Certiorari (BIO), p. 17. If this Court were to accept Respondent's suggestion that the importance of a question is measured solely by the number of cases affected, it would never review cases involving the actual innocence standard. Yet this Court has "firmly established the importance of the equitable inquiry required by the ends of justice." *Schlup v. Delo, supra,* at 320, citing *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Smith v. Murray*, 477 U.S. 527 (1986). Even where a state prisoner has failed to comply with State procedural rules for the litigation of constitutional claims, this Court has "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice." *Schlup v. Delo, supra,* at 321, citing *Sawyer v. Whitely*, 505 U.S. 333, 339-40 (1992), *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991), and *Dugger v. Adams*, 489 U.S. 401, 414 (1989). Petitioner respectfully suggests that the issue presented herein is exceptionally important because the Court below has modified the miscarriage of justice standard in a manner that renders it incapable of reaching a defaulted

claim of ineffective assistance of counsel for failing to uncover and present persuasive evidence that the defendant is innocent of the crime.

Mr. Kidd's case presents a good vehicle for the resolution of this issue because a correct application of the *Schlup* standard would likely produce a different result. No physical evidence linked Mr. Kidd to the crime, and the prosecution's case hinged on Richard Harris, the only witness who testified at trial that Mr. Kidd was involved in the crime. The court below observed that Mr. Kidd "was able to discredit much of Harris' eyewitness testimony," A. 6, and he presented "additional evidence that could have been presented at his original trial to strengthen his alibi," A. 8, as well as "evidence which implicates the Goodspeeds in the murders" of George Bryant and Oscar Bridges. *Id.* All of that evidence was excluded from consideration by the courts below under *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir.), *cert. denied*, *Amrine v. Luebbers*, 534 U.S. 963 (2001)**,** because it "could have been discovered and presented by his original trial counsel." A. 7. *See generally*, A. 4-9.

That Mr. Kidd would likely prevail under a proper application of the *Schlup* standard is clear based upon a review of all of the evidence. The police developed four suspects in a crime that by *all* accounts was committed by three men. The court below noted that Kayla Bryant "told police *three* men visited her father on the day of the shootings," and she identified Merrill "as one of the *three* men involved in the shootings." A. 2 (emphasis added). Neighbors George Washington, T. 535-36, and Shannon Harris, T. 550-51, heard shots and saw *three* men wearing black coats jump into the get-away car and flee Bryant's residence in a white car rented by Gary Goodspeed, Sr. T. 763, 969. The State's key witness, Richard Harris, testified in the district court that "he observed both Goodspeeds and a *third* man enter Bryant's garage" before the shooting, A. 6, and Harris said that after the shooting he was pursued by the white rental car

occupied by *three* men. Hrg. T. 414. All of the evidence, including airline tickets, hotel receipts, the testimony of Eugene Williams, and the pretrial statements of the Goodspeeds and Merrill tie them together and link them to the crime, while excluding Mr. Kidd as the third perpetrator. A. 7. It is apparent that a court freed of *Amrine's* restrictions could easily conclude that reasonable jurors, "conscientiously following the judge's instructions requiring proof beyond a reasonable doubt," would probably acquit Mr. Kidd. *Schlup v. Delo, supra,* at 331.

Aided by the *Amrine* standard that requires courts to ignore evidence that could have been uncovered by a diligent trial attorney, Respondent's BIO relies on a two-perpetrator theory of the crime that has no support in the state or federal court record in this case. Mentioning only Mr. Kidd and co-defendant Marcus Merrill, BIO 3-5, Respondent blatantly misrepresents the evidence presented at trial in support of its two-perpetrator theory, falsely attributing to Merrill the role played by Gary Goodspeed, Jr., in the crime:

> Richard Harris, a neighbor, was walking past Bryant's house when he spotted Bryant emerging from the garage and yelling for help. [T.] Bryant had blood on his blue sweater when he came out. *Id*. at 564. Kidd and *Merrill* then came running out of the garage and caught Bryant. *Id*. at 563-564. After he dropped a black trash bag, *Merrill* grabbed Bryant and took him to the other side of a Trans Am that Bryant had parked in his yard. Id. at 563, 565. *Merrill* told Bryant "You're not going nowhere, [motherf--er]." *Id*. at 567. Kidd then took out a gold .45 caliber gun, stood over Bryant, and shot him twice. *Id*. at 563, 568, 569, 574. Kidd and *Merrill* then left. *Id*. at 579.

BIO, 4. Throughout these trial transcript passages, Harris referred to Bryant's first pursuer as "number one" and the shooter as "number two." T. 563-68. Harris identified Petitioner Ricky Kidd as "number two," T. 580, and he identified "number one" as Gary Goodspeed, Jr., *not* Marcus Merrill. T. 624-28. [1] Gary Goodspeed, Jr., "was the one that had the bag of money and

[1] For reasons not reflected in the record, Gary Goodspeed, Jr., was referenced at trial only by

the dope and dropped it to carry George to keep him from running out the yard." Hrg. T. 382. The court below observed that "[d]espite Harris's identification of Goodspeed, Jr., as one of the men involved in the shootings, Goodspeed, Jr., was not charged along with Merrill and Kidd." A. 3, n. 3. The reason for this is clear: with all the evidence on the table, the case against Kidd weakens substantially unless Goodspeed is written out of the picture.

Although the district court rejected Marcus Merrill's testimony confessing his guilt and naming the Goodspeeds, not Ricky Kidd, as his co-actors, see BIO, 18, "[t]he District Court's application of these incorrect standards may well have influenced its ultimate conclusion." *Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993). This is clear from the district court's statement at the time of the hearing that "Marcus Merrill…impressed me as a pretty truthful witness," but "an appellate court will look at this and say, hey, they had enough to convict him." Hrg. T. 364. Although appellate courts accord great deference to a district court's credibility findings, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985), "when the facts are found under a standard which is legally deficient, the situation is fundamentally different,… and the cause should therefore be remanded for a new, error-free determination." *United States v. Falstaff Brewing Co.*, 410 U.S. 526, 572 (1973) (Marshall, J., concurring). *See also Schlup v. Delo, supra*, at 333 (O'Connor, J., concurring) ("It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law.")

A court applying the correct standard and reviewing all the evidence, as required under *Schlup* but prohibited under *Amrine,* could likely reach a different conclusion regarding Merrill's credibility. The sole reason for rejecting Merrill's testimony was a letter from Ricky Kidd to

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initials rather than by name. Harris acknowledged that there were two subjects named "G.G." connected with the case, "father and son," and that the G.G. he identified as Number 1 was "the son." T. 626-27. Harris has never identified Merrill, although there was a third perpetrator in the house whom he never saw. Hrg. T., 429.

Marcus Merrill suggesting that Merrill ask the prosecutor for consideration not for freeing Ricky Kidd, but for bringing the Goodspeeds to justice. A. 5.[2] That an assessment of Merrill's credibility in light of all the evidence could have a different outcome is clear from the observations of the Court of Appeals, which noted that "Merrill gave a detailed description of the shootings, which matched the physical evidence found at the crime scene." Unfortunately, the *Amrine* standard put substantial corroborating evidence out of reach of the district court because it should have been found and presented by trial counsel. This includes the testimony of Eugene Williams, Kayla Bryant and statements of the Goodspeeds themselves.

Restricted by *Amrine*, the district court disregarded the testimony of Eugene Williams because Merrill told the police he had been at Williams' house the morning of the shootings, and therefore trial counsel should have interviewed him. "Eugene Williams places Merrill and the two Goodspeeds together the morning of the shootings. Williams also connects Merrill and the Goodspeeds to the weapons used in the murders, and knew the three men were going to rob someone that morning." A. 8.[3] In addition, Merrill's testimony matches Kayla Bryant's, who "told police the men who shot her father had been to her house a few days before the murders," and that "Daddy's brother killed Daddy." A. 8.[4] When Goodspeed, Sr., told Merrill to go back in the house and kill the little girl, Merrill told her she would be okay, and fired a 9 mm bullet

[2] The record establishes that Mr. Kidd wrote Mr. Merrill multiple letters, imploring him to tell the truth, Hrg. T. 55, and never suggesting what Merrill should say, other than to tell the truth about what happened. *Id.*, 95. Moreover, Mr. Kidd's counsel made it clear to Merrill that he and Mr. Kidd could not and would not offer any consideration for his testimony, and that only a prosecuting attorney could help him. Hrg. T. 58. No promises or threats of any kind were made to induce him to testify at the hearing. *Id.* 59-60, 65-66.

[3] The panel's description of Williams' testimony is an accurate, succinct summary of Williams' testimony. Hrg. T. 174-178. Respondent's brief description of Williams' testimony, BIO, 10 & 20, is materially incomplete.

[4] Merrill explained that Bryant's nickname for Gary Goodspeed, Jr., was "Little Brother." A. 8.

through the wall, which the police later found in the garage. Hrg. T. 34.[5] Further, a court that is free to consider the fact that "Merrill and the Goodspeeds all gave consistent alibis placing themselves together with one another at the time of the shootings and making no mention of Kidd," could weigh that evidence in favor of crediting Merrill's testimony. A. 8. Aside from the fact that Merrill is far from the only evidence pointing to Kidd's innocence, the district court's rejection of his testimony under the *Amrine* standard enhances rather than diminishes this case as a vehicle for resolving the concededly entrenched circuit split over the correct application of *Schlup's* actual innocence standard.

Similarly, the *Amrine* standard distorted the district court's analysis of Mr. Kidd's alibi evidence. Trial counsel could have discovered Deputy Jordan because her badge number, 937, identified her as the individual who processed Mr. Kidd's application for a gun permit the day of the homicide. Respondent's Appendix (R.A.), 33, 74. She explained, based on procedures for processing such applications, that because the processing of Kidd's application began on February 6 and was completed on February 7, it "couldn't have been" received on any day other than the day of the homicides. *See* R.A. 34-35. Thus, Deputy Jordan flatly contradicts Sgt. Buffalow's trial testimony that the gun permit application could have been delivered the day before the shootings." A. 3. At trial, the application was used to fix the day that Mr. Kidd was seen at his sister's office at the time of the homicide. Because Mr. Kidd's alibi was substantiated by credible testimony from reputable and neutral witnesses, Sgt. Buffalow's misleading testimony was needed to enable the prosecutor to argue that Mr. Kidd's alibi witnesses "are telling you the truth but they are telling the truth about a different day." T., 1385. Under *Amrine,* however, the district court was forced to ignore Deputy Jordan's testimony because "Kidd has

[5] See T. 513 (Kayla Bryant testimony), and T. 648-51, 862-64 (Testimony of officers who processed the scene).

not identified any new evidence supporting his alibi defense that was not available at the time of his jury trial." A. 21. Again, Respondent's "bad vehicle" argument simply accentuates the tension between *Amrine* and *Schlup*, and underscores the fact that it is *Amrine*'s undue restrictions, and not the substance or strength of Mr. Kidd's proof of innocence, that have prevented merits review of his claims of constitutional error

Respondent further argues that "the district court … found that [Richard] Harris was a credible witness," BIO, 13, but that inaccurately states the court's reasoning. The district court found only that Harris did not recant his testimony, A. 20-21, but rejected Kidd's claim of actual innocence because "the jury who heard his case had substantial reasons to question Harris' reliability as a witness," A. 17, due primarily to his criminal history, the disrespect he displayed at trial, and discrepancies between his testimony and that of other witnesses. *Id.* Mr. Kidd's claim is supported by evidence that "Harris claimed Bryant's shooter had a red do-rag on his head with hair flowing out the back, but it was undisputed Kidd had a shaved head at the time of the murders," A. 6, that Harris "observed both Goodspeeds and a third man enter Bryant's garage," *id.*, that Harris admitted withholding and "'editing' the information he revealed to the police because he believed himself to be a suspect in the shootings," *id.*, that Harris was trafficking in drugs with the victim and was "under the influence of marijuana" at the time of the shooting, A. 5, that Harris was upset with Bryant over the murder of Harris' best friend, *id.*, and that none of the other eye witnesses ever saw Harris in front of Bryant's house at the time of the shooting. *Id.* The evidence presented by Kidd has "value as exculpation and impeachment," *Kyles v. Whitley*, 514 U.S. 419, 450 (1995), and none of it fairly fits Respondent's characterization as "confused facts" or "fading" memory. BIO, 23. It is important to note that Harris is the only witness who testified at trial that Ricky Kidd was involved in the crime.

Nothing alleged by Respondent forecloses the likelihood that Ricky Kidd could prevail on his actual innocence claim under the rule applied by any court outside the Eighth Circuit. Although this may not be a case of "conclusive exoneration," *House v. Bell*, 547 U.S. 518, 533 (2006), the evidence supports a probability that any fully-informed fact-finder would conclude an innocent man is in prison while the real killers roam the streets. This Court should grant certiorari to determine whether *Schlup's* actual innocence gateway can reach defaulted claims of ineffective assistance of counsel.

QUESTION PRESENTED 2

Whether a habeas petitioner's claim of actual innocence must be rejected if, in spite of newly presented evidence of innocence, a jury could still find him guilty?

The opinions below contain no evidence of any attempt to predict what a fully-informed, reasonable jury *would* decide based on the evidence now available. Instead, as pointed out in Mr. Kidd's petition, the district court denied relief because Richard Harris did not recant his identification, A. 17. 20-21, and Ricky Kidd's evidence "has not eliminated the possibility of his guilt." A. 23. Respondent argues that the decisions below are unreviewable on certiorari because they correctly quoted the *Schlup* standard. BIO, 25-26. Although the application of the *Schlup* standard does not present a question under 28 U.S.C. § 2254(d), this Court's description of its application is illustrative. A decision "that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of . . . clearly established Federal law.'" *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000). Similarly, it was an incorrect application of the *Schlup* standard to reject Mr. Kidd's colorable claim of actual innocence because he did not present a case of "conclusive exoneration." *House v. Bell, supra. Schlup*, too, rejected the lower court's conclusion that Schlup's innocence claim must be rejected because a jury could still find

him guilty. *Schlup v. Delo*, *supra*, at 330-31. As this Court did in *Schlup*, it should grant certiorari to decide the appropriate articulation and application of the actual innocence standard.

QUESTION PRESENTED 3

Whether this matter should be remanded for reconsideration in light of *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), because the procedural bar which necessitated Mr. Kidd's reliance on the *Schlup* actual innocence gateway was caused by the ineffectiveness of appointed, first-tier state post-conviction counsel, who abandoned without investigating multiple claims of ineffective assistance of trial counsel?

Respondent argues that Mr. Kidd should not receive the benefit of this Court's decision in *Martinez v. Ryan* because he did not argue the ineffectiveness of his Missouri postconviction attorney as cause to excuse the failure to present his claims in state court, even though such an argument would have been dead on arrival in the district court and the court of appeals. Petitioner's counsel respectfully suggests that he did all he could do in the exercise of his duty of candor to the court to raise the issue; he conceded that his claims were defaulted by the ineffectiveness of postconviction counsel, he bemoaned the unfairness of binding authority depriving him of a remedy, and argued actual innocence as the gateway to his defaulted claims. His First Amended Petition for Writ of Habeas Corpus put the issue squarely before the Court:

> At all stages of his Missouri trial, appeal and postconviction proceedings, his public defenders failed to investigate competently the facts that establish his innocence, and failed to discover or recognize constitutional violations that contributed to his wrongful conviction.

R.A., 1. Mr. Kidd was specific in his allegations:

> Mr. Kidd, throughout state court proceedings, had the misfortune of being represented by inexperienced and overworked public defenders who did virtually no investigation into his defense. . . . After his conviction, Mr. Kidd continued to assert his innocence and unfortunately was assigned yet another inexperienced, overworked public defender who not only failed to conduct an independent investigation, but did not even read police reports

> regarding the offense. . . . Other claims are based on evidence outside the scope of the trial record and should have been explored and raised in post-conviction proceedings.

R.A. 8-9. Referring to his postconviction lawyer, petitioner complained, "Given the incompetence of his public defender, Mr. Kidd would have been better off proceeding *pro se*." R.A. 10, n. 4. As his duty of candor required, counsel advised the district court that binding authority precluded the court from holding that postconviction counsel's ineffectiveness constituted cause to excuse his procedural default. R. A. 1, 9. In fact, Mr. Kidd explicitly asserted innocence to reach the merits of his defaulted claims as an alternative to the lack of remedy for the fact that "Mr. Kidd's court appointed . . . postconviction counsel failed to investigate and present important evidence and constitutional claims in state court." R.A. 11. *See also* R.A. 1, 10. Respondent's argument is not supported by the record.

Respondent nevertheless persists in arguing that Mr. Kidd is foreclosed from any benefit under *Martinez* because he failed to urge the district court and the court of appeals to overrule *Noland v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992) and *Johnson v. Lockhart*, 944 F.2d 388 (8th Cir. 1991), even though the panel and the district court were bound to follow those cases. Petitioner disagrees; it could not be anticipated when he filed his petition in 2007 that *Martinez* would create a remedy for the ineffectiveness of Mr. Kidd's postconviction counsel. This Court has held that the system of justice would be ill-served by requiring prisoners to anticipate and allege every conceivable development in the law:

> …counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on

> appeal at least to those which may be legitimately regarded as debatable.

Reed v. Ross, 468 U.S. 1, 16 (1984), citing *Ross v. Reed*, 704 F.2d 705, 708 (1983).

Petitioner respectfully suggests that his equitable footing is equal to that of petitioners whose cases have been remanded by this Court for reconsideration in light of *Martinez v. Ryan.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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