No. 18-380

In the Supreme Court of the United States

DARREL VANNOY, WARDEN,
Petitioner,

v.

JOHN DAVID FLOYD,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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As reflected by the regular appearance of habeas cases on its docket, this Court exercises vigilant oversight in the habeas arena. That vigilance is well warranted. Over 20 years after its enactment, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) remains a boat beating against the current: lower courts continue to balk at applying appropriate deference to state court decisions and at respecting the narrow limits of the equitable exceptions the Court has established to certain AEDPA requirements. *See* Pet. 9-10 (collecting cases); *see also Kernan v. Hinojosa*, 136 S.Ct. 1603 (2016) (*per curiam*); *Woods v. Etherton*, 136 S.Ct. 1149 (2016) (*per curiam*); *White v. Wheeler*, 136 S.Ct. 456 (2015) (*per curiam*). Courts that indulge these tendencies, both of which are exemplified in the present case, unduly infringe the authority of both Congress and the states. Such overreach demands correction. Contrary to Floyd's assertions, it is not beneath the notice of this Court that the rulings below have undermined fundamental state interests in contravention of the demands of AEDPA and of the repeated admonishments of the Court.

1. a. Floyd does not dispute that the courts below were required to defer to the Louisiana Supreme Court's denial of his *Brady* claims unless the denial lacked any reasonable basis. Nor does he dispute that, because no reasons were assigned by state courts, it was incumbent upon the courts below to "determine what arguments or theories. . . could have supported[] the state court's decision[.]" *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Instead, Floyd claims that the Fifth Circuit panel majority "considered and rejected

all possible justifications" for the denial of his claims. BIO 9. That is not what the majority's decision reflects:

- The majority assumes that John Rue Clegg's recollection of a conversation from almost 30 years earlier was entirely accurate and complete. It never questions this assumption. Pet. 15-16.
- The majority assumes the print-bearing whiskey bottle at the Hines scene was in "relatively close proximity" to a drinking glass. It never questions this assumption. *Id.* at 12-13.
- The majority never questions its erroneous conclusion that the fingerprint-comparison results for the Hines scene had impeachment value. *Id.* at 12; *infra* at 3.
- The majority never acknowledges the cumulative nature of the print-comparison results for the Robinson scene. Pet. 14-15.
- The majority never acknowledges evidence (*viz*., eyewitness testimony, video footage, and photographs) that contradicts Floyd's claims of abuse. *Id.* at 16-17.

These are not minor details: they are reasonable grounds for sustaining the decision of the Louisiana Supreme Court, to which the majority turns a blind eye. The majority persistently refuses to consider evidence and perspectives that run counter to its own view of the case, and in doing so refuses to abide by the deferential standards enjoined by AEDPA and the precedents of this Court.

b. Floyd's attempts to dispute some of the factual issues pertaining to his *Brady* claims are without merit. First, he hypothesizes that the bottle of "Martin's N.H." bourbon whiskey that police photographed may have been purchased at a store named Puglia's, and may in turn have "ha[d] a Puglia's store label or marking elsewhere on the bottle" that is not visible in the photograph. BIO 17. His purpose is to suggest that this bottle may be the "Puglia's scotch whiskey bottle" on which latent prints were found. But that is plainly not the case: Floyd does not dispute that the label on the "Martin's N.H." bottle clearly identifies its contents as *bourbon* whiskey.

Second, Floyd writes that the majority viewed the fingerprint analysis for the Hines scene as "ha[ving] some value in countering the detective's testimony . . . that Floyd *shared a drink* with Hines." BIO 16 (citations and internal quotation marks omitted; emphasis added by Floyd). Again, this is a non-sequitur. Detective Dillman did not claim to have first-hand knowledge of what occurred in Hines's apartment on the night of the murder; all he could (and did) testify to was what Floyd had told him occurred and what police later found at the scene. On neither of these points do the results of the fingerprint comparisons provide a basis for impeachment.

Finally, Floyd insists the majority's understanding of the Clegg Statement is not subject to question based on a mere "hypothetical." BIO 18-19. This ignores the fact that the Clegg Statement itself—*i.e.*, John Rue Clegg's actual, specific words to Detective Dillman in 1980—is irreducibly conjectural. There is no "Clegg Statement" in the record. There are only later

descriptions thereof, one based on the nearly contemporaneous recollection of Detective Dillman, the other on the far later recollection of Clegg. The majority is not justified in placing absolute and unquestioning reliance on Clegg's recollection, still less in refusing to acknowledge that other jurists of reason might decline to make a similar leap of faith. Nor is it reasonable for the majority to overlook the fact that, by his own admission, Clegg's knowledge of Hines's sexual proclivities in 1980 was based solely on passing remarks Hines had made over a decade earlier. Pet. 21-22.

2. Floyd errs in asserting that Petitioner misinterprets the standard for establishing actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995) and *McQuiggin v. Perkins*, 569 U.S. 383 (2012). He writes that Petitioner "complains that individual pieces of new evidence do not, alone, establish that no reasonable juror" would vote to convict him. BIO 12. But Petitioner does not dispute that a habeas court "must make its determination concerning the petitioner's innocence 'in light of all the evidence[.]'" *Schlup*, 513 U.S. at 328 (footnote omitted). To the contrary, the petition criticizes the actual-innocence finding below because, *inter alia*, it fails to recognize the points on which Floyd's "new evidence" is merely cumulative and fails to consider existing evidence that weighs against his allegations. Pet. 18-20. Floyd also insists that the list of "new reliable evidence" found in *Schlup* ("exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," 513 U.S. at 324) is "illustrative rather than exhaustive." BIO 11. Petitioner has not claimed otherwise, arguing

instead that Floyd failed to present "the caliber of evidence identified in *Schlup*." Pet. 22.

Rather than view "new evidence" presented under *Schlup* and *McQuiggin* in isolation, courts have inquired whether the evidence is of such significance and persuasive force that it would have compelled a reasonable juror to view differently the evidence presented at trial. As this Court affirmed in *McQuiggin*, "The [innocence] gateway should open only when a petition presents 'evidence of innocence *so strong* that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" 569 U.S. at 401 (emphasis added) (quoting *Schlup*, 513 U.S. at 316). *See also House v. Bell*, 547 U.S. 518, 548 (2006) ("Thus, whereas the bloodstains, emphasized by the prosecution, seemed strong evidence of House's guilt at trial, the record now raises substantial questions about the blood's origin."); *cf. Moore-El v. Luebbers*, 446 F.3d 890, 903 (8th Cir. 2006) ("At most, Petty's testimony would have established conflicting testimony among purported eyewitnesses . . . . The existence of such a 'swearing match' would not establish that no reasonable juror could have credited the testimony of the prosecution witnesses[.]") (quoting *Bosley v. Cain*, 409 F.3d 657, 665 (5th Cir. 2005) (*per curiam*)). Evidence that may be new in itself, but that sheds little to no new light on a case, has thus been widely rejected under the *Schlup/McQuiggin* standard. *See, e.g., Rozzelle v. Sec'y, Fla. Dep't of Corrs.*, 672 F.3d 1000, 1017 (11th Cir. 2012) (*per curiam*) ("Even if Petitioner Rozzelle's claim of actual innocence were cognizable, his claim still fails because his 'new' evidence is largely cumulative of what the

jury heard[.]"); *Foster v. Thaler*, 369 F. App'x 598, 602-03 (5th Cir. 2010) (*per curiam*) ("One more contradictory story would not have compelled jurors to find Foster not guilty. To qualify under the miscarriage of justice exception, evidence must be 'material, not merely cumulative or impeaching.'") (citations omitted); *Souter v. Jones*, 395 F.3d 577, 593, 595 (6th Cir. 2005) (considering two affidavits in which experts recanted their testimony for the State but discounting two other affidavits that were cumulative of a defense expert's testimony).

It is in this sense that Floyd's "new evidence" falls short. Forensic evidence excluding Floyd from the Robinson scene, and establishing that Robinson had engaged in sex with another, unknown male, was presented at trial. So was expert testimony regarding Floyd's potential susceptibility to suggestions and coercion. As for other evidence that "could" be found to impeach Dillman or otherwise undermine Floyd's confession to the Hines murder, it is neither individually nor collectively so strong as to compel any reasonable juror who viewed the evidence as a whole (including evidence refuting Floyd's claims of abuse) to vote not guilty.

3. Floyd argues that with the approach of the deadline provided for in the district court's conditional order of release, this case "could soon be rendered moot or otherwise unsuitable for this Court's review." BIO 22. This argument lacks merit. In granting Floyd's petition, the district court ordered the State "to either retry Floyd or release him within 120 days of this

order." Pet. App. 102.[1] But as Floyd acknowledges, the district court subsequently ordered his immediate release under federal supervision pursuant to Fed. R. App. Pr. 23(c). BIO 22-23. He has not been in Louisiana custody since that time. Floyd suggests the release order requires more of the State, writing that "it seems probable that, at some point after October 29, 2018, the district court will be called upon to decide if the [120-day] deadline has been complied with." BIO 23. In doing so, however, he concedes that this case is not moot. He also fails to show that the case is likely to be rendered moot in the near future. Courts below have been advised of the pendency of the instant petition, and there is no reason to believe that a lower court would gratuitously act to render this case moot, and thereby deprive this Court of the opportunity to exercise review, before the Court has spoken.

[1] This mandate was stayed from June 22, 2017, to August 15, 2018. *See* BIO 22 n. 13.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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