FILED
United States Court of Appeals
Tenth Circuit

July 30, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VON LESTER TAYLOR, Petitioner - Appellee, v. ROBERT POWELL, Warden, Utah State Prison, Respondent - Appellant.	No. 20-4039

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. NO. 2:07-CV-00194-TC)

Andrew F. Peterson, Assistant Solicitor General (Erin Riley, Assistant Solicitor General, and Sean D. Reyes, Utah Attorney General, with him on the briefs), Office of the Utah Attorney General, Salt Lake City, Utah, for Appellant.

Brian M. Pomerantz (Kenneth F. Murray, Phoenix, Arizona, with him on the brief), Law Office of Brian M. Pomerantz, Carrboro, North Carolina, for Appellee.

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MORITZ**, Circuit Judges.

TYMKOVICH, Chief Judge.

Von Lester Taylor and an accomplice, Edward Deli, murdered two unarmed women who tragically encountered them burglarizing a mountain cabin in December 1990.

Linae Tiede, Kaye Tiede (her mother), and Beth Potts (her grandmother), returned to the cabin after a day of shopping in Salt Lake City. When Mr. Taylor and Mr. Deli encountered the three women, they held them at gunpoint. Linae then watched Mr. Taylor shoot her mother and heard the shots that killed her grandmother. When Linae's father later arrived with her sister, Mr. Taylor shot him in the head. They left him in the cabin, believing him to be dead. Mr. Taylor and Mr. Deli then set the cabin on fire and kidnapped Linae and Tricia. Before more violence could occur, law enforcement stopped the two men following a 911 call from Linae's father, who survived the shooting.

Mr. Taylor subsequently confessed to shooting both Kaye and Beth. To this day, Mr. Taylor has never denied that he fired the first shot in the brutal attack that led to the deaths of the two unarmed women.

Mr. Taylor pleaded guilty to two counts of first degree murder and was sentenced to death by a jury in Utah state court. He now challenges his convictions through a petition for federal habeas corpus relief, contending missteps by his trial attorney caused him to enter a defective guilty plea. But Mr. Taylor failed to adequately present this claim to Utah's state courts.

Generally, such a procedural default would prevent us from considering the claim. And yet Mr. Taylor argues we should excuse his procedural default lest we commit a fundamental miscarriage of justice. Despite re-affirming time and again that he participated in the murders, Mr. Taylor now argues he is "actually innocent" of them. Thus, he contends we should consider his underlying claims for habeas relief. But, given these facts, how can he be actually innocent?

Below, Mr. Taylor provided the district court with new ballistics evidence that calls into question whether he fired the fatal shots in the two murders, even if he fired *some* of the shots. Instead, the ballistics evidence indicates the fatal shots were fired by his accomplice. Based on this evidence, the district court credited Mr. Taylor's claim that he was actually innocent of first degree murder and set aside the procedural bar on considering his claims for relief. In reaching the merits of Mr. Taylor's claims for habeas relief, the district court concluded that his guilty plea was defective due to his trial counsel's failure to adequately investigate a possible defense theory that he was culpable only of crimes less serious than first degree murder. The court therefore granted his petition for habeas corpus, undoing Mr. Taylor's thirty-year-old conviction and sentence.

We disagree with the district court's assessment of Mr. Taylor's actual innocence claim. The district court concluded the evidence was inconclusive about whether Mr. Taylor fired the fatal bullets and he therefore was potentially

innocent as the principal triggerman. But under Utah law, an accomplice to a violent felony can be equally liable for first degree murder. The district court concluded that Mr. Taylor could evade this problem because he did not plead guilty to "capital murder as an accomplice." Aplt. App., Vol. XIX at 4812 (Order and Mem. Decision Granting Evid. Hr'g). Under Utah law, however, principal and accomplice liability are theories of guilt, not distinct crimes. Mr. Taylor pleaded guilty to two counts of capital murder—thus, evidence that he committed the crimes as either a principal or an accomplice would have been adequate to prove his guilt. And no doubt exists that he would have been convicted of the murders under at least one of these theories at trial.

Mr. Taylor does not deny he actively participated in the murders. To answer the question of whether he can be actually innocent of the crime: He cannot. Mr. Taylor "is not innocent, in any sense of the word." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). We therefore reverse the district court's grant of habeas relief and remand for further proceedings consistent with this opinion.

I. Background

The meaning of "actual innocence" in the habeas context is very different from what this phrase means in popular parlance. When invoked as part of a habeas petition, actual innocence has a very specific meaning and purpose. Thus,

before describing the facts and proceedings that have led to Mr. Taylor's current habeas petition, we provide a brief overview of how a claim of actual innocence operates within the larger context of federal habeas corpus.

A. The Structure of Habeas Corpus

Contemporary habeas corpus doctrine strikes a delicate balance between justice and finality. *See House v. Bell*, 547 U.S. 518, 536 (2006). Habeas corpus is the tool by which federal courts can correct unjust incarcerations. A combination of statutory law under the Antiterrorism and Effective Death Penalty Act and judge-made law, federal habeas corpus serves as the path for prisoners to challenge both state and federal convictions. But the law makes this pathway narrow. For instance, we will not consider a petitioner's claims for relief that were not adequately presented to state courts. *See id.*; *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). This narrowing function is "based on the comity and respect that must be accorded to state-court judgments." *House*, 547 U.S. at 536.

Yet, recognizing the justice concerns that also underlie habeas corpus, the Supreme Court has concluded the door to habeas relief is not always closed because a petitioner procedurally defaulted his claims. Rather, the Supreme Court has allowed courts to consider such claims when it is necessary to avoid a miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) ("[T]he fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."). Courts apply this miscarriage-of-justice exception when a petitioner can demonstrate that he is actually innocent of the crime of conviction. In these cases, the petitioner's claim of actual innocence does not serve as the basis for granting habeas relief.[1]

[1] Actual innocence can serve at least three functions in a habeas petition. First, it can be invoked to overcome AEDPA's statute of limitations. *See Doe v. Jones*, 762 F.3d 1174, 1182 (10th Cir. 2014) ("If petitioner does have a substantial actual innocence claim, . . . the existence of such a claim will serve as an exception to the AEDPA statute of limitations[.]"). Second, and as is the case here, actual innocence can be invoked to overcome other procedural bars to a claim. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) ("[A] credible claim of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief."). Third, the Supreme Court has not foreclosed the possibility that actual innocence could be invoked as the substantive constitutional claim for habeas relief. *See Herrera*, 506 U.S. at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." (internal quotation marks omitted)).

Instead, the claim of actual innocence is joined with a procedurally defaulted claim to serve as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (internal quotation marks omitted). This exception "is intended for those rare situations where the State has convicted the wrong person of the crime or where it is evident that the law has made a mistake." *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000) (internal quotation marks omitted; alterations incorporated).

To qualify for the actual innocence exception, the petitioner need not conclusively demonstrate his innocence. *See House*, 547 U.S. at 538 ("The *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence."). Rather, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of new evidence." *Schlup*, 513 U.S. at 327. Or, "to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. This standard requires courts to engage in a counterfactual analysis, determining whether a jury confronted with all the evidence now known would still have convicted the petitioner of the crime charged. *See Schlup*, 513 U.S. at 329 ("[T]he standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do."). "The court's function is not to make an independent factual determination about

what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538.

An actual innocence claim must be based on more than the petitioner's speculations and conjectures. The gateway claim must "be credible" and requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 537 (internal quotation marks omitted). To be "new," the evidence need only be evidence that was not considered by the fact-finder in the original proceedings. *See Fontenot v. Crow*, __ F.4th __, 2021 WL 2933220, at *36 (10th Cir. July 13, 2021) (explaining that, under *Schlup*, "new evidence" means evidence "newly presented" rather than evidence "newly discovered through diligence"). When determining whether a petitioner qualifies for the exception, courts are not "bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327. Instead, we may "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327–28.

B. Factual and Procedural Background

Mr. Taylor procedurally defaulted his underlying constitutional claim—that his guilty plea was constitutionally defective based on ineffective assistance of his trial counsel. He did so by failing to raise the claim in the proper manner before the Utah state courts. He now attempts to overcome this procedural

default by arguing he is actually innocent of capital murder based on new ballistics evidence.

To explain why his claim is procedurally defaulted, we next recount the relevant factual and procedural history that led to Mr. Taylor's initial conviction and efforts to obtain post-conviction relief.

1. The Murders

In December of 1990, the Tiede family was vacationing in a family cabin in Summit County, Utah, for the holidays. On December 21, the family took an overnight trip to Salt Lake City to do some Christmas shopping. While the family was gone, Mr. Taylor and his accomplice Edward Deli broke into the cabin as part of a series of burglaries. They stayed the night at the cabin.

The family returned the next day. The cabin was located a distance from the nearest road and recent snow forced the family to use snowmobiles to get from the road to the cabin. Kaye Tiede, her twenty-year-old daughter Linae, and Kaye's elderly mother, Beth Potts, took the snowmobiles from the road and arrived at the cabin first. Linae was the first to enter the cabin. Mr. Taylor approached her at gunpoint and asked who else was with her. Linae indicated Kaye and Beth were. Once Kaye and Beth entered, Mr. Taylor and Mr. Deli held them at gunpoint. After a short exchange, Linae witnessed Mr. Taylor shoot Kaye and heard her mother say "I've been shot." Aplt. App., Vol. I at 97. Linae then

turned away from the violence and did not see what happened next but she heard the shooting continue. When the shooting ended, Kaye and Beth lay dead on the floor. Kaye had been shot three times (twice with bullets that went through her chest and upper torso and once with bird shot pellets that caused small wounds around her left arm and neck), as had Beth (twice in the chest and once in the head). It is well-established that on the day of the murders, Mr. Taylor possessed a .38 special revolver and Mr. Deli a .44 magnum revolver, the bullets from which were recovered at the scene.

After shooting Kaye and Beth, Mr. Taylor and Mr. Deli tied Linae up and brought her to one of the cabin's bedrooms. They told Linae that she would be coming with them when they left. Linae also testified that Mr. Deli told Mr. Taylor at one point "we need to reload." *Id.*, Vol. I at 135. She later overheard Mr. Taylor telling Mr. Deli that "he needed help with the bodies" to "throw them over the balcony." *Id.* at 101. Finally, she heard Mr. Taylor tell Mr. Deli that "he had to shoot [one of the women] in the head twice." *Id.* Beth died of a gunshot wound to the head.

About two hours after the initial shooting, Linae's sister (Tricia) and her father (Rolf) arrived at the house. Mr. Taylor instructed Mr. Deli to shoot Rolf. When Mr. Deli hesitated, Mr. Taylor shot Rolf twice in the head and left him in the cabin, believing him to be dead.

Mr. Taylor and Mr. Deli then spread gasoline around the cabin and attempted to set fire to it. The two men then used the family's snowmobiles to drive themselves, Linae, and Tricia down to the road to the family's car. Despite the two gun shot wounds, Rolf survived. He then made his way down to the road where he encountered his half brother. The men then contacted the Summit County Sheriff's Department. Following a high-speed chase, officers apprehended Mr. Taylor and Mr. Deli. Linae and Tricia were released unharmed. Police found the bodies of Kaye and Beth on the cabin's balcony, covered by a blanket.

2. The Information and Plea

Mr. Taylor and Mr. Deli were each charged with two counts of capital homicide,[2] attempted homicide, aggravated arson, two counts of aggravated kidnapping, aggravated robbery, theft, failure to respond to an officer's signal to stop, and aggravated assault. For the capital murder charges, the Information stated that "VON LESTER TAYLOR and EDWARD STEVEN DELI, did

[2] In Utah, a homicide "constitutes aggravated murder if the actor intentionally or knowingly causes the death of another" in one of several enumerated circumstances. Utah Stat. Ann. § 76-5-202(1). Here, "the homicide[s] [were] committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed[.]" *Id.* at § 76-5-202(1)(b). Alternatively, the homicides were committed "incident to . . . [a] criminal episode during which the actor committed . . . burglary[.]" Id. at § 76-5-202(1)(d). Aggravated murder is a death-penalty-eligible crime. *Id.* at § 76-5-202(3)(a).

intentionally or knowingly, cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons, to wit: Beth Potts and Kaye Tiede, were killed." Aplt. App., Vol. I at 1. The Information contained an identical second count for the death of Kaye Tiede.

The state held a preliminary hearing to determine whether probable cause existed to bind the men over for arraignment and trial. At this hearing, attorneys for Mr. Taylor and Mr. Deli both argued it was not clear who had fired the fatal shots that killed Kaye and Beth. Nonetheless, the state court concluded that probable cause existed as to both men. The court believed the evidence was adequate to show "that each to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information." *Id.*, Vol. III at 552.

Mr. Taylor initially pursued insanity as a defense. During his mental evaluation, he told the psychiatrist he had committed both murders. *See id.*, Vol. XIX at 4803 (Order and Mem. Decision Granting Evid. Hr'g) (When asked whether he believed himself to be insane, Mr. Taylor responded, "No, but how can you determine? I shot two people with no motive, out of cold blood, with my

gun, then with Ed's."). After the interview, the examining doctors concluded Mr. Taylor was legally sane.

The state then offered Mr. Taylor a guilty plea—he would plead guilty to the two counts of capital murder and, in exchange, the remainder of the charges against him would be dropped. Although Mr. Taylor's attorney told Mr. Taylor that the state's case against him was strong, his attorney still encouraged him to proceed to trial. At a hearing on his performance, Mr. Taylor's counsel provided his reasons for giving this advice: "This is a capital homicide case. His options are—worst option is death penalty. As far as I was concerned, it was going to trial. You didn't have an option." *Id.*, Vol. VI at 1244–45. Despite this advice from his attorney, Mr. Taylor accepted the state's offer. According to the Utah Supreme Court, Mr. Taylor chose to plead guilty "because he did not want to put his family and the victims through a trial and he did not want to testify against Deli." *State v. Taylor* (*Taylor I*), 947 P.2d 681, 684 (Utah 1997).

The plea agreement listed the crimes as "Criminal Homicide, Murder in the First Degree as charged in Count[s] I . . . and II." Aplt. App., Vol I at 18. The plea then provided a description of each count: "the defendant, Von Lester Taylor, did intentionally or knowingly cause the death of Beth Potts, and the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons . . . were killed." *Id.* at 19.

The second count was the same, simply replacing Beth with Kaye. The plea then stated, "My conduct, and the conduct of other persons for which I am criminally liable, that constitute the elements of the crime charged are as follows[,]" and then described that conduct in the following manner:

> On the 22nd day of December, 1990, in Summit County, State of Utah, I, Von Lester Taylor, in conjunction with Edward Steven Deli unlawfully entered the cabin belonging to Rolf Tiede. When Kaye Tiede and Beth Potts returned to the cabin, I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts by shooting them with firearms.

Id.

Having pleaded guilty, Mr. Taylor then proceeded to the penalty phase of his proceedings. After hearing testimony and arguments, a jury ultimately sentenced Mr. Taylor to death for the murders.[3]

3. Direct Appeal and State Collateral Review

After his sentencing, Mr. Taylor appealed both his guilty plea and sentence in state court. Mr. Taylor argued his attorney had failed him in two ways: by misinforming him about what evidence could be used against him at the sentencing phase and by suffering from conflicts of interest. The trial court held

[3] Unlike Mr. Taylor, Mr. Deli elected to proceed to trial. His trial started after Mr. Taylor had pleaded guilty and ended prior to the start of Mr. Taylor's penalty phase. A jury convicted Mr. Deli of second degree murder and sentenced him to life in prison for his participation in the crimes.

a hearing at which Mr. Taylor's attorney testified regarding his representation of Mr. Taylor. Based on the attorney's testimony and records of Mr. Taylor's proceedings, the Utah Supreme Court affirmed the convictions. *See Taylor I*, 947 P.2d at 690 ("Taylor cannot show prejudice related to [his attorney's] performance . . . [and] Taylor failed to show an actual conflict.").

Mr. Taylor subsequently sought post-conviction relief in state court. *See Taylor v. State* (*Taylor II*), 156 P.3d 739 (Utah 2007). In his first petition, he argued that both his trial counsel and appellate counsel had been constitutionally ineffective. The Utah Supreme Court rejected relief on the ineffective-assistance-of-trial-counsel claim, reasoning that "[b]ecause Taylor has already challenged the effectiveness of his trial counsel on appeal, his post-conviction claims that his trial counsel was ineffective are procedurally barred." *Id.* at 746 (citing Utah Stat. Ann. § 78-35a-106(1)(c) (2002), for the proposition that "[a] defendant is not eligible for post-conviction relief on any ground that was raised on appeal or that could have been raised on appeal"). The Utah Supreme Court then rejected Mr. Taylor's arguments about his appellate counsel on the merits.

Mr. Taylor then brought a petition for federal habeas corpus relief under 28 U.S.C. § 2254. But, because Mr. Taylor had failed to exhaust a number of his federal habeas claims before the state court, the federal district court stayed proceedings for him to return to state court. To cure this defect, Mr. Taylor

brought a second petition in state court for post-conviction relief asserting thirty claims for relief. *See Taylor v. State* (*Taylor III*), 270 P.3d 471 (Utah 2012). The Utah Supreme Court denied this petition, treating all of Mr. Taylor's claims as procedurally barred.

4. Federal Habeas Proceedings

Having finally exhausted all of his claims for relief in state court, Mr. Taylor returned to federal court. In 2012, he filed a Second Amended Petition for habeas relief, raising twenty-six claims. Mr. Taylor invoked actual innocence as a gateway to overcome the fact that a number of his claims were procedurally defaulted. To support his actual innocence claim, he moved for an evidentiary hearing to develop evidence about the circumstances of the murders. Specifically, he sought to elicit evidence that Mr. Deli had fired the fatal shots that killed Beth and Kaye. The state opposed this motion, arguing that it was irrelevant whether Mr. Taylor had fired the fatal bullets. Under the state's reasoning, he was guilty of capital murder at least as an accomplice and thus could not establish his actual innocence.

The district court granted the evidentiary hearing. It rejected the state's contention that Mr. Taylor had to establish actual innocence as an accomplice to qualify for the actual innocence exception. According to the district court, Mr. Taylor did not have actual notice that he was charged as and pleading guilty

to "capital murder as an accomplice," so accomplice liability was beyond the scope of the actual innocence inquiry. Instead, "[t]he question must be whether Mr. Taylor can advance his claims that he is actually innocent of the crime to which he pleaded—capital murder as a principal—not any crime to which he could have been convicted of had he gone to trial and been put on notice." Aplt. App., Vol. XIX at 4812 (Order and Mem. Decision Granting Evid. Hr'g).

At the evidentiary hearing, the parties presented ballistics and medical forensics evidence. Based on this evidence, the district court concluded that Mr. Taylor had met his burden of showing actual innocence. Specifically, the district court found that Mr. Deli had been in possession of the .44 magnum revolver throughout the shootings.[4] And the district court further concluded it was likely the bullets that killed Kaye and Beth were fired from that gun. Based on these two facts, the court concluded that "no reasonable juror, conscientiously following the appropriate instructions requiring proof beyond a reasonable doubt, would have voted to convict Mr. Taylor of the charges to which he pleaded, capital murder as a principal." *Id.*, Vol. XX at 4907 (Findings of Fact and Conclusions of Law Regarding Claim of Actual Innocence).

---

[4] The district court discounted Mr. Taylor's confession to the court-appointed psychiatrist that he had used Mr. Deli's gun to shoot both victims. The court determined this confession was "not credible" given Mr. Taylor's incentive to convince the psychiatrist he was insane. Aplt. App., Vol. XIII at 4868 (Findings of Fact and Conclusions of Law Regarding Claim of Actual Innocence).

Having overcome the procedural bar on Mr. Taylor's constitutional arguments, the district court proceeded to Mr. Taylor's substantive argument that his trial counsel was constitutionally ineffective in advising him about the guilty plea, rendering his plea constitutionally defective. Mr. Taylor specifically claimed that his attorney failed to adequately investigate the "no-fatal-shot theory" and thus failed to advise him of the possibility that Mr. Deli had fired the shots that killed Kaye and Beth. Thus, Mr. Taylor insisted he forwent trial and entered the guilty plea without valuable knowledge regarding his actual liability for the murders. According to Mr. Taylor, his counsel's failure to advise him on this theory of innocence was objectively unreasonable and fell below the constitutional floor for effective assistance of counsel. Mr. Taylor maintains that had he been provided with the ballistics information, he would have taken his chances at trial.

The district court granted Mr. Taylor's habeas petition based on this claim. It concluded Mr. Taylor's trial counsel was constitutionally ineffective for failing to investigate whether Mr. Taylor fired the fatal shots. The court then determined this failure prejudiced Mr. Taylor because there was a reasonable probability that he would have chosen to proceed to trial if he had known the strength of the state's evidence against him as the principal to the murders. Based on this

constitutional violation, the district court granted Mr. Taylor's habeas petition and overturned his thirty-year-old murder convictions.

II. Analysis

On appeal, the state does not challenge Mr. Taylor's new evidence. The state concedes for the sake of argument that Mr. Taylor did not fire the fatal shots. Rather, the state argues the district court erred as a matter of law in confining the actual innocence inquiry to Mr. Taylor's guilt of capital murder *as a principal*. According to the state, Mr. Taylor pleaded guilty to the two counts of capital murder generally, not under a specific theory of liability. Thus, the state argues that because Mr. Taylor cannot establish actual innocence as both a principal and an accomplice, his claims for relief remain procedurally defaulted and we cannot consider them.

We agree with the state. As we explain below, under Utah's laws regarding accomplice liability, the state provided Mr. Taylor notice of what crime he was being charged with and pleading guilty to: capital murder. And Mr. Taylor has done nothing to prove a reasonable, properly instructed jury more likely than not would have reasonable doubt about his guilt as an accomplice to the murders. Thus, we need not reach Mr. Taylor's claim of ineffective assistance of counsel leading to a defective guilty plea because it remains procedurally barred.

Before reviewing the district court's application of actual innocence to Mr. Taylor, we address two threshold legal questions which inform our reasoning: (1) What should the scope of the actual innocence inquiry be in a case involving a plea bargain? and (2) What is accomplice liability under Utah's criminal law?

A. Standard of Review

Our review of habeas petitions is "governed by AEDPA's standards to the extent that the claims were adjudicated on the merits by [a] . . . state court." *Douglas v. Workman*, 560 F.3d 1156, 1170 (10th Cir. 2009). Under AEDPA, we may grant a habeas petition that a state court rejected on the merits only if the state court's adjudication of the petitioner's claims resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). But "[t]he § 2254(d) standard does not apply to issues not decided on the merits by the state court." *Bland v. Sirmons*, 459 F.3d 999, 1010 (10th Cir. 2006).

Thus, "AEDPA's deferential standard of review for claims decided on the merits by a state court . . . has no application to a gateway innocence assertion." *Fontenot,* 2021 WL 2933220, at *38. Rather, an actual innocence gateway claim is a mixed question of law and fact that we review de novo. *See id.* Even in this

context, we presume the state court's finding of facts to be correct. *Id.* (citing 28 U.S.C. § 2254(e)(1)). "Therefore, when a state court has made a factual determination bearing on the resolution of a *Schlup* [actual innocence] issue, the petitioner bears the burden of rebutting this presumption by clear and convincing evidence." *Id.* (internal quotation marks omitted).

Our decision today also requires us to interpret and apply Utah's criminal law. We review de novo the district court's interpretation of state law. *See, e.g.*, *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020). In conducting this review, we are bound by the state courts' interpretation of the state's laws. *See, e.g.*, *Chapman v. LeMaster*, 302 F.3d 1189, 1196 (10th Cir. 2002) ("On habeas review, however, the New Mexico courts' interpretation of the state felony murder statute is a matter of state law binding on this court." (emphasis omitted)). "If the state's highest court has not decided an issue, our task is to predict how it would rule." *Jordan*, 950 F.3d at 730–31 (internal quotation marks omitted). "To guide our prediction, we may consult persuasive state authority, such as dictum by the state's highest court and precedential decisions by a state's intermediate appellate courts." *Id.* (internal quotation marks omitted; alterations incorporated).

B. Actual Innocence Based on a Guilty Plea

Mr. Taylor's convictions resulted from his guilty plea, not a trial. When a conviction is obtained through a trial, we limit the scope of the actual innocence inquiry to the crime of conviction. *See, e.g.*, *Black v. Workman*, 682 F.3d 880, 915 (10th Cir. 2012) ("This exception applies to those who are actually innocent of the *crime of conviction* and those 'actually innocent' of the death penalty (that is, not eligible for the death penalty under applicable law)." (emphasis added)).

Our analysis expands when reviewing an actual innocence claim by a petitioner who was not convicted by a jury, but who rather pleaded guilty before trial. The Supreme Court has made clear that a petitioner invoking actual innocence as to a guilty plea still has to prove his innocence of the charge to which he pleaded guilty—namely, the crime of conviction. *Bousley v. United States*, 523 U.S. 614 (1998). Furthermore, "[i]n cases where the Government has foregone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624. The Supreme Court's holding in *Bousley* prevents a petitioner from artificially narrowing the scope of the actual innocence inquiry through plea bargaining.

Still, the Court in *Bousley* also made clear that the actual innocence inquiry does not extend to any conceivable crimes the state could have charged but decided not to. For example, in *Bousley*, the government charged Bousley with

using a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c). But when Bousley brought a habeas petition and invoked the actual innocence gateway to overcome a procedural default, the government argued he had to "demonstrate that he is actually innocent of both '*using*' and '*carrying*' a firearm[.]" *Id.* (emphasis added). The Court disagreed. It explained Bousley did not need to demonstrate actual innocence of carrying the firearm—a separate crime under § 924(c)—because his "indictment charged him only with 'using' firearms" and there was "no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." *Id.*

Here, the state did not forego any more serious charges in the midst of plea bargaining with Mr. Taylor. So, in assessing Mr. Taylor's actual innocence claim, the actual innocence inquiry is limited to his liability for the crime of conviction: two counts of capital murder.

C. Accomplice Liability Under Utah Law

Given that the actual innocence inquiry is limited to the capital murder charges, the crux of Mr. Taylor's actual innocence claim hinges on how Utah understands accomplice liability. Mr. Taylor contends the state had to specifically charge him, and he had to specifically plead guilty as, an accomplice for accomplice liability to be relevant in the *Schlup* actual innocence inquiry.

Under Utah law there are two different ways of committing the same substantive crime. First, the defendant could satisfy all the elements of the crime himself. This is principal liability. *See In re D.B.*, 289 P.3d 459, 465 (Utah 2012). Alternatively, the defendant could still be guilty of the substantive crime even if someone else directly commits the offense. Utah law makes it clear that "[e]very person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct." Utah Stat. Ann. § 76-2-202. This is accomplice liability. *See In re D.B.*, 289 P.3d at 465.

Accomplice liability applies when two conditions are met. First, the defendant must "have the intent that the underlying offense be committed." *State v. Briggs*, 197 P.3d 628, 632 (Utah 2008). Second, the defendant must have engaged in one of the enumerated acts from the accomplice liability statute—that is, soliciting, requesting, commanding, encouraging, or intentionally aiding.

In Utah, accomplice liability is not a separate crime with different elements. *See State v. Gonzales*, 56 P.3d 969, 972 (Utah Ct. App. 2002) ("[C]onviction of accomplice and principal liability do not require proof of different elements or proof of different quality."). Rather, it is a separate theory

supporting liability of the charged crime. *See Briggs*, 197 P.3d at 632. Accomplice liability, to be sure, "requires conduct different from direct commission of an offense[.]" *In re D.B.*, 289 P.3d at 465. Although proving someone is liable as an accomplice may look quite different from proving he is liable as a principal, "[i]t is well settled that accomplices incur the same liability as principals." *Id.* at 471 (quoting *Gonzalez*, 56 P.3d at 972). Principal liability and accomplice liability are two means of committing the same substantive crime.[5]

Given that accomplice liability is a theory of guilt rather than a distinct crime, the state need not provide the same level of notice as when it charges a defendant with a substantive crime. The state does not have to identify all possible theories of guilt it intends to pursue at trial in the Information. *See Gonzales*, 56 P.3d at 972 ("We find it unreasonable to require the State to give

[5] Another federal court recently denied a habeas petition involving a similar state accomplice liability law. *See Hallman v. Brittain*, No. 17-4604, 2020 WL 1875603, at *4 (E.D. Pa. April 15, 2020) ("Under [Pennsylvania's accomplice liability law], the prosecution here could have lawfully proven Petitioner's guilt on the robbery charge by showing that he was either the principal or an accomplice. It was not required to separately charge him as both principal and accomplice."). Under Pennsylvania law, a person is an accomplice if the state proves "(a) that the defendant had the intent of promoting or facilitating the commission of the offense, and (b) that the defendant solicited, commanded, encouraged, or requested the other person to commit it or aids/attempts to aid the other person in planning or committing it." *Id.* at *3 (quoting Pa. Suggested Standard Criminal Jury Instructions § 8.306(A)(1)).

notice, at a stage as early as the filing of an information, of all possible theories that might arise, including those that do not become part of the State's case."). In fact, a criminal defendant charged with a substantive crime already has notice that accomplice liability could be on the table at trial. *See In re D.B.*, 289 P.3d at 471 ("[A] person charged with a crime as a principal has adequate notice of the possibility of accomplice liability being raised at trial." (emphasis omitted; alteration incorporated) (quoting *Gonzales*, 56 P.3d at 972)).

Still, if the state intends to pursue a theory of accomplice liability, it must give the defendant notice of this intention sometime prior to the close of trial. *See In re D.B.*, 289 P.3d at 471. "Charging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *Id.* The state cannot simply spring a new theory of guilt on the defendant when instructing the jury at the end of trial. As the Utah Supreme Court has explained,

> a defendant may receive constitutionally adequate notice that he is facing accomplice liability in several ways. The simplest way for the State to provide adequate notice is by actually charging the defendant as an accomplice. The state may also notify a defendant of potential accomplice liability through presentation of adequate evidence at any time prior to the close of evidence at trial.

Id. But simply because the state *can* explain it is pursuing a theory of accomplice liability in the initial information does not mean it *must*. And it certainly does not

mean that accomplice liability is a separate crime which requires a specific, stand-alone charge. *See Gonzales*, 56 P.3d at 972 (explaining that accomplice liability is not a separate offense from principal liability); *see also Briggs*, 197 P.3d at 632 (explaining "the State relied upon accomplice liability as a theory for convicting [the defendant] of the crimes included in the information, and *not as a separate offense*" (emphasis added)).

D. Application

Here, Mr. Taylor claims his trial counsel was ineffective for failing to investigate and advise him on the "no-fatal-shot" defense. But Mr. Taylor failed to adequately present this claim in state court, meaning it is procedurally defaulted. So, we will not consider this constitutional claim unless Mr. Taylor can establish he qualifies for an exception to the bar on considering procedurally defaulted claims. Mr. Taylor argues, and the district court agreed, that Mr. Taylor overcame this procedural bar because he is actually innocent of his crime of conviction—capital murder as a principal.

Our review begins and ends with Mr. Taylor's actual innocence claim. Mr. Taylor was charged with capital murder. Neither the Information nor the plea agreement specified a particular theory of liability, nor did they have to. The actual innocence inquiry extends beyond Mr. Taylor's guilt as a principal to his guilt as an accomplice. This puts an end to Mr. Taylor's actual innocence

argument because he has not argued that he is actually innocent as an accomplice to capital murder. Nor could he. The evidence clearly establishes that Mr. Taylor intended to cause the deaths of Kaye Tiede and Beth Potts and intentionally aided Mr. Deli to that end.

1. Accomplice Liability

The district court limited the actual innocence inquiry to Mr. Taylor's liability as a principal. The court reasoned that "[t]he Information did not charge Mr. Taylor with accomplice liability. Nothing in the Statement of Defendant or plea colloquy mentions accomplice liability. And, of course, no trial occurred." Aplt. App., Vol. XIX, at 4810–11 (Order and Mem. Decision Granting Evid. Hr'g). Thus, the district court concluded that "[a]s a matter of law, Mr. Taylor did not plead guilty to accomplice liability." *Id.* at 4811.

Mr. Taylor adopts the district court's reasoning and expands on it in responding to the state's appeal.

He first argues that extending the actual innocence inquiry to accomplice liability would raise constitutional concerns. The Sixth Amendment requires that all criminal defendants "be informed of the nature and cause of the accusation" against them. U.S. Const., amend. VI. Here, the state never specifically informed Mr. Taylor that he was being charged as an accomplice to the murders, and he never pleaded guilty to capital murder as an accomplice. Thus, he contends that

extending the actual innocence inquiry to accomplice liability now would violate the Sixth Amendment's guarantee of notice regarding charged crimes. Mr. Taylor argues that because the state did not charge him as an accomplice in the first instance, it missed its chance. All the state's arguments about accomplice liability exist in the realm of "would've, could've, should've." Aple. Resp. Br. at 35. Based on the limits of the charging documents and plea agreement, Mr. Taylor maintains we are required by the Constitution to limit our actual innocence inquiry to his liability as a principal to capital murder.

Second, Mr. Taylor insists that assessing his potential liability as an accomplice as part of the actual innocence inquiry would conflict with *Schlup*. According to Mr. Taylor, considering accomplice liability at this stage would require us to speculate about what theories of guilt the state would have pursued at trial if Mr. Taylor had not pleaded guilty. Mr. Taylor maintains that such speculation is inappropriate under *Schlup*. *See id.* at 34 ("Under *Schlup*, the mere existence of sufficient evidence that *could possibly* convict Taylor of a different offense than his offense of conviction is irrelevant." (emphasis in original)). So, forcing him to prove his actual innocence as an accomplice requires more than is necessary to qualify for the *Schlup* gateway.

In making both of these arguments, Mr. Taylor relies on his theory that "capital murder as an accomplice" is a separate crime under Utah law that must be

specifically charged in the information. But in doing so, he misconstrues Utah's law on accomplice liability. It is not a separate crime that needs to be charged separately. *See Gonzales*, 56 P.3d at 972. It is a different theory of liability available to the state leading up to and throughout trial to prove the defendant's guilt of the underlying substantive offense. Only the substantive crime, not the state's theory of the defendant's guilt, must be included in the information.

Utah argues in the alternative that the information and plea agreement contained specific language that gave Mr. Taylor adequate notice the state was charging him as an accomplice. Again, because accomplice liability is not a separate crime under Utah law, it is not necessary that Mr. Taylor had actual notice of the state's intention to treat him as an accomplice prior to trial.

In any event, the plea agreement and proceedings contained language indicating Mr. Taylor was being treated as both a principal and an accomplice to the murders. The plea agreement explicitly stated, "My conduct, *and the conduct of other persons for which I am criminally liable*, that constitute the elements of the crime charged are as follows[.]" Aplt. App., Vol. I at 19 (emphasis added). The plea then described the factual basis for the crime: "When Kaye Tiede and Beth Potts returned to the cabin, *I, Von Lester Taylor, and my co-defendant, Edward Steven Deli, intentionally and knowingly caused the death of both Kaye Tiede and Beth Potts* by shooting them with firearms." *Id.* (emphasis added).

Furthermore, at the preliminary hearing, the judge explained that probable cause existed to continue holding Mr. Taylor based on accomplice liability. In doing so, his language reflected Utah's statute on accomplice liability: "each [defendant] to the other, acted with the mental state required for the commission of the offenses alleged in the Information, and they each to the other, solicited, requested, demanded, encouraged or intentionally aided the other to engage in the conduct which is alleged in the Information." *Id.*, Vol. III at 552.

Thus, applying the actual innocence inquiry to Mr. Taylor's guilt as an accomplice conflicts with neither the Constitution nor *Schlup*. Mr. Taylor was adequately and accurately "informed of the nature and the cause of the accusation" against him. U.S. Const., amend. VI; *see also Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than the notice of the *specific charge*, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (emphasis added)). And nothing about such an application of the actual innocence theory would conflict with *Schlup*, which requires proof that the defendant is innocent of the *crime of conviction*. *See Black*, 682 F.3d at 915 ("This exception applies to those who are actually innocent of the *crime of conviction*[.]" (emphasis added)).

Here, the Information charged Mr. Taylor with various crimes, including two counts of capital murder. Mr. Taylor pleaded guilty to these two charged crimes. Nothing more, nothing less.[6] To prove capital murder, the state must demonstrate Mr. Taylor intentionally or knowingly caused the death of another in certain circumstances—here, that the homicide was committed incident to one criminal episode during which two or more persons were killed or a criminal episode during which the defendant committed burglary. *See* Utah Stat. Ann. § 76-5-202. Mr. Taylor must demonstrate his actual innocence as to this substantive crime to overcome the procedural bar on his underlying claims for relief. But, under Utah law, there are two different ways he could have been found guilty of the capital murders. The state could have established his guilt of these crimes either through evidence of his conduct as a principal or as an accomplice. The state therefore could prove he directly committed the murders or that he "solicit[ed], request[ed], command[ed], encourag[ed], or intentionally

---

[6] Mr. Taylor also insists it is impossible to plead guilty to both principal and accomplice liability. He cites a Utah Supreme Court case, *State v. Loveless*, 232 P.3d 510 (Utah 2010), to support this argument. But *Loveless* does not stand for this proposition. In *Loveless*, the defendant was charged in a single count with two alternative substantive crimes. The charges were silent as to liability. In that instance, when a single count contains alternative substantive crimes, the prosecutor is "at risk that the defendant will plead guilty as charged to one of the offenses and thereby eliminate the alternative offense contained in the same count." *Id.* at 513. Again, accomplice liability is not a separate crime. Mr. Taylor pleaded guilty to a single crime, capital murder, which can be committed in different ways.

aid[ed] another person to" commit the act. *In re D.B.*, 289 P.3d at 465 (quoting Utah Code Ann. § 76-2-202). Mr. Taylor cannot side-step proving his actual innocence as an accomplice simply because he ended the process through a plea agreement.

Unlike the government in *Bousley*, the state of Utah is not asking Mr. Taylor to prove his innocence of an uncharged crime. Rather, the state correctly articulates what is necessary in all actual innocence cases: the petitioner must prove his innocence of the crime of conviction. Here, Mr. Taylor could have committed the capital murders as either a principal or an accomplice.[7] Thus, he must establish his actual innocence under both theories of liability to qualify for *Schlup*'s gateway for overcoming a procedural default.

[7] We are not saying a habeas petitioner invoking the actual innocence exception must prove he is innocent of any possible offense he could have been charged with for his conduct. In *Bousley*, the Supreme Court clearly foreclosed this understanding of *Schlup*. *See Bousley*, 523 U.S. at 624 (explaining the petitioner needed to prove his actual innocence only as to crimes charged in the indictment and more serious charges the government forwent in plea bargaining). All we conclude here is that under Utah law, principal liability and accomplice liability are two theories of liability that can each be used to prove guilt of the same crime. When a criminal defendant pleads guilty to a substantive crime and later claims actual innocence, he must demonstrate his innocence under both theories.

2. Actual Innocence Counterfactual

Now that we have determined the scope of the actual innocence inquiry, we evaluate whether Mr. Taylor has demonstrated he is actually innocent of the two charged counts of capital murder. To do so, we must rewind the tape thirty years and imagine a counterfactual scenario about what would have happened if Mr. Taylor had gone to trial on the two capital murder charges. We must determine what "reasonable, properly instructed jurors" would have done in light of all the evidence—including the petitioner's newly proffered evidence—in this alternate universe. *Schlup*, 513 U.S. at 329. We will apply the actual innocence gateway only if it is "more likely than not" that these jurors "would have reasonable doubt" about whether Mr. Taylor committed capital murder. *House*, 547 U.S. at 538.

In undertaking *Schlup*'s probabilistic inquiry, we bear several things in mind. The question must be what a jury would do with the new evidence, not what we would do. *See House*, 547 U.S. at 538. While the court has a responsibility to confine the actual innocence inquiry to the relevant crimes, it must make the actual innocence determination based on what "reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. And because we look to this reasonable, properly instructed jury, we also will not speculate about whether Mr. Taylor may have drawn a particularly lenient jury.

Furthermore, in making the actual innocence assessment, we do not blind ourselves to what would have happened if the case had gone to trial. We will not limit the state's theories of guilt in the actual innocence inquiry because the state had not yet been forced to articulate what theories of guilt it would advance in trying the case. As long as the state is not seeking to force the petitioner to prove his innocence of crimes he was never charged with, we can now consider the state's various theories of the case when determining what a reasonable jury would do. We therefore determine how a reasonable, properly instructed jury would have viewed Mr. Taylor's two counts of capital murder, bearing in mind the different theories of guilt the state could have pursued at trial.

The state does not challenge any of the district court's factual findings regarding the ballistics evidence. The district court concluded, and the state concedes for the sake of this appeal, that Mr. Taylor has demonstrated his actual innocence as a principal to the capital murders. Thus, we focus our inquiry solely on whether Mr. Taylor has demonstrated his actual innocence to capital murder as an accomplice.

So, we ask: would any reasonable, properly instructed juror have had reasonable doubt as to Mr. Taylor's guilt for the capital murders as an accomplice? As a reminder, to prove accomplice liability the state must show the defendant intended that the crime be committed and also solicited, encouraged,

helped, or intentionally aided the principal in the commission of the crime. *See Briggs*, 197 P.3d at 632.

The state argues that Mr. Taylor's "guilt as an accomplice is well established by the overwhelming and uncontested evidence." Aplt. Op. Br. at 36. The state is correct. The parties do not dispute that Mr. Taylor intended the deaths of the two victims. And the record makes clear that he intentionally aided Mr. Deli in committing the crime. To be sure, it is not enough if Mr. Taylor simply "assist[ed] someone *who* committed murder[.]" *State v. Grunwald*, 478 P.3d 1, 16 (Utah 2020) (emphasis in original). He must have "assist[ed] someone *to* commit murder." *Id.* (emphasis in original). That is precisely what Mr. Taylor did here. The facts are well established. Linae witnessed and then testified that Mr. Taylor fired his gun first, shooting Kaye. Later, Mr. Deli told Mr. Taylor they needed to reload their guns, an indication that both guns had been emptied during the shooting. Mr. Taylor subsequently told Mr. Deli he had shot one of the victims in the head twice. Mr. Taylor then asked for Mr. Deli's help moving the bodies, and the men moved the bodies to the cabin's balcony, covering the bodies with a blanket. After Rolf Tiede arrived, Mr. Taylor instructed Mr. Deli to shoot Rolf. When Mr. Deli did not, Mr. Taylor shot him twice. Finally, Mr. Taylor attempted to set the house on fire while the bodies of the two women remained on the cabin's deck.

This is accomplice liability of the clearest kind. *See State v. Comish*, 560 P.2d 1134, 1136 (Utah 1977) ("[A]n 'accomplice' is one who participates in a crime in such a way that he could be charged and tried for the same offense."); *see also State v. Apodaca*, 448 P.3d 1255, 1269 (Utah 2019) (affirming conviction under accomplice liability theory where state presented evidence that the defendant "actively and intentionally planned, participated in, and attempted to cover up" a robbery). Mr. Taylor fired the first shot. He then fully participated in and tried to cover up the murders. No reasonable juror could have heard this evidence and harbored doubts about Mr. Taylor's liability as an accomplice to the two counts of capital murder.[8]

Because Mr. Taylor cannot establish his actual innocence of capital murder, our analysis ends. The constitutional claim on which the district court granted relief was procedurally defaulted, and Mr. Taylor has not provided us with any method to overcome the bar on considering such a claim.

III. Conclusion

Thirty years after participating in the murders of Kaye Tiede and Beth Potts, new ballistics evidence indicates Mr. Taylor may not have fired the fatal shots. Based

[8] In prior cases, we have concluded that an actual innocence claim fails where the petitioner's argument goes "to legal innocence, as opposed to factual innocence." *Beavers*, 216 F.3d at 923. The parties did not brief, and so we do not decide, whether the distinction between principal and accomplice liability goes to legal innocence as opposed to factual innocence.

on this evidence, Mr. Taylor argues that this new evidence qualifies him for the actual innocence exception so that we can consider his underlying constitutional claims for habeas relief. But Mr. Taylor has not demonstrated that applying the well-established procedural default rules would result in a fundamental miscarriage of justice. Overturning the convictions now would be the fundamental miscarriage of justice. Mr. Taylor cannot qualify for the actual innocence exception based upon a technical parsing of the different theories of guilt a state could pursue. His actual innocence of capital murder as a principal does not absolve him of the substantive crime of capital murder under Utah law. He must also prove his actual innocence as an accomplice. Mr. Taylor failed to do so. We accordingly **REVERSE** the district court's grant of habeas corpus relief and **REMAND** for further proceedings consistent with this opinion.

No. 20-4039, *Taylor v. Powell*
BRISCOE, Circuit Judge, concurring.

I fully agree with the majority that Mr. Taylor's actual innocence gateway claim lacks merit. I write separately to emphasize three key points: (1) Taylor's actual innocence gateway claim is inconsistent with basic principles of Utah state criminal law; (2) the record establishes that Taylor received both constructive and actual notice of the possibility that the State could pursue a theory of accomplice liability on the two aggravated murder charges; and (3) the evidence overwhelmingly establishes that Taylor participated in, and was arguably the driving force behind, the two fatal shootings, and thus he is unquestionably subject to accomplice liability for the two murders.

Taylor's actual innocence gateway claim is inconsistent with basic principles of Utah state criminal law

Section 76-5-201 of the Utah Criminal Code states, in pertinent part, that "a person commits criminal homicide if the person intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being . . . ." Utah Code Ann. § 76-5-201(1)(a). Section 76-5-201 also sets out the following types of criminal homicide: "aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide." Utah Code Ann. § 76-5-201(2).

Taylor was charged by information with two counts of criminal homicide, specifically aggravated murder, in violation of Utah Code Ann. § 76-5-202(1)(b) and/or (d). Those statutory provisions state as follows:

> (1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:
>
> * * *
>
> (b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons were killed, or during which the actor attempted to kill one or more persons in addition to the victim who was killed;
>
> * * *
>
> (d) the homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, child abuse as defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, or child kidnapping . . . .

Utah Code Ann. § 76-5-202(1)(b), (d).

Chapter 2 of the Utah Criminal Code, entitled "Principles of Criminal Responsibility," expressly recognizes the concepts of principal liability and accomplice liability for criminal offenses. Specifically, § 76-2-202 of the Utah Criminal Code, entitled "Criminal responsibility for direct commission of offense or for conduct of another," states:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202.[1]

The Utah Supreme Court has held, based upon the language of § 76-2-202, that "[t]o show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense." *State v. Briggs*, 197 P.3d 628, 631-32 (Utah 2008). The Utah Supreme Court explained in *Briggs* that "[a]n accomplice will be held criminally responsible to the degree of his own mental state, not that of the principal." *Id*. at 632. Thus, an accomplice must have both "the intent that the underlying offense be committed" and "the intent to aid." *Id*. Notably, and key to our analysis in this case, the Utah Supreme Court stated "that the nature of accomplice liability makes it impossible for the State to charge an individual with accomplice

---

[1] Chapter 2 also includes a "Definitions" section that states, in pertinent part:

> A person engages in conduct:
>
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
>
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Utah Code Ann. § 76-2-103(1)-(2).

liability standing alone." *Id*. And the Utah Court of Appeals subsequently explained that "[a]ccomplice liability . . . is not an independent crime." *State v. Melancon*, 339 P.3d 151, 158 (Utah Ct. App. 2014).

In *State v. Gonzales*, 56 P.3d 969 (Utah Ct. App. 2002), the Utah Court of Appeals rejected a defendant's claim "that due process required the State to provide notice in the information of the State's intention to pursue an accomplice liability theory at trial." *Id*. at 971. In doing so, the Utah Court of Appeals noted that "Rule 4(b) of the Utah Rules of Criminal Procedure requires only that an information 'charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge.'" *Id*. at 972 (quoting Utah R. Crim. P. 4(b)). The Utah Court of Appeals in turn rejected the notion "that accomplice liability is a separate offense from principal liability such that it would require specific notice." *Id*. The Utah Court of Appeals noted "[i]t [wa]s well settled that accomplices incur the same liability as principals," and, consequently, "a person charged with a crime has adequate notice of the possibility of accomplice liability being raised at trial because conviction of accomplice and principal liability do not require proof of different elements or proof of different quality." *Id*. (citing Utah Code Ann. § 76-2-202 and *State v. Comish*, 560 P.2d 1134, 1136 (Utah 1977)).

In *State v. Blair*, 868 P.2d 802 (Utah 1993), the Utah Supreme Court addressed the issue of accomplice liability in the course of addressing a defendant's appeal from the

denial of his motion to withdraw his guilty plea. The defendant and a codefendant were charged with first degree murder. Prior to and shortly after the preliminary hearing, the defendant told another inmate, a deputy county sheriff, and the prosecutor that he was the one who shot the victim in the course of robbing him. Not long after the preliminary hearing, the defendant changed his story and told the prosecutor that it was his codefendant who was actually responsible for shooting the victim, and that the defendant simply assisted in disposing of the victim's body after the shooting. Then, approximately three weeks later, the defendant changed course again, pleaded guilty to the charge and, in doing so, informed the trial court that he was responsible for shooting the victim. Eleven and a half years later, the defendant moved to withdraw his guilty plea, reverting again to his claim that he was not the shooter. The defendant asserted that his codefendant shot the victim and that he "agreed to stay with his plea because he falsely believed, based on his attorney's representations, that he could be held liable for the crime just by being at the crime scene even though he professed no prior knowledge that [the codefendant] intended to kill [the victim]." *Id*. at 806. The trial court denied his motion and the defendant appealed to the Utah Supreme Court. The Utah Supreme Court affirmed the trial court's ruling, noting "that a jury could have determined that" the defendant "was guilty of first degree murder as an accomplice even if he did not pull the trigger." *Id*. at 807. Consequently, the Court agreed with the trial judge's conclusion that

the defendant failed to establish "that he [wa]s an innocent man who . . . [pleaded] guilty to first degree murder."[2] *Id*.

In *State ex rel. D.B. v. State*, 289 P.3d 459 (Utah 2012), the Utah Supreme Court addressed the timing of the notice of potential accomplice liability when the defendant was originally charged solely as a principal but was later "adjudicated delinquent as an accomplice." *Id*. at 471. Quoting with approval from the Utah Court of Appeals' decision in *Gonzales*, the Utah Supreme Court noted that because "'accomplices incur the same liability as principals,'" even "'a person charged with a crime [as a principal] has adequate notice of the *possibility* of accomplice liability being raised a trial.'" *Id*. (quoting *Gonzales*, 56 P.3d at 969) (emphasis added by Utah Supreme Court). As for "the question of what notice is constitutionally sufficient before the State may *actually* pursue accomplice liability," the Utah Supreme Court held "that the Sixth Amendment is satisfied when a defendant (1) receives adequate notice that the State is pursuing accomplice liability and (2) the State has not affirmatively misled the defendant." *Id*. The Utah Supreme Court in turn held that "[c]harging an individual as a principal, standing alone, does not provide adequate notice that the State is actually pursuing an accomplice liability theory." *Id*. "But," the Court held, "a defendant may receive constitutionally adequate notice that he is facing accomplice liability in several ways."

---

[2] Taylor's claim of actual innocence is strikingly similar, not in a factual sense but rather in a legal sense, to the actual innocence claim asserted by the defendant in *Blair*.

Id. "The simplest way for the State to provide adequate notice," the Court held, "is by actually charging the defendant as an accomplice." *Id*. "The state may also," the Court held, "notify a defendant of potential accomplice liability through presentation of adequate evidence at any time prior to the close of evidence at trial."[3] *Id*. But, the Court held, "development of an accomplice liability theory *after* the close of evidence eliminates a defendant's ability to prepare his defense and present evidence relating to the accomplice liability theory" and "therefore fails to provide constitutionally adequate notice." *Id*. at 472 (emphasis in original).

Considering this recited Utah statutory and case law as a whole, the following conclusions can be drawn regarding Taylor's case and the actual innocence gateway claim that he now asserts. First, the State's information, at a minimum, effectively placed Taylor on notice that the State, at trial, could attempt to prove Taylor guilty of the two counts of aggravated murder as either an accomplice and/or as a principal. Second, had Taylor not pleaded guilty and instead proceeded to trial, the State almost certainly, based upon its arguments at the preliminary hearing, would have pursued both theories, at least if Taylor had actually pursued the defense he now asserts that his trial counsel should have pursued, i.e., that Taylor was not directly responsible for firing the fatal shots. Third, had Taylor presented evidence at trial suggesting that Deli, rather than he, fired the

---

[3] The Utah Supreme Court cited with approval a New Jersey Supreme Court case that held a defendant received notice of potential accomplice liability through his own testimony. 289 P.3d at 471 (citing *State v. Mancine*, 590 A.2d 1107, 1120 (N.J. 1991)).

fatal shots, that evidence would have placed the issue of accomplice liability squarely at issue.

Constructive and actual notice of the accomplice theory

The district court, in its order granting Taylor's motion for evidentiary hearing, concluded that Taylor never received notice of the possibility that the State was pursuing or might pursue a theory of accomplice liability on the two capital murder charges. I reject this conclusion. In my view, the record firmly establishes that Taylor received both constructive and actual notice of the possibility that the State might pursue a theory of accomplice liability.

As discussed above, the State's information charging Taylor with two counts of aggravated murder in violation of Utah Code Ann. § 76-5-202(1)(b) and/or (d) effectively placed Taylor on notice that the State could, at any point prior to the close of evidence at trial, attempt to prove Taylor guilty of the two counts of aggravated murder either as an accomplice or as a principal. And, in fact, Taylor received actual notice of the possibility of accomplice liability at least as early as the preliminary hearing.

The preliminary hearing in the case was held on January 8, 1991, approximately two weeks after the information was filed against Taylor and Deli. Both Taylor and Deli were present along with their counsel. At the conclusion of the State's evidence, Taylor's counsel moved to dismiss Counts I and II of the information. In support of that request, Taylor's counsel, as an early preview of the same evidentiary issues that Taylor presently raises, noted that it was "very difficult to determine which defendant had which weapon,"

which caliber of bullets actually killed the two victims, and whether "the weapon that was fired" by Taylor "did in fact cause the death[s]." Aplt. App., Vol. III at 541-42. More specifically, Taylor's counsel conceded that the testimony of Linae Tiede established that Taylor fired his weapon "in the direction of" Kaye Tiede "and in the direction of" Beth Potts, but Taylor's counsel asserted that there had "been no evidence that in fact, the rounds from this weapon, if it was in fact fired, did in fact, kill these two victims." *Id*. at 543.

The prosecutor responded by citing to and quoting from Utah Code Ann. § 76-2-202 which, as previously discussed, outlines the concepts of principal and accomplice liability for criminal offenses. *Id*. at 545. The prosecutor in turn stated that "there should be no question in the Court's mind that these gentlemen were acting in concert with one another, this was a joint enterprise" and that, under § 76-2-202, "they [we]re both culpable."[4] *Id*. at 545–46. In addition, the prosecutor noted that the evidence established "that two different weapons were fired" and that Taylor told Deli after the shootings that

---

[4] Taylor argues in his appellate response brief that the prosecutor's arguments were made solely in response to arguments made by Deli's counsel. Aple. Br. at 13-14. It is true that the prosecutor followed these arguments by stating: "[u]nder these circumstances, your Honor, I'd ask the Court to dismiss Mr. Gravis' motion on behalf of Mr. Deli." Aplt. App., Vol. III at 546. Nevertheless, it is undisputable that (a) the prosecutor was responding to arguments made both by Deli and Taylor, including Taylor's arguments about potentially not having fired any fatal shots, and (b) the prosecutor noted in his arguments that both defendants were liable under § 76-2-202. Thus, it is clear that by this exchange Taylor was placed on notice of the possibility of accomplice liability.

he (Taylor) "had reloaded his weapon." *Id*. at 546. At the conclusion of these arguments, the trial court denied Taylor's counsel's request to dismiss the charges and instead found that there was sufficient evidence to establish probable cause for those charges.

Thus, in sum, the evidence and arguments that were presented at the preliminary hearing provided Taylor with actual notice of the possibility that the State might seek to convict him on the basis of accomplice liability.

The uncontested evidence overwhelmingly establishes that Taylor is responsible for the two murders under a theory of accomplice liability

Because Taylor received both constructive and actual notice of the possibility of accomplice liability for the two murders, it was the district court's obligation under *Schlup v. Delo*, 513 U.S. 298 (1995), to consider not only the issue of principal liability, but also the issue of accomplice liability. Unfortunately, however, the district court focused solely on the issue of principal liability and, by doing so, failed to make a predictive judgment after examining available evidence whether a reasonable, properly instructed jury could have convicted Taylor of both murders as an accomplice. We could of course remand the case to the district court to conduct that analysis in the first instance. But, because it is a legal issue subject to de novo review, and given the importance of avoiding any additional delay in this case, the proper course for us is to conduct the analysis in the first instance.

Turning to the evidence in the record, including the evidence presented at the original sentencing proceeding *and* the new forensic evidence that was presented by

Taylor at the evidentiary hearing before the district court, it is apparent that Taylor cannot establish, in pertinent part, that it is more likely than not that no reasonable juror would have convicted him of the two aggravated murders under an accomplice theory of criminal liability. Even accepting the premise of Taylor's new forensic evidence as correct, i.e., that the fatal shots to the victims were caused by the .44 caliber handgun and that it was Deli who fired those shots, and in turn accepting that it is more likely than not that no reasonable juror would have convicted Taylor under a principal theory of criminal liability, the evidence nevertheless quite clearly establishes Taylor's guilt as an accomplice because Taylor both (a) intended for the victims to be killed or knew that the victims would die as a result of his and Deli's actions and (b) encouraged and/or intentionally aided Deli in the conduct that constituted the offense of aggravated murder (i.e., firing fatal shots into each victim with the .44 caliber handgun).

The undisputed evidence that supports Taylor's convictions as an accomplice in both murders includes the following: (a) Linae Tiede's eyewitness testimony that Taylor, within three to four minutes of Kaye Tiede and Beth Potts entering the cabin, and without either woman doing anything to provoke Taylor or Deli, raised his weapon, aimed it at Kaye Tiede, and shot and struck her with a bullet (notably, Taylor concedes that he was the first to shoot and that he shot and struck Kaye Tiede, Aplt. App., Vol. XIX at 4680), *id*., Vol. III at 94–97; (b) Taylor's admission under oath at the Rule 23B remand evidentiary hearing before the trial court that he emptied his .38 handgun while shooting at Kaye Tiede and Beth Potts, *id*., Vol. III at 608; (c) Linae Tiede's testimony that, after

Taylor and Deli discussed reloading their guns, Taylor said to Deli that he "needed help with the bodies" and that they "needed to throw them over the balcony" of the cabin, *id*., Vol. I at 101; (d) testimony from Brad Wilde, a local sheriff's deputy, who testified that he found the bodies of Kaye Tiede and Beth Potts on the outside balcony of the cabin, covered with both a blanket and snow on top of the blanket (suggesting that Taylor and Deli attempted to conceal the bodies), *id*. at 185; and (e) testimony from both Linae Tiede and Rolf Tiede describing how, after the shootings of Kaye Tiede and Beth Potts, Taylor robbed Rolf Tiede, directed Deli to then shoot Rolf Tiede, and, when Deli failed to comply, Taylor himself shot Rolf Tiede, *id*. at 110–13, 273–78.

It is inconceivable that any reasonable juror, properly instructed and considering all of this evidence, could have reached any other conclusion than that Taylor intended to kill, or at a minimum clearly knew that his actions would result in the deaths of, Kaye Tiede and Beth Potts (as well as Rolf Tiede), and that he both encouraged and assisted Deli in causing the deaths of Kaye Tiede and Beth Potts. In other words, it is inconceivable that a reasonable juror could not have found Taylor guilty beyond a reasonable doubt of the two aggravated murders at least on the basis of accomplice liability even assuming, as argued by Taylor, that none of the bullets he fired from his handgun caused the fatal wounds to Kaye Tiede and Beth Potts.