

No. _____

IN THE
Supreme Court of the United States

RICHARD M. ARNOLD,
Petitioner,

v.

REED A. RICHARDSON, WARDEN
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Richard Arnold was convicted of sexually assaulting his son, M.A. The only substantive evidence against Arnold was M.A.’s accusation. Following Arnold’s conviction, M.A. recanted.

Arnold sought relief in state court, but it was fruitless. So, Arnold filed a federal habeas petition, but it was untimely under 28 U.S.C. § 2244(d)(1). However, Arnold argued that his petition’s untimeliness should be excused under the “actual innocence” standard, first announced in *Schlup v. Delo*, 513 U.S. 298 (1995). The district court wasn’t persuaded and dismissed Arnold’s petition without conducting factfinding.

Arnold appealed and the Seventh Circuit remanded for factfinding so that “the credibility and reliability of the recantation may be assessed.” *Arnold v. Dittman*, 901 F.3d 830, 840 (7th Cir. 2018). However, on remand, the district court never found whether M.A.’s recantation was credible or reliable. Instead, it addressed whether a juror “could” plausibly find some fault with the recantation. Using this modal standard, the district court dismissed Arnold’s petition and the Seventh Circuit affirmed.

The Question Presented Is:

Whether, when assessing a claim of actual innocence” the district court must determine as a matter of fact whether the new evidence is credible and reliable, before determining as a legal matter, what effect such evidence would have on reasonable jurors?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Richard Arnold.

Respondent is Reed A. Richardson, the Warden of Stanely Correctional Institution in Wisconsin.

No party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Richard Arnold respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, *Arnold v. Richardson*, No. 20-2701 (7th Cir. Oct. 6, 2021) (unpublished), is attached (P-App 1a.). The preceding Seventh Circuit decision is available at *Arnold v. Dittman*, 901 F.3d 830 (7th Cir. 2018) (“*Arnold I*”); (P-App 68a.). The two district court opinions are attached. (P-App 12a, 92a). The last state court opinion, *State v. Arnold*, 2013AP2538, 2015 WL 540534 (Wis. Ct. App. Feb. 11, 2015) (unpublished) is attached. (P-App 9a).

JURISDICTION

The Seventh Circuit issued its decision on August 6, 2020. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution’s Fifth Amendment provides in relevant part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”

The Constitution’s Fourteenth Amendment provides in relevant part: “[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”

STATEMENT OF THE CASE

In 2008, Richard Arnold was convicted in a Wisconsin state court of repeated sexual assault of a child. *Arnold I*, 901 F.3d at 832. The alleged victim was Arnold's son, M.A., and the State's case against Arnold rested entirely on M.A.'s testimony. *See id.* at 832-33. The best that other witnesses could do was recount M.A.'s out of court statements, which were partially consistent and partially inconsistent with his testimony. *See id.* But in the end, it all came down to M.A.'s testimony. *See id.*

The jury convicted Arnold and the trial court sentenced him to life in prison without the possibility of parole. *Id.* at 833. Arnold appealed to the Wisconsin Court of Appeals and petitioned the Wisconsin Supreme Court. *Id. at 834.* Both state courts denied him relief. *Id.*

After Arnold's direct appeal to the Wisconsin Court of Appeals, M.A. signed an affidavit unequivocally recanting the accusatory portions of his trial testimony. *See id.* Two years later, Arnold filed a pro se motion in a Wisconsin trial court seeking a new trial. *Id.* The state court system again denied him relief. *Id.* at 834-835.

Critically, no State court ever conducted a factfinding hearing to assess the veracity of M.A.'s recantation. *Id.*

Having exhausted his state court remedies, Arnold subsequently filed a pro se habeas petition in the federal district court. *Id.* at 835. He claimed to be actually innocent and asked for habeas relief on that ground. *Id.*

Arnold's petition was filed more than a year after his conviction became final; the State argued that the petition was untimely under 28 U.S.C. § 2244(d)(1). *Id.* at 835-36. The district court agreed with the State and dismissed Arnold's petition without a factfinding hearing. *Id.* In its decision, the district court considered whether Arnold could pass through the actual innocence "gateway" set forth in *Schlup*, 513 U.S. at 298 and *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), but concluded that Arnold could not carry his burden under the applicable legal standards. *Arnold I*, 901 F.3d 830 at 835-36.

Arnold appealed, pressing his actual innocence claim both as a procedural excuse for surmounting § 2244(d)(1)'s time limit and as a freestanding claim for relief. *Id.* at 836. Arnold argued that a remand for a factfinding hear was necessary because no court had done any factfinding to assess the credibility of M.A.'s recantation. *Id.* at 838.

The Seventh Circuit agreed with Arnold and remanded the case for factfinding. *Id.* at 842. The decision noted that "M.A.'s recantation, if it represents the truth, would by itself exonerate Arnold as a factual matter." *Id.* at 839. The court explained the instructions on remand as follows:

The appropriate step, then, as the State recognizes, is for us to remand the case to the district court for an evidentiary hearing at which the credibility of M.A.'s recantation can be assessed along with the probable impact that the recantation would have had on reasonable jurors. As *Schlup* makes clear, any reliable evidence bearing on the veracity of the recantation and on Arnold's guilt or innocence may be considered in making these assessments.

Our decision to remand for a hearing should not be understood as reflecting any finding or impression on our part as to the reliability and credibility of the recantation. That is question for the factfinder. We hold only that, taking M.A.'s affidavit at face value, Arnold has a plausible claim of actual innocence entitling him to an evidentiary hearing.

If, upon hearing and weigh the evidence, the district court concludes that no reasonable juror would have found Arnold guilty beyond reasonable doubt in view of M.A.'s recantation, then Arnold will be entitled to pursue his habeas petition notwithstanding its tardiness under section 2244(d)(1). At that point, it will be necessary to consider whether his freestanding claim of actual innocence presents a viable claim for relief in habeas and what standard of proof Arnold would have to meet in order to prevail on that claim. If, on the other hand, the court concludes that a reasonable juror could still have convicted Arnold beyond a reasonable doubt notwithstanding M.A.'s recantation, then his petition must be dismissed as untimely.

Id. at 842.

On remand, the district court considered evidence from three witnesses:

(1) M.A.; (2) M.A.'s former counselor, Karen B.; and (3) Dr. Mark Goldenstein, an expert on child sexual abuse. *Arnold v. Richardson*, No. 20-2701, at *5 (7th Cir. Oct. 6, 2021) (hereinafter “*Arnold II*.”); (P-App 5a).

M.A. was 28 years old at the time of the evidentiary hearing. *Id.* Through his testimony, affidavit, and interview with Dr. Goldstein, M.A. recanted the sexual assault testimony from Arnold's trial. *Id.* M.A. gave three reasons that he had falsely accused Arnold.

First, M.A. explained that he made the false allegations under pressure from a counselor who he believed had the power to send him to prison. *Id.* at *2, 5-6. Specifically, the counselor, Karen B., supervised M.A. as part of a juvenile court program for children who had sexually abused other children.

Id. at *2. M.A. noted that Karen had power over his life and had previously arranged for him to be taken into custody over trivial matters. *Id.* at *5-6. M.A. believed that as part of the program, Karen could revoke his judicial supervision, which would cause him to go to prison for five years. *Id.* M.A. accused Arnold of sexual assault because he believed that was what Karen wanted him to hear and he feared that if he didn't' make the accusation, he would go to prison. *Id.*

A second reason for M.A.'s false accusation was that he felt pressured by Arnold's probation officer. *Id.* at *6.

Third and finally, M.A. was angry with Arnold for not giving him attention. *Id.*

M.A. explained that when he made the accusations, he was unaware that Arnold faced the possibility of life in prison. *Id.* Once he was more mature and had his life in order, M.A. decided to come forward with his recantation. *Id.* This started with talking to Arnold's ex-wife, Randi Shaw. *Id.* She drafted the affidavit based on her conversations with M.A., which was later signed by M.A. and notarized. *Id.*

Karen B.'s testimony was less detailed. *Id.* She remembered M.A.'s name but didn't recall her work with him, so her testimony concerned her role in the juvenile supervision program. *Id.* According to Karen, she didn't personally have the authority to revoke juveniles for program violations, but she did report violations to their social workers. *Id.* Karen also denied that

she would have pressured a juvenile into making a false disclosure and that she approached suspected sexual assault “gingerly.” *Id.*

Dr. Goldstein testified as an expert witness on child abuse. *Id.* at *6-7. He wasn’t asked to opine on M.A.’s credibility. *Id.* Instead, Dr. Goldstein’s testimony centered on common characteristics of false child abuse allegations and a generalized application of those characteristics to the facts of Arnold’s case. *Id.* Specifically, Dr. Goldstein testified that certain aspects of M.A.’s recantation were consistent with a false accusation, while others weren’t. *Id.*

Following the evidentiary proceedings, the district court denied Arnold’s petition, concluding that Arnold couldn’t pass through the actual innocence gateway to overcome the time bar. *Id.*, at *7-8. But—as Arnold will explain in more detail later—the district court conducted the wrong analysis. Instead of making a reliability or credibility determination itself, it repeatedly analyzed how a “reasonable juror could” evaluate the recantation evidence. *Id.*

Arnold appealed again, arguing that the district court had failed to conduct the requisite factfinding that had been ordered on remand, namely, assessing whether M.A.’s recantation was in fact credible and reliable. *Id.* at *9.

The Seventh Circuit affirmed. It concluded that the district court’s canon of modal determinations complied with its remand mandate. *Id.* at *10-11. *Arnold II* emphasized that the ultimate determination about the effect of the new evidence was an “inherently probabilistic” determination. *Id.* According

to the Seventh Circuit, “it was not a part of the court’s charge on remand to independently determine whether it found M.A.’s recantation credible or reliable.” *Id.* at *11.

REASONS FOR GRANTING THE PETITION

I. This Court should grant review to clarify whether a district court must make factual findings when presented with a plausible claim of “actual innocence.”

In a line of cases beginning with *Schlup v. Delo*, 513 U.S. 298 (1995), this Court has held that a prisoner’s “actual innocence” overcomes certain procedural barriers, allowing a federal court to review the merits of a constitutional claim in a habeas petition.

While the legal standard for an actual innocence claim is well-settled, it’s always been “somewhat cryptic.” *Hyman v. Brown*, 927 F.3d 639, 657 (2d Cir. 2019). To succeed, a claim of actual innocence must be “credible.” *Schlup*, 513 U.S. at 324; *McQuiggin*, 569 U.S. at 392-93. A claim is “credible” in this context, if it is founded on “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324. In light of the new evidence, the petitioner must demonstrate that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Id.* at 327.

The issue in this case is that no court has ever actually determined whether M.A.'s recantation is credible or reliable. No state court addressed it at all, and the district court didn't either.

Instead of making clear factual findings, the district court listed reasons that there could possibly be some doubt about the veracity of M.A.'s recantation. But again, it never actually said, something akin to, "M.A.'s recantation is [or is not] reliable."

The two Seventh Circuit decisions in this case are (perhaps fittingly) "somewhat cryptic" when read in tandem. *Cf. Hyman*, 927 F.3d at 657. *Arnold I* held that "[w]hether Arnold's claim of innocence meets the *Schlup* standard can only be determined after M.A.'s new account of events is subjected to adversarial testing under oath before a factfinder, so that the credibility and reliability of the recantation may be assessed." *Arnold I*, 901 F.3d at 840. It then emphasized that what the district court needed to do was find facts: "Our decision to remand for a hearing should not be understood as reflecting any finding or impression on our part as to the reliability and credibility of the recantation. That is a question for the factfinder." *Id* at 842.

When Arnold appealed the district court's post remand decision, the Seventh Circuit essentially said the opposite of what it said in *Arnold I*. *See Arnold II*, No. 20-20701 at *10-11; (P-App 10a-11a). This time the court held, "It was not a part of the court's charge on remand to independently determine whether it found M.A.'s recantation credible or reliable." *Id*.

The contradiction between *Arnold I* and *Arnold II* brings us to the question raised by this petition: must the district court make factual findings when a petitioner presents a plausible claim of actual innocence? This Court should grant the petition to answer that question for at least three reasons.

First, the Second Circuit is right—actual innocence has always been “somewhat cryptic,” *Hyman*, 927 F.3d at 657; this Court should take the opportunity to decrypt it. The deep issue here is this: while this Court has reaffirmed the amorphous *Schlup* language over the decades, no decision from this Court has added any texture to clarify how it should be applied in practice.

Here, the missing texture, as it were, is what sort of factfinding is required. *Schlup*’s treatment of this point is so lacking in practical definition that the Seventh Circuit was able to conclude that factfinding was both required *and not* required in exactly the same case. In *Arnold I*, the Seventh Circuit court’s conclusion was that the district court had to make a factual determination about the reliability of the applicable evidence. In *Arnold II*, it concluded that it was enough for the district court to make a probabilistic determination about how hypothetical reasonable jurors could consider such evidence, without actually saying whether the evidence was in fact reliable.

Which procedure (if either) is appropriate? Neither *Schlup* nor any of its descendant decisions from this Court answer that question. The net result is

that two contradictory decisions—*Arnold I* and *Arnold II*—are both entirely defensible depending on how one reads *Schlup*.

Second, the simplicity of this case makes it an ideal vehicle for addressing the question presented. Petitioner’s actual innocence claim comes down to a single question of pure fact: was M.A. telling the truth at the evidentiary when he recanted his accusations? That question turns entirely on a factfinder’s in-person evaluation of M.A.’s credibility. There’s simply no other meaningful evidence that sheds light on that question. The absence of any complicating factors would make a decision by this Court all the more illustrative of whatever standard applies in the *Schlup* context.

Third and finally, if *Arnold II* stands, then the Seventh Circuit will have essentially erased recantations as a mechanism for passing through the actual innocence gateway. That follows from the Seventh Circuit’s blessing of the district court’s modal analysis. That analysis, as a reminder, was evaluating the evidence through the lens of how a reasonable juror could possibly find it unreliable.

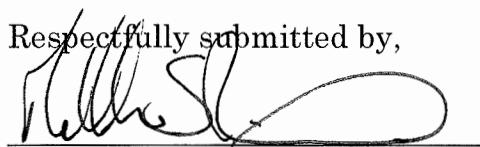
The problem is that no recantation, standing alone, will ever surmount the standard that the district court employed. It will always be the case that a reasonable juror could find some possible flaw with an uncorroborated recantation.

This Court’s guidance is needed to address how the lower courts should be handling factfinding in actual innocence cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted by,



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