No. 22-581

IN THE
SUPREME COURT OF THE UNITED STATES

HEIDI R. STEWARD, Acting Director,
Oregon Department Of Corrections,

***Petitioner*,**

v.

FRANK E. GABLE,

***Respondent*.**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Seven of the State's eight material witnesses who implicated Frank Gable in a high-profile murder have recanted, and it is now clear that police misconduct that the State no longer denies pressured and incentivized them to testify against him. Gable's jury also never heard that another man, John Crouse, credibly confessed to the murder providing details that only the killer would know. The state court excluded that critical evidence, holding that Crouse was "available" to testify, even though he made clear he would invoke the Fifth Amendment, but that his testimony was not relevant. The Ninth Circuit affirmed the district court's holdings, after a detailed presentation of new evidence, that the state court violated Gable's right to present his defense by excluding Crouse's confession, and that a reasonable jury, more likely than not, would have acquitted Gable had it heard all the evidence. The questions presented are:

1. Whether the courts below correctly ruled, applying *Chambers v. Mississippi* to the extraordinary facts of this case, that the state court erred in excluding the other man's confession to the murder.

2. Whether the courts below correctly excused default under *Schlup v. Delo* because the habeas record contains reliable new evidence of Gable's actual innocence.

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INTRODUCTION

This case is not appropriate for review. Based on a comprehensive examination of the fact-intensive record and faithful application of this Court's precedent, all four federal judges below concluded that habeas relief was appropriate: Frank Gable's right to present a defense was violated by the exclusion of trustworthy evidence of another man's guilt. All agreed that, considering the new evidence presented on federal habeas review, it is more likely than not that no reasonable juror would have convicted Gable. The victim's own family believes Gable is innocent and supports his release. And the State never sought *en banc* review in the circuit.

Having no physical evidence against Gable, the State built its case exclusively on the testimony of incentivized witnesses—jailhouse snitches and criminals. The district court reviewed 25,000 pages and held a hearing at which Gable's multi-faceted presentation eviscerated the State's entire circumstantial case. The innocence evidence included under-oath recantations of seven of the eight witnesses the State declared "material" to its case, but also expert scientific evidence proving "significant investigative misconduct," which the State never controverted and, "remarkably, does not dispute," App. 2a, and which caused witnesses to falsify their trial testimony. "As Gable's expert explained, the State's investigators used widely discredited polygraph and interrogation techniques as a 'psychological club' to elicit the statements against Gable," and the State "built its entire case on that tainted foundation." *Id.* The recanting witnesses explained they intended to frame Gable after hearing he was a police informant or attributed their false testimony to this

pervasive investigative misconduct. *Id.* On top of that, Gable also established an alibi for the night of the murder *and* presented reliable evidence that another man, John Crouse, confessed in detail to murdering Michael Francke.

Crouse made his "botched-burglary" confession to both investigators and loved ones, sometimes through tears, describing the stabbing as an accident. He divulged non-public facts that only the killer would know: the cluttered car, the interrupted car burglary, the accurate description of the victim, the frenzied struggle including a punch that explained the victim's facial wounds and bent eyeglasses, the surprised, hurt sound the victim made, and the direction of his flight. Gable's animated crime-scene recreations illustrated how Crouse's confession was consistent with the only objective eyewitness account (Hunsaker's). A prolific car burglar, Crouse matched the assailant's physical description and the crime profile. Crouse passed an FBI polygraph on the interrupted-car-burglary confession, which the State's investigators described as genuine. Yet, Gable's trial jury, privy only to the State's one-sided view of the evidence, never learned of Crouse's detailed confession that dovetailed with the crime-scene and autopsy evidence.

Relief was premised on a straightforward application of *Chambers v. Mississippi*, 410 U.S. 284 (1973), to nearly identical evidence of third-party guilt, not on a state evidentiary error as the State claims. The State also mischaracterizes the state-court ruling excluding the defense's Crouse evidence as a valid state hearsay ruling. In reality, the unlikely-to-be-repeated ruling involved an arbitrary and contorted analysis of several evidentiary rules, in combination, to reach the

idiosyncratic conclusion that Crouse's confession to Francke's murder was not *relevant* at Gable's trial for that very crime. Sidestepping the significant corroboration of Crouse's confession that establishes its trustworthiness under *Chambers*, the State focuses instead on claimed "inconsistencies" with its one-sided view of the evidence. But the State's minutiae do not justify excluding this critical evidence from the jury. The unique facts of this case warrant relief, as the circuit held.

The circuit's ruling likewise neither departs from this Court's standard under *Schlup v. Delo*, 513 U.S. 298, 327-31 (1995), nor how other circuits have applied it. The circuits, the Ninth included, uniformly view recantations with skepticism. But the record here, of which the recantations are only one component, gutted the State's case for guilt *and* also offered both an alibi and evidence of Crouse's guilt. The State's fragmentary, skewed, and cherry-picked presentation does not undermine the unanimous conclusion of the courts below that, more likely than not, no reasonable juror considering all the evidence, including the recantations and thorough impeachment of all the State's evidence, Gable's alibi, *and* Crouse's detailed and compelling confession, would have convicted Gable. This case offers no error to correct.

The Court should deny certiorari.

STATEMENT OF CASE

A. In April 1989, John Crouse confessed to murdering Michael Francke, including in his confession details that dovetailed with the only objective eyewitness account and both public and non-public crime-scene evidence.

At approximately 7:00 p.m. on January 17, 1989, Oregon Department of Corrections Director Michael Francke was stabbed near his car outside his Dome Building office at the Oregon State Hospital (OSH). The scene and autopsy pointed to no particular suspect or motive. App. 37a. A single assailant thrust a knife at Francke at least three times, slashing his coat and stabbing through his bicep and shirt pocket to his lower chest as he held his arm to his body. The fatal blow entered his left chest. App. 36a-37a. He suffered a "blunt force injury" to his left eye that bent the left arm of his eyeglasses inward, which the medical examiner said was "most likely" the result of a blow that "drove [his] eyeglasses into his eye." App. 21a; Tr. 6448-49, 6532. After being stabbed, Francke walked back to the building, but died on a secluded porch. App. 4a, 37a-38a. The driver's-side door was left ajar and the car was cluttered with personal items, but nothing was taken from the car or Francke's person. App. 4a, 110a.

The only objective eyewitness was Dome Building custodian Wayne Hunsaker, who came forward the day after the murder and described an altercation he witnessed as he left work at 7:00 p.m. App. 38a-39a. Hearing a sound "like somebody had their breath knocked out," he turned and saw two men facing each other in the parking circle. *Id.* A man matching Francke's description turned and headed briskly towards

the building, while the other man—who he described as six feet tall, 175 pounds, aged 20-40, with short brown or black hair, wearing a "light colored" or "beige" trench coat—turned and ran west down the driveway, across 23rd Street, and behind a generator. *Id.* Hunsaker saw no other people or cars in the area. App. 39a.

A newly formed investigative task force strategically provided information to the press, refusing to share details that only the murderer would know. SER 460-61, 470-71. The media reported Hunsaker's general description of the suspect and the direction he fled and that Francke died of a stab wound to the heart, but investigators would not discuss his other injuries. SER 460-61, 470-71, 476.

Just weeks after the murder, in February 1989, a suspect emerged when John Crouse came forward and claimed he witnessed the murder and chased the culprits. App. 21a, 74a-83a. Crouse matched Hunsaker's description of the assailant. He was 6' tall, in his 30s, with short dark hair. His presence at the Dome Building on the night of the stabbing was confirmed, as he was there meeting with his parole officer. *Id.* Skeptical of Crouse's story that he only witnessed the murder, the task force investigated Crouse's background and learned that he was a prolific car prowler with a history of using knives in assaults and robberies. SER 1153-54, 1175-77, 1243. A profiler concluded that Crouse's "psych profile . . . matched" the characteristics profiled for the murderer; the task force named him a person "of special interest." SER 1242-43.

In early April 1989, Crouse was arrested and reinterviewed after assaulting a stranger in her car. App. 75a. Initially, Crouse told a second story about being paid

to commit the murder. But when he was asked about how personal it is to stab someone, Crouse's demeanor changed. He tearfully admitted that, after visiting his parole officer, he was caught prowling Francke's car and stabbed Francke to escape, explaining that it was a "mistake"—an "accident that went bad." SER 421; App. 76a-77a. Crouse provided numerous details that dovetailed with non-public facts of the crime: walking by, Crouse noticed "stuff" in Francke's car and used a wire to enter it; after a "few minutes," Francke grabbed Crouse, and said "come with me," causing Crouse to go into a fury to fight his way out of Francke's grip; the altercation occurred about 8-10 feet from the car; Crouse hit Francke on the left side of his face with a roundhouse right punch; Crouse described Francke as 6'-6'3", 170-200 pounds and "cock strong"; when Crouse felt Francke was getting the better of him, he used his knife, initially taking wild stabs to slow Francke down; Crouse was uncertain of "all the spots he hit him" but said he was going at Francke's chest when he hit his arm, and that he thought he might also have stabbed Francke's "stomach" and "cut his arms and hands" in trying to break free; Crouse eventually stabbed him in the "left side of the chest," which caused the wind to go out of Francke; Crouse fled west down the driveway across 23rd Street toward a large green generator, leaving the car door open. App. 37a, 77a-80a; ER 1029, 1082.

As contrasted with Crouse's earlier stories, the state's own investigators believed the "interrupted-car-burglary confession" based on Crouse's demeanor and detailed description. App. 80a, 112a. Throughout April 1989, Crouse maintained the same basic confession, adding and clarifying details as the task force took him to the

scene and reinterviewed him. App. 77a-80a. In addition to confessing to law enforcement, Crouse confessed to the same basic facts in a recorded prison phone call to his brother. App. 22a, 77a; *see also* SER 38-39. Two excerpts from this call are available online: (1) http://or.fd.org/audio/Crouse_Audio_Excerpt_No_1.mp3; (2) http://or.fd.org/audio/Crouse_Audio_Excerpt_No_2.mp3. Crouse also confessed in separate conversations from prison with his mother and girlfriend. App. 22a, 77a. Crouse formally repudiated his earlier false stories—of witnessing the murder and being offered $300,000 to commit it—to an FBI polygrapher, who tested him and confirmed the truth of his interrupted-car-burglary confession. App. 81a-82a. In late spring 1989, the task force's interest in Crouse waned when he retained an attorney and adopted the well-publicized theory that Francke was assassinated to protect graft within the corrections department. App. 22a. The State never charged Crouse with any crime.

B. After months without progress, the State's investigation, led by Fred Ackom, shifted tactics to incentivize witnesses to falsely implicate Gable.

Desperate for leads, the task force cast a wider dragnet in spring and early summer 1989, interviewing people in local jails. Among them was Gable, who said he had no information relevant to the murder and was willing to take a polygraph. App. 1a, 55a. By summer's end, the floundering investigation was widely criticized as having reached "a virtual dead end." *E.g.*, SER 446. In September 1989, newly minted task-force polygrapher Fred Ackom took Gable up on his offer, polygraphing him on his denial of involvement. Ackom concluded that the test results demonstrated Gable

was guilty. SER 639. No other evidence pointed to Gable. But the task force arrested him on petty charges, App. 59a; he remained in custody for the next 30 years.

After the polygraph, five of the eight acquaintances who would later become "material" witnesses against Gable (Earl Childers, Mark Gesner, Kevin Walker, Daniel Walsh, and Randy Studer) were interviewed. None implicated him, although Gable's wife at the time, Janyne, said she believed he was out on the night of the murder. App. 6a, 59a. Gable told investigators he thought he and his wife had a party at home that particular night, but he was not certain as nine months had passed. App. 58a. When first interviewed, Cappie Harden and Jodie Swearingen, whose purported eyewitness testimony would later become the centerpiece of the State's case, both said they met Gable *after* the murder. SER 683, 833.

By late September, Gable's purported polygraph failure was leaked to the media. News articles painting him as guilty began appearing daily, breathing new life into the investigation. App. 14a. Although nothing beyond the polygraph inculpated Gable, news reports stated—incorrectly—that he confessed and that clothing linked him to the crime. *Id.* The media also outed Gable as a police informant, stating he was responsible for Gesner's arrest. *Id.*

When investigators told Michael Keerins, Gable's former jail cellmate, that Gable had implicated him, Keerins turned the tables, becoming the first witness to implicate Gable. He described a jailhouse confession to the interrupted-car-burglary facts the media had publicized when Crouse confessed. App. 14a, 83a-84a. Newspapers published Keerins's account, noting he was in "good shape" to receive a

reward publicized by the task force. SER 263-66. These media reports prompted Linda Perkins to come forward next; she claimed Gable made a veiled confession to her, Studer, and her daughter the day after the murder, but both Studer and her daughter denied Perkins's account. App. 19a.

Over the next six months, the task force detained and re-interrogated Gable's drug-world acquaintances. And one by one, they implicated him in the crime. Barriers to doing so were lessened because of media reports that Gable was an informant. App. 17a-18a. Several witnesses—Childers, Gesner and Studer—changed their stories to implicate Gable in order to receive leniency on new criminal charges they faced. Studer, for example, corroborated Perkins's statements in exchange for probation on serious charges uncovered by the task force that otherwise would have resulted in a decade in prison. App. 91a-92a. Publicity also shaped witness accounts: Childers claimed that he only recalled Gable's purported confession after reading in the "[news]paper about Gable and Mike Keerins . . . ." SER 662; SER 361-62; Tr. 7790.

Others—Swearingen, Harden, Walker, and Walsh—capitulated when the task force exposed them to a pattern of interrogation, polygraphing, and confrontation. Ackom conducted dozens of polygraphs and repeatedly told witnesses that his tests demonstrated they were lying. Ackom exposed all the witnesses to his hunches, contaminating their accounts. Seeking to satisfy their interrogator, whether for benefits or to end the relentless interrogations, witnesses eventually confirmed

Ackom's hunches. Even after witnesses implicated Gable, details of their stories often still changed in response to Ackom's tactics until Ackom was satisfied.[1]

C. The evidence presented at trial deprived the jury of the full story, including of evidence of Crouse's guilt.

By April 1990, fifteen months after the murder, the State had formed a cadre of witnesses comprised of "jailhouse snitches" and Gable's drug-world acquaintances willing to implicate him in the murder. Borrowing the Crouse interrupted-car-burglary confession as its theory, the State indicted Gable for aggravated murder. The State declared eight witnesses "material" to its case—Harden, Swearingen, Childers, Gesner, Walker, Walsh, Keerins, and Studer. ER 1385-88; SER 1504-05. At the 1991 trial, the State did not call Keerins or Studer, who had recanted prior to trial. App. 14a, 19a. The defense called Swearingen, who had also recanted.

1. The State's case for Gable's guilt turned on Harden's testimony as augmented by Swearingen's cross-examination.

The State never linked any physical evidence to Gable. The linchpin of the State's case was Harden's purported eyewitness testimony. App. 14a-15a, 39a-41a. Harden testified that Swearingen called him twice on the night of the murder, asking to be picked up at OSH. After the second call, at 6:30 or 7:00 p.m., Harden drove to OSH where Swearingen jumped into his car. *Id.* He said he heard a yell; he looked up and saw the light come on in Francke's car and recognized Gable's face before Gable,

[1] Gable's expert explained how Ackom's process caused witnesses to falsify their testimony. The pattern of Harden's and Swearingen's interrogations, discussed in Section B.1., illustrates how Ackom's tactics generated false statements.

dressed in dark clothing, lunged out of the car and stabbed a "businessman" who had approached. *Id*.

Swearingen, called as a defense witness, testified that she did not witness the murder and that she lied to the grand jury. App. 41a-43a. On cross-examination, however, the State elicited details from her recanted grand jury testimony as substantive corroboration for Harden's testimony. *Id.* Defense counsel, who had never received her grand jury testimony, was unprepared to rehabilitate Swearingen after this devastating cross-examination, and failed to draw the jury's attention to the significant contradictions between Swearingen's and Harden's accounts. ER 753. For example, Swearingen said Gable was *never in* Francke's car and stabbed Francke *from "behind*" while Harden said Gable "*lunged" out* of Francke's car. *Compare* App. 40a *with* App. 35a. But the jury never heard this; the State avoided eliciting these discrepancies. App. 42a; Tr. 9369.

Childers testified that Gable drove past him on a street several blocks away from the Dome Building on the night of the murder and later confessed. App. 43a. Perkins testified that the morning after the murder, Gable made statements to her and Studer about "the Francke case," but the jury never heard from Studer, who would have disputed that this conversation occurred. App. 19a, 90a. Walker, Walsh, and Gesner each claimed Gable confessed after the crime. App. 6a. Gesner also testified that Gable gave him a mysterious bag to dispose of after the murder. *Id.* Janyne testified that Gable never confessed but was not home on the night of the murder. App. 7a, 46a. Law enforcement witnesses testified at trial that Gable never

confessed during police interrogations, App. 4a, 6a; Tr. 7625, 7299, 8691-92. But the State contended at trial, as it still does, that snippets from Gable's statements were tantamount to confessions.

2. The trial court excluded all evidence about Crouse as irrelevant, hobbling Gable's planned defense.

Gable's intended defense was third-party guilt—that Crouse, not Gable, committed the murder. App. 68a-69a. During its case, the State elicited testimony from a law enforcement witness that Crouse had confessed but that his confession could not be "corroborated in any way" and was later recanted. Tr. 7479; ER 322-23. The State then moved to exclude any defense evidence of Crouse's guilt, and the trial court held a mid-trial hearing outside the presence of the jury on the State's motion. App. 68a, 113a-118a. The defense called Crouse, who was accompanied by counsel, and asked him: ". . . did you kill Michael Francke?" Crouse responded: "No." App. 114a. Crouse thereafter invoked his Fifth Amendment privilege against self-incrimination and his attorney (and Gable's) clarified that Crouse intended to invoke his Fifth Amendment rights from the outset on all questions and would invoke on all questions in front of the jury. *Id.*

Expecting Crouse to so invoke, the parties had agreed to stipulate that Crouse was "unavailable" as a witness so that his prior confessions would be admissible under the hearsay exception for "statements against interest," Or. R. Evid. 804(3)(c). *Id.* But when Crouse answered the first question, the State withdrew its stipulation, arguing instead that this single substantive answer rendered him "available" but,

because he denied culpability, his testimony was irrelevant. App. 114a-18a. Adopting this reasoning, the trial court found Crouse to be "available as a witness," but concluded that his sole answer denying guilt was irrelevant, and thus there was no testimony to impeach. App. 115a-18a. According to the trial court, testimony about who did not commit the murder was irrelevant, so Crouse's testimony could neither be presented nor impeached. App. 118a. Gable was convicted and sentenced to life in prison with no possibility of parole. App. 133a.

D. Upon review, all four federal judges agreed that the jury should have heard Crouse's confession and that, with the full story told, no reasonable jury would have convicted Gable.

After his state-court appeals, Gable sought federal relief based on, among other things, the violation of his right to present his defense based on the trial court's exclusion of the Crouse evidence (the *Chambers* claim). App. 2a. To excuse default, Gable submitted evidence under *Schlup* undercutting the State's trial evidence, establishing an alibi, and putting forth Crouse as a more plausible suspect. Gable's expert demonstrated that the State's investigative tactics caused witnesses to falsify their testimony against Gable. Those tactics included a pattern of interrogation and polygraph that psychologically cudgeled the witnesses to confirm Gable's guilt, either for leniency on charges they faced or simply to end Ackom's relentless confrontations. App. 13a-18a, 83a-94a. Recantations from nearly all the State's "material" witnesses were mutually corroborative and confirmed that the trial testimony was false. *Id.*

In 2019, the district court granted relief under *Chambers*, reaching the merits under *Schlup*. The district court stayed its retrial order and released Gable pending

the State's appeal. App. 146a. Gable has lived a law-abiding life in the community in the four years since that decision. In 2022, the circuit affirmed, App. 1a-30a.

Both lower courts viewed the recantations with skepticism but credited them over the trial testimony after a careful multi-factor evaluation, concluding that the overarching and common reason witnesses said they lied—police pressure—was bolstered by commonalities among the recantations and by the expert evidence establishing pervasive investigative misconduct, which the State never controverted. App. 4a, 13a-18a, 83a-98a, 99a-109a. Further, the witnesses had incentives to fabricate at the time of trial but not when they recanted. App. 13-a-18a, 100a-101a.

Schlup requires proof that, in light of all of the evidence viewed holistically, "it is more likely than not that no reasonable juror would have found [the petitioner] guilty beyond a reasonable doubt." 513 U.S. at 327-31. Both courts found, viewing the totality of the new innocence evidence together with the trial evidence, that Gable demonstrated that it was more likely than not that no reasonable juror would convict. App. 83a-98a, 99a-109a. The circuit's *Schlup* holding rested on two independent bases. First, the circuit found that "no reasonable juror could ignore the heavy blow to the State's evidence" from the recantation evidence establishing the falsity of the trial testimony, App. 20a. Importantly, the circuit's finding was based on the recantation evidence *as corroborated by Gable's expert's testimony*, which the circuit found established "significant investigative misconduct" that tainted the State's entire case. App. 2a, 10a-20a (noting that the state did not dispute the misconduct). Second, reasoning that Crouse "would have presented a more compelling choice to the

jury," App. 23a, the circuit found that "Crouse's detailed and compelling confessions, when considered with the recantations of nearly all the State's key witnesses, are more than sufficient to satisfy *Schlup*'s demanding standard." App. 24a. The circuit also noted that Gable now has a "loose alibi." App. 15a. On the merits, the lower courts both found that Crouse's confession was "corroborated" and, thus, "trustworthy," as well as "critical" to Gable's defense. Accordingly, both lower courts ruled its arbitrary exclusion based on a mechanistic application of state evidentiary rules violated *Chambers*. App. 24a-30a, 119a-125a, 145a-146a.

REASONS FOR DENYING THE WRIT

The State points to no cert-worthy issue in this highly fact-bound case, instead seeking error correction where there is no error. The circuit faithfully applied this Court's precedent to the extraordinary facts of this case.

A. The circuit's *Chambers* ruling in this fact-bound case is a faithful application of precedent to a complex and voluminous record, warranting neither summary reversal nor plenary review.

1. The circuit's *Chambers* ruling is exclusively grounded in federal constitutional law, rendering summary reversal inappropriate.

The State's lead argument seeks summary reversal pursuant to *Swarthout v. Cooke*, 562 U.S. 216 (2011) (Pet. 9-10), claiming that the circuit premised federal habeas relief on an error of state law. That argument distorts the circuit's *Chambers* holding, which turned solely upon federal constitutional law, and not on a finding that the Oregon courts misapplied state law. In fact, the circuit said so expressly, making clear that its constitutional *Chambers* holding was independent of any

suspected evidentiary error: "But even assuming the state court's application of its evidentiary rules was correct, *the exclusion of Crouse's confessions nevertheless violated Gable's due process rights*." App. 28a (emphasis added).

2. The circuit unquestionably stated the correct rule of law and faithfully applied *Chambers* to an excluded third-party confession under circumstances analogous to those presented in *Chambers* itself, rendering summary reversal inappropriate.

The circuit's decision is a straight-forward application of *Chambers* to the analogous facts of this case, contrary to the State's second basis for summary reversal (Pet. 10-17). As here, the defense in *Chambers* was that another man (McDonald), who had confessed to several people, killed the victim. When McDonald repudiated his confession at trial, the defense sought to challenge his repudiation, but the state court relied on several state evidentiary rules in combination to prohibit him from doing so. Chambers had already presented *some* evidence of McDonald's guilt, but this Court held that the "mechanistic" application of state evidentiary rules to exclude any third-party-guilt evidence that "bore persuasive assurances of trustworthiness" and was "critical" to the defense violated the accused's rights "to confront and cross-examine witnesses" and "to call witnesses in one's own behalf," which are "essential to due process." *Id.* at 294, 302. In finding that the confession bore sufficient "assurances of trustworthiness," this Court noted that McDonald confessed multiple times to close acquaintances shortly after the murder, the statements were against his penal interest, and the confession was "corroborated by some other evidence in the case." *Id.* at 300-02. That "other evidence" included one witness who testified he

saw McDonald shoot and another who testified McDonald had a gun after the shooting. *Id.* at 289. But the State's eyewitness identified Chambers, flatly contradicting McDonald's confession.

Crouse's confession and the third-party confession at issue in *Chambers* bear comparable assurances of trustworthiness. Like McDonald, Crouse gave multiple statements against his penal interest shortly after the murder, and those statements were made to close associates, including to his mother, brother, and girlfriend, as well as to investigators. App. 28a, 76a-82a. To be clear, the "multiple" statements on which the circuit relied are multiple repetitions of Crouse's April 1989 interrupted-car-burglary admissions. App. 28a. While the State focuses on Crouse's early "wild claims," which were patently false, and his later recantation of any culpability after retaining counsel (Pet. 11), Crouse repeated the interrupted-car-burglary confession multiple times, detailing the same core facts to several loved ones and to law enforcement. App. 76a-78a.

As in *Chambers*, Crouse's confession was corroborated by "other evidence." In fact, Crouse's confession did not conflict with any objective evidence in the case. The FBI even confirmed the truth of the interrupted-car-burglary confession by polygraph. App. 81a-82a. And the task-force investigator to whom Crouse confessed in 1989 told the State's investigators during the pendency of this case that he still views Crouse's confession as "genuine" and corroborated.

The State suggests Crouse mined newspaper accounts to come up with a convincing confession (Pet. 16). But, in reality, Crouse's confession matched non-

public evidence and added credible context to the few details of the crime that were public. For example, comparing Crouse's confession to Hunsaker's eyewitness account, Crouse matched Hunsaker's description of the assailant and the path of his flight from the scene, both public details. But Crouse's account also aligned with other non-public details of Hunsaker's account: the sound of knocking the wind out the victim, the altercation taking place 8 to 10 feet behind the car, the direction Crouse faced before he turned and ran. The State has never explained how Crouse knew these details.

Crouse's confession also was corroborated by more than just Hunsaker. Crouse's physical description of Francke is corroborated by the autopsy and by witness accounts of Francke as athletic and aggressive. App. 111a. Crouse correctly stated that Francke's car, which was reportedly cluttered with personal items, had "a lot of stuff" in it. App. 77a. Crouse accurately stated the car was locked; the State omits that the wire he used to break in was recovered from Crouse's home. App. 77a, 79a, 81a; SER 1205. The roundhouse right punch that Crouse described is consistent with the blunt force injury to Francke's left eye and the inward bend in his eyeglasses, which had not been made public. App. 81a. Crouse's admission that he took out his knife to get room to get away, not to kill, is consistent with otherwise unexplained slashes to Francke's coat and the fact that Francke walked away alive. App. 37a, 81a. And consistent with Crouse being interrupted burglarizing the car, the car door was still open after Crouse fled. App. 36a, 78a-81a.

Ignoring this corroboration, the State instead attacks Crouse's description of what he wore as "totally different" from what Hunsaker described (Pet. 12). In reality, the jacket Crouse described is consistent with the light-colored coat Hunsaker described (Pet. 15). In contrast, the State relied on Harden's trial testimony that the Gable wore dark clothes, even though it was at odds with what Hunsaker described.

The State also focuses on the subjective interpretations of the crime-scene evidence that it presented at trial to argue that Crouse's interrupted-car-burglary confession "got basic facts wrong," (Pet. 12). Many of those supposed discrepancies are illusory or betray the shortcomings of the State's investigation and its tunnel vision while saying little about the confession's trustworthiness. For example, Crouse's knife *did* match the victim's wound, which had a half-moon-shaped notch caused by a hinge from a knife like the one Crouse described. App. 70a. That the State could find no blood on Crouse's knife and clothing months after the murder likewise is not evidence that those items never had blood on them, particularly in a case where the State could not link physical evidence to any suspect. And the fact that the State's investigators could not duplicate Crouse's method of breaking into the car (Pet. 13) is not evidence that Crouse did not so use the wire. Crouse was a prolific car prowler whose own mother told investigators he broke into his first car while still in elementary school and police recovered the wire. The State's claims about the wounds being inconsistent with left-handed stabs are based only on the State's representation of its own pathologist's view during the hearing on the Crouse evidence; the State does not, nor could it, cite the autopsy itself for this proposition.

The State also takes issue with Crouse's description of Francke's wounds (Pet. 12-14). Indeed, Crouse repeatedly was asked about how and where he stabbed Francke. App. 76a, 79a. That Crouse did not know precisely where his blows struck is unsurprising given the struggle he described, confirmed by slashes to Francke's coat and that Francke was contorting his body in a defensive posture. App. 21a, 37a. Crouse also said he threw a "round house" punch with his right hand to the left side of Francke's face, an act that corresponds to otherwise unexplained blunt force injuries to Francke's left eye. App. 76a, 79a. Notably, while maligning Crouse's testimony, the State touts on Childers's trial testimony that never aligned with the evidence from the crime scene or even the State's trial theory, including the number and location of the stabs and the motive he described. App. 23a n.8.

Later, repeating many of the same supposed inconsistencies, the State incorrectly claims that the circuit was "wrong on almost every significant point" when it deemed Crouse's confession to be sufficiently corroborated by key details that had not been made public, especially regarding the number and location of Francke's injuries (Pet. 13-15). For example, the State says that, contrary to the circuit's opinion, Crouse did not accurately identify Francke's injuries when Crouse explained that he slashed at Francke's stomach, arms, hands and punched him in the left side of the face (Pet. 15). The circuit accurately recognized that Crouse's statements were consistent with the three primary stab wounds that the objective evidence showed—to Francke's arm (which includes the bicep and forearm), torso (which includes the stomach and chest), and heart, as well as with slashes to Franke's overcoat. App. 21a;

see also App. 110a-111a. Likewise, the circuit's use of the word "tan" does not detract from the fact that the jacket Crouse described is consistent with Hunsaker's description of a "light-colored" or "beige" coat. *Id.* While the State argues Francke's eye was cut when he fell (Pet. 15), the medical examiner testified the "blunt force injury" to Franke's left eye was "most likely" the result of a blow that "drove [his] eyeglasses into his eye." Tr. 6448-50, 6532. This is consistent with Crouse's account of punching the left side of Francke's face.

Crouse's confession unquestionably reflected his awareness that he was exposing himself to the harshest of criminal penalties, which was a factor considered in *Chambers*, 410 U.S. at 299. Yet, the State criticizes the circuit for relying, in part, on the inherent reliability of statements against interest, incorrectly suggesting the circuit did not also rely on corroboration. App. 28a; *see also Williamson v. United States*, 512 U.S. 594, 599 (1994) ("[R]easonable people, even reasonable people who are not especially honest, tend not to make self-incuplatory statements unless they believe them to be true.").

In sum, the circuit's conclusion that Crouse's confession was sufficiently corroborated by public and non-public facts was correct. The details on which the State focuses, many of which are subjective, do not undermine that Crouse, a knife-wielding, known car prowler, who was a fit for this crime, confessed to details that only the killer could have known. The State has never attempted to explain how Crouse knew so many non-public details. Instead, the State continues to employ a double standard, touting ambiguous snippets plucked from Gable's dozens of hours

of through-the-night interrogations as reliable evidence of guilt (Pet. 32-33) while ignoring that Crouse's detailed interrupted-car-burglary confession dovetailed far more with the evidence. As the circuit correctly found, "Gable need not prove Crouse's guilt beyond a reasonable doubt" to establish a *Chambers* violation. App. 23a. "Under the State's theory of a single killer, their guilt is mutually exclusive—either Gable killed Francke or someone else did. Crouse would have presented a more compelling choice to the jury." *Id.* The circuit correctly held, under *Chambers*, that Crouse's confession was trustworthy and that it was constitutional error to exclude this critical evidence from the jury's consideration.

Citing distinguishable cases, many of which arose under the Section 2254(d) standard, which is inapplicable here, the State claims summary reversal is appropriate. But, in fact, the circuit unquestionably set out the applicable legal principles and faithfully applied them to this unusual fact-bound case in a lengthy, considered, and carefully reasoned decision, making this the "type of case in which" this Court is "*most* inclined to deny certiorari." *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting). Summary reversal is inappropriate.

3. Neither the circuit's application of *Chambers* nor its narrow holding warrants plenary review.

The State's lead argument for plenary review under *Chambers* is that the circuit's ruling "implicates" the constitutionality of evidentiary unavailability requirements, such as the one in Federal Rule of Evidence 804. Pet. 19-21. But the circuit here neither considered, nor concluded, that *Chambers* invalidates the Rule 804 unavailability requirement. And, in any event, this case is not an appropriate vehicle for considering that issue because the declarant here almost certainly was not available beyond the single question he answered. For several reasons, the fact-bound *Chambers* ruling here does not warrant plenary review.

a. The *Chambers* ruling is limited by the idiosyncratic facts of this case, including the state court's convoluted relevance ruling.

First, the reach of the ruling below is bounded by the state court's idiosyncratic analysis under hearsay and relevance rules, in combination, to exclude third-party-guilt evidence, and therefore is unlikely to have broader application to other cases. The state-court ruling did not turn solely on Rule 804 or the state court's finding that Crouse was "available," as the State suggests (Pet. 21). Rather, the state court invoked a convoluted combination of several evidentiary rules, including hearsay and relevance rules, to exclude as *irrelevant* defense evidence that Crouse committed the murder. App. 26a-29a; App. 115a-18a. But evidence of Crouse's guilt unquestionably was probative of who committed the murder—the central question at Gable's trial—as the circuit suggested. *See* App. 27a ("We question the state court's finding that Crouse's testimony was irrelevant in this context.").

At best, the state court's ruling was arbitrary. The state court relied heavily on the fact that Crouse mistakenly answered a single substantive question during the hearing outside the jury's presence instead of asserting his Fifth Amendment privilege on all questions as his attorney said he had intended to do. App. 114a. The "[state] court did not acknowledge that Crouse invoked his privilege" on every question *after* he was asked if he committed the murder, "including whether he was at OSH or told the police he killed Francke." App. 27a. At a minimum, Crouse should have been deemed unavailable as to those issues. *Id.*

The state court's application of several rules of evidence to reach its ultimate relevance ruling in no way offers a "textbook example of how the unavailability requirement affects the admissibility of a statement against interest" nor would the analysis "have played out exactly the same way" in other courts (Pet. 20-21). On the contrary, courts across the country would have found Crouse unavailable as to all the questions on which he would assert the Fifth Amendment making the third-party-guilt evidence admissible under Rule 804. *E.g.*, Fed. R. Evid. 804 advisory committee's note (exercise of a claim of privilege by declarant satisfies unavailability requirement); Kenneth S. Broun, et al., *McCormick on Evidence* § 253 (6th ed. 2006) ("The successful exercise of a privilege not to testify renders the witness unavailable within the scope of the privilege"). Thus, the *Chambers* ruling here is unlikely to have any application beyond the facts of this unusual case.

b. The circuit's as-applied *Chambers* ruling poses no threat to the unavailability requirement or Rule 804(b)(3)(B).

Second, this Court's *Chambers* decisions already answer the questions the State touts for plenary review on this issue. *Chambers* challenges are as-applied challenges to particular evidentiary rulings, not to the rule itself. 410 U.S. at 303 ("[W]e hold quite simply that *under the facts and circumstances of this case* the rulings of the trial court deprived Chambers of a fair trial.") (emphasis added). The State's contrary claim that "the upshot" of the *Chambers* ruling in this case is to "invalidate" or call into question the viability of Rule 804's unavailability requirement (Pet. 22. 25), is not well taken.

Chambers itself noted: "[W]e establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.* at 302-03. Indeed, *Chambers* explicitly recognized that hearsay rules serve a valid purpose in excluding untrustworthy testimony. *Id.* at 295. The Court's holding merely recognized that the exclusion of third-party-guilt evidence based on a combination of such rules, as applied under the circumstances of that case, violated the defendant's due process right to present a defense. *Id.* at 295, 298-300.

And in *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996), this Court rejected the notion that *Chambers* requires finding a due process violation "whenever" critical evidence favorable to the defense is excluded. *Egelhoff,* which involved very different facts than were at issue in *Chambers* or here, confirmed that *Chambers* remains

viable and is circumstance-specific, not categorical: "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.* at 53. This case has never involved a facial challenge to any evidentiary rule; the State's contrary assertion is a straw man.

c. The circuits uniformly apply *Chambers* narrowly, rarely granting relief in the 50 years since *Chambers* was decided.

There is no confusion in the lower courts about the narrow applicability of *Chambers*. The State points to nothing that suggests otherwise, nor to any decision that conflicts with the circuit's application of the constitutional rule of *Chambers*. In reality, *Chambers* has been applied sparingly and is the subject of very little debate in the lower courts. In the 50 years since *Chambers*, fewer than ten circuit cases have granted relief based on the exclusion of third-party-guilt evidence. *E.g.*, *Welcome v. Vincent*, 549 F.2d 853, 858-59 (2d Cir. 1977) ("We hold that to restrict examination of . . . a witness [who has previously confessed], so that his prior confession may not be proven, is to deny the defendant a fair trial, at least when the confession, though retracted, has some semblance of reliability.").[2] Three others have granted *Chambers* relief based on the exclusion of other important evidence. *E.g.*, *Kubsch v. Neal*, 838 F.3d 845 (7th Cir. 2016) (en banc), *cert. den.* 581 U.S. 993 (2017).

[2] *See also O'Neal v. Balcarcel*, 933 F.3d 618 (6th Cir. 2019); *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019); *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012); *Lunbery v. Hornbeak*, 605 F.3d 754 (9th Cir. 2010); *Wallace v. Price*, 243 F. App'x 710 (3d Cir. 2007); *Rivera v. Dir., Dep't of Corr.*, 915 F.2d 280 (7th Cir. 1990)

These decisions demonstrate a uniform understanding of *Chambers*' narrow proposition: the Constitution requires courts to prioritize trustworthy and critical third-party-guilt evidence over mechanistic or hyper-technical applications of evidentiary rules. That rule, though infrequently applied, provides an important failsafe in the rare case, like this one, where withholding evidence from the jury undermined the defendant's right to present his defense. The limited application of *Chambers* to the extraordinary facts here is faithful to this Court's precedent and it does not warrant further review.

B. The circuit faithfully applied *Schlup* to the wealth of reliable innocence evidence that gutted the State's case for guilt.

1. The circuit correctly found that, with the full story told, it is more likely than not that no reasonable juror would convict.

Unlike other recantation cases, Gable's innocence evidence included far more than just recantations while the State's case against him was built on nothing more than uncorroborated testimony from witnesses who, as the State now concedes, "told inconsistent stories and had other credibility problems" (Pet. 32). Gable has amassed an extraordinary record of innocence demonstrating the falsity and unreliability of the trial evidence that inculpated him. The reliable recantations of nearly all the State's material witnesses are amplified by expert evidence establishing pervasive investigative misconduct, which the State did not controvert, and explaining how that misconduct was likely to cause false testimony. App. 13a-18a, 101a-108a. Gable also presented new objective alibi evidence and evidence of Crouse's guilt. App. 15a-16a.

Swearingen's and Harden's statements dramatically illustrate how Ackom's tactics generated false testimony, confirming the expert's assessment. Initially, Swearingen told investigators that she met Gable months after the murder and knew nothing about it. SER 834 But when investigators accused her of withholding information, the teenager flip-flopped and said Gable confessed the day they first met in summer 1989. SER 836.[3]

A drug-addicted runaway, Swearingen then fled before Ackom could polygraph this false statement. As it did with other witnesses, the task force arrested and re-interviewed Swearingen, but she changed her position and denied having information about the case. SER 837-39. Ackom the administered the first of 23 polygraphs he would conduct of Swearingen, and concluded she was an eyewitness based solely on that first polygraph, despite that she provided no detail and investigators had no corroboration. App. 15a, 93a-94a, 107a; SER 985-989. Gable's expert stated he had never seen so many polygraphs of a single person in his 43 years as a polygraph expert and trainer. App. 15a, 93a-94a, 107a.

Subsequently, Swearingen provided her first account as an "eyewitness": she claimed that she and Gable walked to and fled the scene together. This bore little resemblance to the story later presented to the trial jury, particularly because Harden was conspicuously absent. When Swearingen was polygraphed next, she denied being an eyewitness but said Harden was involved, SER 989-91. So the task force arrested

[3] This is the pre-polygraph statement upon which the State relies (Pet. 31).

and re-interviewed Harden, who denied involvement. SER 686-88. After further polygraphing and interrogation, Swearingen changed her story *again*: this time Harden drove her and Gable to the Dome Building and she left with Harden. SER 271-72, 989-1006. But Harden still denied involvement, SER 688, so Ackom turned to polygraph, confronting Harden with results purportedly showing he was involved. SER 928-29. Scared, Harden agreed "he was there," but denied driving Swearingen and Gable. SER 688-89. Between January and March 1990, the task force conducted many more interviews, confrontations, and polygraphs, particularly of Swearingen. App. 86a; SER 841-58.

The task force took Harden and Swearingen to the Dome Building and allowed the pair to meet. SER 689, 854; Tr. 5934, 9330-31. Six months after Swearingen's first interview, Swearingen finally adopted Harden's account that she called Harden for a ride. SER 857; *compare* SER 686-94, *with* 841-58, 1001-33. But the pair's final inculpatory accounts remained materially inconsistent on important points, for example: how Gable supposedly committed the stabbing, where they were during the stabbing, and how they left the scene. App. 108a-109a.

According to Gable's expert, the polygraph techniques Ackom used on Harden, Swearingen, and others were discredited and could not produce reliable results. His pattern of confronting and repeatedly polygraphing was bound to make witnesses tell him what they perceived he wanted to hear. App. 103a-108a. Recanting witnesses confirm this, saying that what Ackom wanted to hear was clearly: Gable was guilty.

Gable's innocence presentation included animated crime-scene recreations that exposed fatal problems with Swearingen and Harden's inculpatory accounts. App. 97a n.10, App. 109a-110a & n.12. The animations illustrated a stark reality: if Harden's testimony is credited, Gable would have run right past his car, and if Swearingen's grand jury account is credited, she would have run right through the altercation with Francke to get to Harden's car; but neither account is compatible with each other or with what Hunsaker saw (unlike Crouse's confession). App. 109a.

But Ackom's flawed practices did not just taint Swearingen and Harden's statements. In addition to Harden and Swearingen, who recanted their purported eyewitness testimony, Childers, Walker, Walsh, Keerins, and Studer all submitted under-oath recantations retracting their testimony that Gable confessed, App. 13a-20a; 83a-94a. Childers also submitted an under-oath recantation retracting his claim that he saw Gable driving near the Dome Building on the night of the murder. *Id.* The recantation states that, although he saw a car that looked like Gable's, he is not certain that he saw Gable driving. *Id.* These witnesses provided overlapping and mutually-confirming explanations for *why* they falsely inculpated Gable. Some capitulated to end the interrogations, as it was clear the task force would continue to interrogate and polygraph them until they confirmed Ackom's desired "facts." *Id.* Some implicated Gable to obtain leniency or as revenge, particularly for Gable's work as an informant. *Id.* Gable's expert explained the now-recanted false testimony is an inevitable byproduct of the task force's use of coercive, guilt-presumptive interrogation tactics on third-party witnesses. Ackom's misuse of polygraph

examinations is unprecedented in the expert's many decades as a polygrapher and trainer of investigators. *Id.*

2. The State's claims understate the force of Gable's innocence evidence and the "remaining" or "other" evidence on which the State relies is too unreliable to be considered the *Schlup* holistic analysis.

Employing unwarranted hyperbole, misrepresenting the complex record, and asking this Court to ignore the required holistic view of the evidence (Pet. 26-34), the State both fails to respond to Gable's innocence evidence and, instead, hangs its hat on utterly unreliable shreds of evidence. The circuit already carefully considered and implicitly or explicitly rejected these shreds as "thoroughly impeached" or "threadbare, at best." App. 18a-19a. In reality, the record here demonstrates that no inculpatory evidence has escaped thorough impeachment. Even though it is not relevant under *Schlup*, the State complains that a retrial will be a hardship (Pet. 18), but the State fails to acknowledge that any difficulty it faces at retrial is because its case for guilt has been "thoroughly impeached," not because witnesses are unavailable. App. 18a. Each of the State's arguments fails.

<u>A reasonable jury would credit the recantations if privy to their full context.</u> Harden and Swearingen both provided under-oath recantations attesting they were not eyewitnesses. App. 14a-15a. Even though it heard Swearingen disavow her false grand jury testimony, the jury never learned that, even after dozens of interrogations and more than 30 combined polygraphs, her and Harden's final accounts suffered from material inconsistencies. App. 108a-109a. The pair's inability to provide a

consistent narrative on even basic details is best explained by a simple conclusion: they were not eyewitnesses as they both now swear.

Contrary to *Schlup*, 513 U.S. at 330, which explicitly rejected use of the sufficiency-of-the-evidence standard in favor of a standard requiring a lesser showing, the State points to tidbits that it suggests a jury could still rely on to convict. None of this evidence could support a conviction or change the holistic calculus. For example, the State asserts that a jury could credit Swearingen's and Harden's pre-polygraph statements (Pet. 30). First, *all* of Harden's and Swearingen's inculpatory statements, the pre-polygraph statements, have both been recanted and impeached by Gable's evidence establishing that the State's investigative process was fatally flawed. But, in any event, these statements were wildly inconsistent with the State's theory of the case and with the testimony that the trial jury heard. Swearingen's pre-polygraph statement that she first met Gable months after the murder cannot square with the State's claim that Gable and Swearingen drove to the scene together and were both present at the time of the murder. Similarly, the most incriminating thing Harden said before being polygraphed was that Swearingen told him about the murder, but why would Swearingen tell Harden about the murder if he witnessed it himself? Without their refashioned inculpatory versions that the jury heard, the pre-polygraph statements do "not pinpoint Gable in the murder." App. 19a.

Next, the State reprises its argument that Harden's recantation should not be believed because he received a gift nearly twenty years ago (Pet. 7). This gift was from Francke's brother, not from a website promoting Gable's innocence as the State

asserts, and the victim's brother attested that his only interest was in "learning the truth"; he did not seek any particular information from Harden. SER 255-56. This evidence was considered by the circuit and does not change the calculus, particularly in light of the obvious problems with Harden's trial testimony.

As Gable's animations illustrated, Harden's now-recanted trial testimony was never compatible with Hunsaker's objective account. Hunsaker never saw Harden or Swearingen. He never saw Harden's car racing from the scene. He did not hear the yell Harden described nor describe the assailant as Harden did. App. 39a. In the face of these damning inconsistencies, the State suggests, for the first time, that Hunsaker might have not seen what Harden did because "it would have been dark at 7 p.m. in January" (Pet. 32). The record offers no support for this argument—not made in the courts below and therefore forfeited—that the Dome Building parking circle was not sufficiently well-lit for Hunsaker to see, for example, a mustang car racing away. Of course, the lighting would not prevent Hunksaker from *hearing* the yell Harden described if it had really happened. The State also does not explain how Harden's testimony could square with phone records establishing Gable was at home until at least 5:43 p.m. ER 228. Gable would not have had enough time to pick up Swearingen, drive to the scene, and have her twice walk the two-mile roundtrip to the nearest payphone to call Harden, as he testified, Tr. 8062; SER 857, before Harden allegedly witnessed the murder at 7:00 p.m.

The State next argues that some witnesses recanted portions of their recantations, pointing to Kevin Walker, Janyne Gable, and Earl Childers (Pet. 30).

Kevin Walker. The State now argues that Walker "recanted" his 1993 recantation, citing decades-old media reports, Pet. 30. Those media reports contradicted what Walker directly told the State's own investigators during the pendency of this case, which was that he lied at trial and that his 1993 recantation was the truth. In the district court, the State did not disclose Walker's admissions to its investigators, SER 251, but instead submitted the media reports it now touts. Walker subsequently reaffirmed his 1993 audio-recorded recantation in an under-oath declaration which Gable submitted to the district court. SER 248-53. Recasting the media reports as evidence that Walker "flip-flopped" does not detract from his detailed, repeated, and corroborated recantation.

Janyne Gable. Upon reviewing phone records evidencing calls Gable made from home on the night of the murder and an eviction notice the couple received for having a loud party at home that night, App. 7a, Janyne submitted a 2010 under-oath statement that these objective documents, which she had never previously seen, confirmed Gable was home on the night of the murder, contrary to her trial testimony that she was home alone. ER 219-221. The State now argues that Janyne's under-oath submission should not be believed because she "later provided another affidavit reiterating that she testified truthfully at trial when the events were fresher in her mind," Pet. 30-31. But while Janyne's credibility is in question, the objective alibi evidence—the phone records and eviction notice demonstrating Gable was home (which Walker also confirmed, App. 7a)—undercut the State's trial claim that Gable had no alibi.

The State also later argues that Janyne "never recanted" her belated statement—made to the State's investigators for the first time decades after the murder during the pendency of this case—that she suddenly remembered that Gable confessed to her a quarter century earlier (Pet. 34). Prior to trial, Janyne was asked repeatedly by the State's investigators whether Gable ever confessed. She racked her brain to recall any confession, but unequivocally said Gable never confessed, as she testified. *E.g.*, SER 863, 870, 872. Janyne's newest recollection of a confession made decades ago is patently not worthy of belief, and it is belied by her own new statement that her memory was better at the time of trial. Pet. 31. Janyne's newest, internally-contradictory submission, which does not square with the objective alibi evidence, is too unreliable to cross *Schlup*'s reliability threshold.

Earl Childers. In his under-oath affidavit, Childers stated that, contrary to his trial testimony, he is not certain whether he saw Gable driving near the scene on the night of the murder. App. 89a-90a; ER 312. The State takes issue with the circuit's reliance on that affidavit, because the State subsequently submitted a *new* statement by Childers recanting parts of his recantation and stating that he was suffering from memory loss (Pet. 32). Childers's newest submission is internally contradictory: Childers affirms his trial testimony while maintaining that Gable never confessed to him. ER 123. Childers's inculpatory trial testimony was motivated by revenge and self-interest in leniency, and the substance of his testimony was drawn from newspaper reports of Keerins's false account superimposing the Crouse interrupted-car-burglary scenario onto Gable. Moreover, the details Childers described—

including, for example, that Gable purportedly said he stabbed Francke multiple times in the chest—never fit with the other evidence. App. 23a n.8, 54a. Finally, even if believed, Childers's testimony that he saw Gable driving that night is not probative of anything, much less murder, either on its own or in conjunction with anything else the State now touts. App. 19a. Childers has been "thoroughly impeached" and what he adds to the calculus is "threadbare, at best" because "nothing directly pinpoints Gable in the murder," as the circuit found. App. 19a-20a.

Last, the State points to "other" evidence, including Gable's own statements, testimony from Linda Perkins, and Kris Warila, that is says would support a conviction, again focusing on the rejected sufficiency-of-the-evidence standard. No reasonable juror could rely on any of this "other" evidence. It is too unreliable to be considered under *Schlup* much less make a difference in the holistic analysis.

Gable's statements to police. The State places significant weight on Gable's statements to investigators, asserting that they would support a conviction, even if the jury credited all of the recantations (Pet. 32-33). The State is wrong. Its argument, which was thoroughly discredited in the briefing below, CR 75, at 102-08, 117-25, plucks ambiguous statements out of context or, in some instances, flatly misrepresents the record. For example, the State's assertion that Gable "admitted to police that he told his wife that he had killed Francke" (Pet. 33) is simply not true. Gable was clear with police that he never confessed to his wife even in jest, and Janyne's testimony confirmed that. CR 38-4 at 68. In reality, the statement to which the State points was not an admission but a hypothetical question Gable posed to

Ackom as he tried to understand how he could have failed the polygraph test despite being truthful: "*If I did that* [*i.e.*, *if I joked to my wife about killing Francke*], would [the polygraph test] show I was lying?" SER 640 (emphasis added).

The State's suggestion that Gable admitted being at the scene or fleeing (Pet. 33) also misrepresents the evidence. In the relevant interviews, Ackom insisted that Gable "guess" what certain witnesses were saying about him—Gable's responses guessing that "Jodie" was the eyewitness or that "Earl" was the one who saw him driving were neither admissions nor corroborative of the now-recanted trial testimony. Instead, the record demonstrates that Ackom primed Gable with cues to this information, just as Ackom did with other witnesses, contaminating his responses and rendering the statements more probative of Ackom's problematic investigative practices than of Gable's guilt. App. 65a, 67a; *compare, e.g.*, SER 1494-96 *with* Tr. 7566.

The other statements the State relies on as inculpatory are, in their proper context, indicative of innocence, fatigue after hours of interrogation, or the clear product of contamination. Responses to Ackom's baiting such as "maybe, maybe not," "You bet I am," or the "Me and God" statement (Pet. 33) simply do not equate to confessions to aggravated murder. *See* CR 74 at 102-08, 117-25. Indeed, the State applies a double standard, arguing that Crouse's explicit, fact-rich confessions to murder should be discounted as unreliable, but that Gable's inscrutable remarks should be relied upon as admissions of guilt.

Linda Perkins. Randy Studer "thoroughly impeached" Perkins's testimony, reliably saying the veiled confession she thought she heard never occurred, App. 19a, contrary to the State's claim that her testimony remains "unaffected by the recantations" (Pet. 33). In any event, as the circuit concluded, Perkins's testimony, which, even if believed, related only a vague statement about having made a mistake and a reference to the "Francke case" (before there ever was a case), does not "pinpoint Gable in the murder"; it too is "threadbare, at best." App. 19a-20a.

Kris Warila. The State complains the circuit did not mention Kris Warila (Pet. 33). But the State never declared Warila material to its case and never called him at trial. Like the recanting witnesses, Warila initially denied any knowledge of the murder. Only after he was arrested, polygraphed, told that he was lying, and then interrogated for twelve hours, did he agree with the investigators that Gable had confessed to him. ER 930-34. Thus, the investigative process that generated Warila's dubious claim is just as suspect for Warila as for the remaining recanting witnesses. Given the recantations of other witnesses in similar circumstances and Gable's expert evidence, no reasonable juror would rely on Warila.

3. The circuit's *Schlup* ruling is in lockstep with decisions of other circuits.

The State cites a single case, *Hyman v. Brown*, 927 F.3d 639, 660 (2d Cir. 2019), in support of its claims that recantations cannot affirmatively establish innocence and that the *Schlup* analysis here is in "tension" with other circuits (Pet. 27-28). *Hyman* supports neither point. *Hyman* explicitly rejected the State's argument that

recantations cannot be compelling evidence of innocence, finding it "defeated by *House v. Bell*[, 547 U.S. 518, 537 (2006).]" *Id.* at 660 (citing cases). *House*'s rejection of categorical limitations on *Schlup* evidence, cited by *Hyman*, also forecloses the State's criticism that Gable did not present "DNA or other physical evidence excluding him or tying a different person to the murder" (Pet. 26-27). In any event, this criticism disregards the innocence evidence here.

In fact, *Hyman* acknowledged that recantation evidence may satisfy *Schlup*'s standard in cases—like this one—where the innocence evidence "thoroughly undermine[s] the evidence supporting the jury's verdict," 927 F.3d at 665-66.

Hyman is factually distinguishable because the recantation evidence there did not eviscerate the state's entire case for guilt as the innocence evidence does here. Though credible, the lone recantation of one of four eyewitnesses could not have changed the jury's reasonable-doubt calculus when considered holistically with ballistics evidence and a trio of remaining eyewitnesses proving the defendant was the shooter. *Id.* at 666-70.

However, the decision here is in lockstep with *Hyman*'s legal analysis affirming the district court's decision to credit the eyewitness's recantation over her trial testimony after applying "the appropriate high level of skepticism." *Id.* at 661. As in *Hyman*, the circuit here noted that "[w]itness recantations are generally viewed with suspicion," but affirmed the district court's multi-factor analysis and conclusion that the recantations are mutually corroborative and reliable. App. 11a, 13a-18a; *see also* App 99a-109a. This analysis likewise aligns with that of the other decisions the State

cites (Pet. 28). The State's claim that witnesses had nothing to lose by recanting after trial (Pet. 29), ignores this analysis; the more salient facts are that the witnesses had something to gain by implicating Gable thirty years ago, and none had good reason to recant other than to tell the truth. App. 13a. The witnesses never had close relationships with Gable and none have had contact with him since his incarceration three decades ago. App. 100a-01a. The State essentially seeks to prohibit consideration of any recantation evidence in the *Schlup* analysis (Pet. 26-29), but *Hyman*—the only case the State cites—illustrates that viewing recantations with skepticism is not the same as banning them. 927 F.3d at 660. The State's claim of discord among the circuits in this area of the law fails.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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