No. 23-5970

In the

Supreme Court of the United States

JERRY S. WILSON,

Petitioner,

v.

MICHAEL G. GIERACH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner Jerry S. Wilson is entitled to the extraordinary remedy of summary reversal where the Seventh Circuit Court of Appeals applied the correct standard in determining that he did not make a sufficient showing of actual innocence to obtain review of his procedural defaulted claims, and where four eyewitnesses identified Wilson as the shooter to law enforcement, ballistics evidence supported the eyewitness accounts of the shooting, and Wilson's newly obtained account was uncorroborated by any other witness.

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INTRODUCTION

In 2010, a Wisconsin jury found Jerry Wilson guilty of shooting and killing one person and injuring two others at a large Milwaukee house and street party. The State presented evidence that four eyewitnesses identified Wilson as the shooter to police, and ballistics evidence was consistent with two, if not three, of the eyewitness accounts of Wilson's movements and location when he fired the shots.

Four years after trial, Wilson obtained a statement from Lakisha Wallace, a host of the party and resident of the duplex where the party was held, who said that one of the State's eyewitnesses, Antwan Smith-Currin, was the shooter. Wilson knew Wallace, and he had even set up the music system for her before the party. The State agreed that Wilson was entitled to a hearing based on the newly discovered evidence. There, Wallace testified that she saw Smith-Currin fire the gun—and heard others firing guns at the same time. The hearing court found Wallace's testimony to be "generally credible," but it determined Wilson was not entitled to a new trial under Wisconsin law because he was negligent in identifying Wallace as a witness, and his testimony about how he came to discover her account was not credible.

Wilson alleged in the state courts that his attorneys were ineffective in not identifying Wallace as a witness, and these claims were rejected on state law grounds. Wilson sought federal habeas relief, and the district court denied his petition on the ground his claims were procedurally defaulted.

Wilson appealed, and the Seventh Circuit granted a certificate of appealability. The court appointed counsel and ordered the parties to address in briefs whether Wilson had made a sufficient showing of actual innocence to excuse his procedural defaults. Applying *Schlup v. Delo*'s "demanding" test for gateway claims of actual innocence, the court of appeals properly concluded that Wilson was not entitled to review of his defaulted claims because he failed to show that, more likely than not, no reasonable juror would have convicted Wilson if Wallace's new evidence had been presented together with the trial evidence. Judge Hamilton dissented. In his view, Wilson had made a showing sufficient of actual innocence.

Wilson seeks summary reversal of the court of appeals' decision because, he maintains, the court actually applied *Jackson v. Virginia*'s sufficiency-of-the-evidence standard, not the *Schlup* standard, in denying his actual innocence claim, and other courts have made the same error in denying actual innocence claims.

Wilson has not shown that he is entitled to the "extraordinary remedy" of summary reversal. His assertion that the court of appeals applied a sufficiency-of-the-evidence standard is demonstrably wrong. Here, the court of appeals applied *Schlup*'s probabilistic, more-likely-than-not standard throughout its decision—no matter what other courts may have done in resolving similar claims.

Moreover, the court of appeals' decision was reasonable and correct: Wilson failed to show that, more likely than not, any reasonable juror would have had reasonable doubt of Wilson's guilt if Wallace's evidence had been presented together

with the trial evidence. Wallace's account, though found to be credible, was uncorroborated by any other witness. More likely than not, some reasonable jurors would have relied on the corroborating evidence of the four eyewitnesses who identified Wilson as the shooter—two of whom made "unequivocal" identifications of Wilson at trial, and two, if not three, gave accounts of his movements and location when he fired the shots that were consistent with where undamaged bullet casings fired from the same gun were found. Though two of the eyewitnesses declined to identify Wilson at trial—both testified that police pressured them to identify Wilson—one wrote "I'm sure is shooter" on the photo lineup materials in which she identified Wilson. And very likely, some reasonable jurors would have credited this identification evidence, as well as the officers' direct testimony about the witnesses' identifications, over the witnesses' testimony that police pressured them to identify Wilson.

The court of appeals thus reasonably and correctly concluded that Wilson failed to make a sufficient showing of actual innocence, and Wilson does not show that this decision warrants the "rare disposition" of summary reversal. The petition should be dismissed.

STATEMENT

Melvin Williams was shot and killed on a Milwaukee street during an "after-set" party held inside and outside of a two-story duplex in the early morning hours of May 23, 2009. (Pet-App. 2a.) A fight had broken out at the party, and a gunman shot

Williams and two other men, Robert Taylor and Romero Davis, each of whom sustained non-life-threatening gunshot wounds. (Pet-App. 2a–3a.) Taylor and Davis were unable to identify who shot them. (Pet-App. 3a.)

Four eyewitnesses identified the shooter as Jerry Wilson. (Pet-App. 3a.) The State charged Wilson with one count of reckless homicide and two counts of reckless endangerment, and the case was tried to a jury in August 2010. (Pet-App. 3a–4a.) At trial, the State presented evidence of the four eyewitness identifications and ballistics evidence that matched the eyewitness accounts of the shooting.

Shakira King attended the party, and she testified that she was 15 feet away[1] when she saw the gunman open fire. (Pet-App. 3a–4a.) King identified Wilson as the gunman to police, and she picked Wilson out of a photo line-up the next day. (Pet-App. 3a.) King testified that she saw Wilson emerge from the open space between two houses on the same side of the street as the duplex and started shooting. (Pet-App. 4a.) King's identification of Wilson was unequivocal; she testified that "[t]here was 'no doubt in her mind' that Wilson was the shooter." (Pet-App. 89a.)

Antwan Smith-Currin, a resident of the upper duplex unit, also identified Wilson as the shooter one month after the incident. (Pet-App. 3a, 21a n.10.) Like King, Smith-Currin testified at trial that he saw Wilson come out of an alleyway

[1] King initially testified that the shooter was two feet away, but she settled on 15 feet following a court room demonstration. (Pet-App. 4a.) King told police that the shooter's hair was in braids; she testified at trial that he had a ponytail. (Pet-App. 4a.)

between two houses north of the duplex and shoot Williams. (Pet-App. 4a.) Smith-Currin told police that he was in the street when the shots were fired but testified at trial that he was on his porch at the time. (Pet-App. 4a.)

Samantha Coats testified that she saw the shooting from the second-floor window of a nearby house. (Pet-App. 5a.) Like King and Smith-Currin, Coats testified that she saw a person come into the street near the duplex and start shooting. (Pet-App. 5a.) Coats agreed at trial that the shooter's silhouette fit Wilson's description. (Pet-App. 5a.) But Coats declined to make an affirmative identification of Wilson as the shooter. (Pet-App. 5a.) The State presented impeachment evidence showing that Coats had identified Wilson as the shooter in a photo lineup, writing "I'm sure is the shooter" with her signature on the line-up materials. (Pet-App. 5a.) Coats testified that she was pressured by law enforcement to identify Wilson. (Pet-App. 5a.)

Sanntanna Ross testified that she didn't see the gunman because she was fighting at the time. (Pet-App. 5a.) But the State presented impeachment evidence showing that Ross previously identified Wilson as the shooter. (Pet-App. 5a.) Ross, like Coats, testified that she felt pressure to identify Wilson. (Pet-App. 5a.) The police detectives who interviewed Coats and Ross testified about Coats's and Ross's identifications of Wilson as the shooter. (Pet-App. 5a, 89a.)

The murder weapon was never found, but police discovered several undamaged .40 caliber casings in the street near where eyewitnesses said Wilson fired the shots. (Pet-App. 3a.) Testing revealed that they were fired from the same gun. (Pet-App. 6a.)

Detectives also found several damaged and flattened .38 caliber casings in the street. (Pet-App. 3a.) They testified that the area where the undamaged .40 caliber casings were found was consistent with the gunman firing from the gangway near the duplex. (Pet-App. 5a.)

The defense called three witnesses who testified that they did not see Wilson at the after-set party. (Pet-App. 6a.)

The jury found Wilson guilty of all three counts, and the court sentenced him to 28 years of imprisonment. (Pet-App. 6a.)

Wilson, by counsel, sought direct review of his conviction. (Pet-App. 6a.) In Wisconsin, claims of ineffective assistance of trial counsel are litigated in direct review proceedings, *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 586 (7th Cir. 2022), and Wilson filed a Wis. Stat. § 974.02 motion alleging ineffective assistance on multiple grounds. (Pet-App. 6a–7a.) The trial court denied the motion, and the Wisconsin courts upheld Wilson's conviction. (Pet-App. 7a.)

In 2013, Wilson, pro se, filed a Wis. Stat. § 974.06 collateral challenge to his conviction in the trial court, alleging newly discovered evidence and ineffective assistance of trial and postconviction counsel. (Pet-App. 8a.) The motion was accompanied by the notarized statement of Lakisha Wallace, a resident of the duplex, alleging that Smith-Currin was the shooter. (Pet-App. 7a–8a.) The trial court denied Wilson's motion without a hearing, and the Wisconsin Court of Appeals upheld this decision. Wilson filed a petition for review in the state supreme court.

The Wisconsin Supreme Court ordered the State to submit a response to Wilson's petition, and the State acknowledged that Wilson was entitled to a hearing on his claim of newly discovered evidence. (Pet-App. 8a.) In its order remanding the case to the trial court for an evidentiary hearing, the state supreme court said that the State conceded that "if the allegation at issue is accepted as true, there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to Mr. Wilson's guilt."[2] (Pet-App. 8a.) Wilson's claims of trial and postconviction counsel ineffectiveness were held in abeyance. (Pet-App. 8a.)

On remand, the trial court held a hearing at which Wallace testified. She testified that she lived on the first floor of the duplex, and Smith-Currin lived on the second floor. (Pet-App. 8a.) On the night of the shooting, there was a big party upstairs, and Wallace saw Smith-Currin drinking and taking pills on the lower porch. (Pet-App. 8a–9a.) There was a commotion outside, and Wallace saw Smith-Currin ask his brother for a gun. (Pet-App. 9a.) Smith-Currin went outside with a handgun and yelled at the partygoers to move away from the house. (Pet-App. 9a.) Smith-Currin then ran two stairs down the porch and started shooting into the crowd. (Pet-App. 9a, 92a.)

[2] Reasonable probability of a different outcome at trial is part of the Wisconsin's standard for obtaining a new trial on newly discovered evidence. *State v. McAlister*, 2018 WI 34, ¶ 32, 380 Wis. 2d 684, 911 N.W.2d 77.

Wallace testified that she heard multiple guns firing: "Like you could hear different guns going off. It wasn't like just one person shooting outside." (Pet-App. 9a.) When the shooting stopped, Smith-Currin tried to enter Wallace's duplex unit, but she locked him out. (Pet-App. 9a.) She said she overheard Smith-Currin say that he had just shot someone, and he would pin the shooting on Wilson. (Pet-App. 9a.)

Wallace said that police never interviewed her, and she did not come forward because she did not want to deal with the police. (Pet-App. 92a.) Wallace also testified at the hearing that she is unable to read or write, and she dictated her notarized statement to Wilson's mother. (Pet-App. 10a, 93a.)

Wilson also testified at the hearing. Wilson knew Wallace, and Wilson testified that, before the party, he was at the duplex to help set up the sound system for her. (Pet-App. 9a, 93a.) Wilson said that, the year after his conviction, Wallace wrote him in prison to say that she had information about what happened the night of the shooting. (Pet-App. 7a, 9a, 93a.) After some additional correspondence, Wallace agreed to help him. (Pet-App. 7a, 9a.) Wilson did not save Wallace's letters or copy his own to her. (Pet-App. 9a–10a.)

Wilson said nothing to his trial attorney about Wallace, despite the proximity of her residence to the shooting and his own presence there on that day. (Pet-App. 9a.) It did not occur to him that she might have information about the shooting until she wrote to him in prison. (Pet-App. 9a.) Wilson claimed that he told postconviction

counsel about Wallace's account, but he could not explain why counsel did not reach out to her. (Pet-App. 9a–10a.)

The trial court denied Wilson's motion in a bench ruling. (Pet-App. 10a.) The court found Wallace's testimony "generally . . . credible and worthy of belief," though she "ha[d] some difficulties in [the] sequence of events." (Pet-App. 10a & n.5.) But the court found Wilson's testimony "not credible" and "not worthy of belief." (Pet-App. 10a.) It did not believe Wilson's story that Wallace, an illiterate person, spontaneously reached out to him by letter and then maintained a correspondence with him. (Pet-App. 10a.) Wilson's testimony was "designed to achieve a particular end rather than designed to just relay what it is that happened." (Pet-App. 93a.) Applying Wisconsin's newly discovered evidence standard, the court denied the motion on the ground that Wilson was negligent in not obtaining Wallace's testimony sooner. (Pet-App. 10a.)

Following this decision, Wilson made a strategic decision to appeal the order denying his newly discovered evidence claim—and to voluntarily dismiss his petition for review, thus forgoing Wisconsin Supreme Court review of his ineffective assistance of counsel claims. The Wisconsin courts subsequently upheld the order denying Wilson's newly discovered evidence claim.

Wilson sought federal habeas relief. Wilson had filed a habeas petition in 2013, which the district court had stayed to allow Wilson to exhaust his claims. (Pet-App. 11a.) Wilson filed an amended petition in July 2019 raising three grounds for relief:

(1) ineffective assistance of trial counsel; (2) ineffective assistance of postconviction counsel; and (3) newly discovered evidence. (Pet-App. 11a.) The U.S. District Court for the Eastern District of Wisconsin dismissed Wilson's petition and denied a certificate of appealability. (Pet-App. 11a, 82a–83a.) The court concluded that Wilson's claim of trial counsel ineffectiveness was procedurally defaulted, his claim of postconviction ineffective assistance was without merit, and the newly discovered evidence claim did not state grounds for habeas relief. (Pet-App. 11a, 72a–81a.)

Wilson appealed, and the Seventh Circuit Court of Appeals granted a certificate of appealability to address, as relevant here, whether Wilson "has made a strong enough showing of actual innocence to excuse any procedural defaults" on his claims of ineffective assistance. (Pet-App. 12a.)

In an opinion authored by Judge Brennan and joined by Chief Judge Sykes, the Seventh Circuit affirmed the district court's order denying habeas relief in a January 23, 2023 decision. The court concluded that Wilson's claims of ineffective assistance of trial and postconviction counsel were procedurally defaulted—the former for Wilson's failure to satisfy Wisconsin's pleading standards in his postconviction motion, the latter for his failure to exhaust by voluntarily dismissing his petition for review in the Wisconsin Supreme Court. (Pet-App. 12a–17a, 45a–

50a.)[3] The court then turned to whether Wilson had made a sufficient showing of actual innocence to excuse the defaults.

The court rejected Wilson's argument that the State's admission that Wilson was entitled to an evidentiary hearing amounted to a concession that Wilson was actually innocent because the showing for actual innocence is far more demanding than that for a hearing. (Pet-App. 19a, 52a.) Acknowledging that the state courts found Wallace's testimony to be "generally credible," the court explained that new, credible evidence does not automatically satisfy the *Schlup* standard. (Pet-App. 20a.) The court must consider the new and old evidence together, and "make a probabilistic determination about what reasonable jurors would do," citing *House v. Bell*, 547 U.S. 518, 538 (2006). (Pet-App. 20a, 53a.) "The requisite probability," the court explained, "is established only if Wilson shows that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' *Schlup*, 513 U.S. at 327." (Pet-App. 20a, 53a.)

Examining the old evidence with the new, the court of appeals concluded that Wilson failed to meet this demanding standard. Wallace's account was not "so compelling and unequivocal that no reasonable juror would have convicted Wilson in the light of it." (Pet-App. 21a.) Wallace's story was uncorroborated by any other witness, and she testified that she heard gunshots from *multiple* shooters. By

[3] Except where noted, parallel cites are provided to the June 1, 2023 amended decision and the original decision issued January 23, 2023.

contrast, King and Smith-Currin "still unequivocally identified Wilson as the gunman," and both described him emerging from an alleyway and firing. (Pet-App. 21a, 54a.) Their account was supported by the detective's testimony that the location of the undamaged, likely newly deposited, .40 caliber casings "was generally consistent with s shooter coming from the alleyway." (Pet-App. 21a, 54a.)

The court further noted that the State's impeachment evidence of Samantha Coats's and Santana Ross's additional identifications of Wilson as the shooter, and the officers' own testimony about Coats's and Ross's identifications of Wilson buttressed King's and Smith-Currin's account and would have undermined Wallace's story in the minds of reasonable jurors. (Pet-App. 21a–22a, 54a.) The court noted that the "closest corroboration of Wallace's version" was a statement Smith-Currin made at the preliminary hearing that people thought he was shooting. (Pet-App. 22a, 54a.) "But that advances the ball little," the court concluded, "because Wallace is still the only identified witness to accuse Smith-Currin of being the gunman." (Pet-App. 22a, 54a–55a.) Finally, the court noted that, while the state courts found Wallace's hearing testimony to be credible, reasonable jurors would not necessarily credit her testimony over the inculpatory, corroborated testimony of the existing trial witnesses. Thus, even considering Wallace's testimony, the court said it could not conclude that it was more likely than not that no reasonable juror would find Wilson guilty beyond a reasonable doubt. (Pet-App. 26a, 58a–59a.)

Judge Hamilton dissented. In his view, Wilson met his burden to show that it was more likely than not that no reasonable juror would have convicted him in light of Wallace's testimony. (Pet-App. 27a, 60a.) Judge Hamilton focused on the "extraordinary feature of this habeas case . . . the combination of two facts": The State's admission in state court that Wilson had made a showing sufficient to be entitled to an evidentiary hearing on Wallace's newly discovered statement, and the state courts' subsequent finding that Wallace's hearing testimony was "generally credible." (Pet-App. 27a, 60a.) "Under these unusual circumstances, and given other significant weaknesses in the state's case," Judge Hamilton wrote, "we should find that Wilson has made a showing of innocence sufficient to excuse his procedural default." (Pet-App. 27a, 60a.)

Wilson filed a petition for rehearing en banc. As he does here, Wilson argued that the majority opinion applied the sufficiency-of-the-evidence standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), not *Schlup*'s probabilistic standard, in concluding that he had not shown actual innocence. As here, he focused on five passages in the majority opinion that identified specific pieces of trial evidence from which a reasonable juror "could" infer guilt in assessing whether Wilson had made a sufficient showing of actual innocence. (Pet. 17–18; Pet-App. 54a–55a.)

On June 1, 2023, the panel issued an amended decision with changes to the majority and dissenting opinions. The majority opinion's framework and conclusion were unchanged by these amendments. The majority revised the five passages

flagged by Wilson, replacing them with statements showing explicit consideration of the likelihood that reasonable jurors would rely on inculpatory inferences arising from each of the five different pieces of evidence. (Compare parts of Pet-App. 21a–23a, 26a, with 54a–55a, 58a.)

Five days later, the court issued an order denying the petition for rehearing. No judge in active service requested a vote on the petition. (Pet-App. 118a.)

REASONS TO DENY THE PETITION

Summary reversal is inappropriate because the court of appeals applied the correct standard and reached the correct result in determining that Wilson did not show actual innocence where four eyewitnesses identified him as the shooter to police and ballistics evidence supported their accounts.

Summary reversal is an "extraordinary remedy." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J. dissenting) (citations omitted). "Summary reversals of courts of appeals are unusual under any circumstances." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Summary reversal is appropriate, however, when the "Court of Appeals 'commit[s] [a] fundamental error that this Court has repeatedly admonished [it] to avoid.'" *Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting from denial of certiorari) (quoting *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam)). "A summary reversal is a rare disposition, usually reserved by this Court

for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

While this Court has been more apt to use the summary reversal procedure in federal habeas cases (Pet. 16–17), it has done so primarily to check the court of appeals when it does not follow the habeas review standards in granting state prisoners relief. *See, e.g., Sexton*, 138 S. Ct. at 2560 (noting the court of appeals' repeated failure to apply AEDPA deference on habeas review); *Hardy v. Cross*, 565 U.S. 65, 71–72 (2011) (per curiam) (reversing for failure to apply AEDPA deference) *Cavazos v. Smith*, 565 U.S. 1, 6–7 (2011) (per curiam) (same); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591, 594 (2016) (Of the 34 summary reversals in federal habeas cases from 2005–2016, more than eighty percent (28) overturned erroneous grants of the writ). Federal habeas cases account for a disproportionate share of summary reversals because it appears that this is an area in which the court of appeals often commits a fundamental error—failure to defer to state court judgments as required by habeas review standards—despite this Court's repeated admonishments. *Cassano*, 142 S. Ct. 2051, 2057 (Thomas, J., dissenting).

But the error that Wilson alleges—misapprehension of the actual innocence standard—is not one for which this Court has repeatedly taken the court of appeals to task, and Wilson does not show otherwise. Instead, he argues or appears to argue

that summary reversal's extraordinary remedy is appropriate because (1) the court of appeals actually applied the sufficiency-of-the-evidence standard in reviewing his claim; (2) its decision was clear error; and (3) the decision is representative of a trend in which courts have misapprehended the actual innocence standard. Wilson fails to show that summary reversal is warranted for any of these reasons.

A. The court of appeals applied the correct standard in *Schlup* in rejecting Wilson's actual innocence claim.

A claim of actual innocence is a "gateway" through which a federal court may reach the merits of defaulted or untimely federal claims by the "fundamental miscarriage of justice" exception to procedural default. *McQuiggin v. Perkins*, 569 U.S. 383, 384, 386 (2013). To show actual innocence, the petitioner must present "new reliable evidence" and must demonstrate that, in light of the new evidence, it is "more likely than not that no reasonable juror would have convicted him." *Schlup v. Delo,* 513 U.S. 298, 324, 327 (1995). "[O]r, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). This standard "is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327).

To evaluate an actual innocence claim, the court considers all the evidence, old and new, incriminating and exculpatory, and then makes a "probabilistic determination about what reasonable, properly instructed jurors would do." *Schlup*, 513 U.S. at 329. This assessment of the likely behavior of reasonable jurors differs from sufficiency-of-the-evidence analysis under *Jackson v. Virginia*, 443 U.S. 307

(1979), which asks only whether there is sufficient evidence which, if credited, could support the conviction. *Schlup*, 513 U.S. at 330.

The court of appeals applied the *Schlup* standard in denying Wilson's gateway claim of actual innocence. In its June 1, 2023 amended decision and its January 23, 2023 original decision, the court plainly stated the *Schlup* standard (Pet-App. 20a, 53a), and it applied that standard to the evidence in total. With its amended decision, the court of appeals also revised the five passages to which Wilson objected (and does so again here, Pet. 17). These passages no longer discuss what a juror "could" reasonably conclude from specific evidence in the record.[4] (Pet-App. 54a–59a.) Each of the passages now addresses the likelihood that, from particular evidence, a reasonable juror *would* draw an inculpatory inference.[5]

The State questions whether these revisions were necessary under *Schlup*. In the original decision, the court of appeals identified and applied the *Schlup* standard in making its ultimate, probabilistic determination that Wilson had not shown that

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[4] For example: "[B]oth Smith-Currin and King still unequivocally identified Wilson as the gunman and described him emerging from an alleyway and opening fire," the court wrote in its original decision. "A reasonable juror could credit their testimony as honest and compelling—especially since a detective testified that the location of the .40 bullet casings was generally consistent with a shooter coming from the alleyway." (Pet-App. 54a.)

[5] As revised: "We conclude that matching testimony from Smith-Currin and King, delivered at trial and without qualification," the court wrote in the amended decision, "likely would prevent reasonable jurors from placing significant reliance on Wallace's account presented more than four years later—especially since a detective testified that the location of the .40 bullet casings was generally consistent with a shooter coming from the alleyway." (Pet-App. 20a, 21a.)

it was more likely than not that any reasonable juror would not have convicted him in light of the Wallace evidence. (Pet-App. 52a–55a.) That the court did not in its original decision also make separate assessments of the probability that a reasonable juror would infer guilt from *each of the inculpatory pieces of evidence* noted in the opinion does not show that it failed to apply the *Schlup* standard to the evidence as a whole. *Schlup*'s probabilistic assessment is about the likely outcome when *all* the evidence, old and new, incriminating and exculpatory, is in the mix. *See House*, 547 U.S. at 538. Only then does the court make its conclusive determination of whether, more likely than not, any reasonable juror would find reasonable doubt. *Id.*

Regardless, the court *did* revise the analysis in the amended decision, and that decision is the one that matters. Wilson objects that the court of appeals' changes in the amended decision are mere "window dressing," and that the court's analysis is still, "in spirt," a sufficiency-of-the-evidence analysis. (Pet. 18.) But whatever label Wilson applies to these changes, the court's amended decision employs *Schlup*'s probabilistic approach throughout. The court of appeals applied the *Schlup* standard in deciding Wilson's actual innocence claim.

That the court applied the correct standard is good reason to deny the petition. *See* Sup. Ct. R. 10 (misapplication of a properly stated legal standard is rarely grounds for review). Wilson's primary rationale for this Court to grant the rare relief of summary reversal rests on his claims that the court of appeals applied the wrong

standard, and that it has done so in other cases, too. The court applied the correct standard, and Wilson's petition should be denied.

B. The court of appeals' decision that Wilson did not make a sufficient showing of actual innocence was reasonable and correct.

Wilson does not explicitly argue that the court of appeals simply misapplied *Schlup* and clearly erred in concluding that he did not make a sufficient showing of actual innocence. But if Wilson's petition is read to make such an argument, and even if it were adequate justification for summary reversal, Wilson cannot show that the court of appeals erred. Rather, the court's conclusion that Wilson did not show actual innocence was reasonable and correct under *Schlup*.

The court of appeals properly concluded that Wilson failed to show that, more likely than not, no reasonable juror would have found Wilson guilty beyond a reasonable doubt if Wallace's evidence were considered with the trial evidence. Granted, the state court found Wallace's testimony implicating Smith-Currin in the shooting was "generally credible." (Pet-App. 10a.) But that does not mean that a reasonable juror would credit Wallace's evidence over the existing witnesses and accounts. The state courts' finding and the timing of Wallace's discovery satisfy the innocence standard's threshold requirement that the petitioner have new, credible evidence. (Pet-App. 10a.) It entitles Wilson to have the Wallace evidence considered with the trial evidence, but it does not dictate the outcome of that analysis.

Though credible, Wallace's hearing testimony, as the court of appeals reasonably assessed, was not "so compelling and unequivocal that no reasonable juror would have convicted Wilson in the light of it." (Pet-App. 21a.) By Wallace's own account, there were multiple shooters; she testified that she heard other guns going off at the same time Smith-Currin fired his gun. (Pet-App. 9a, 21a.) Wallace did not come forward until four years later. *See Schlup*, 513 U.S. at 332 (timing of the new submission bears on its probable reliability). Wallace's version was also uncorroborated. No other witness's trial testimony or statements to police resembled her account, and Wilson did not identify any other partygoer or neighborhood resident after trial who could confirm Wallace's account.

King and Smith-Currin, in contrast, "unequivocally identified Wilson as the gunman." (Pet-App. 4a, 21a.) King testified that "[t]here was 'no doubt in her mind'" that the shooter was Wilson. (Pet-App. 89a.) King's and Smith-Currin's accounts were very similar to each other's. Both described seeing Wilson emerge from an alleyway between two houses on the same side as the duplex and firing. (Pet-App. 4a, 21a.) Similarly, Coats testified that she saw a person with Wilson's "silhouette" emerge onto the street and start shooting. (Pet-App. 5a.) Of course, King's and Smith's testimonies were not without inconsistences, King's regarding Wilson's hair (ponytail or braids) and her distance from him when he opened fire, and Smith-Currin's regarding whether he was on the porch or the street when he saw the shooting. (Pet-App. 4a.) But they each unequivocally identified Wilson, and their accounts (and, to

a lesser degree, Coats's) were backed up by the detective's testimony that the location of the undamaged, likely newly deposited .40 caliber casings "was generally consistent with a shooter coming from the alleyway." (Pet-App. 21a, 54a.)

Further, reasonable jurors could—and some very likely *would*—credit impeachment evidence of Coats's and Ross's original identifications of Wilson as the shooter, and police officers' direct testimony about those identifications, over the eyewitnesses' trial testimony that they were pressured into identifying Wilson. As to Coats in particular, these reasonable jurors would have found more convincing her handwritten note "I'm sure is the shooter" with her signature on the photo lineup materials than her allegation at trial that police pressured her. (Pet-App. 5a, 21a–22a.)

Taking the trial evidence together with Wallace's testimony, the court of appeals correctly concluded that Wilson did not make the showing of actual innocence required by *Schlup*. Jurors were shown evidence at trial that four eyewitnesses identified Wilson as the shooter—King and Smith-Currin by unequivocal trial testimony, Coats and Ross by impeachment evidence and law enforcement testimony. By contrast, only Wallace identified another person, Smith-Currin, as a shooter, and Wallace said that she heard others shooting at the same time. While Wallace's account was found to be credible, it was uncorroborated by any other witness. But King's and Smith-Currin's accounts of the shooting—Wilson emerging from an alleyway and shooting—were consistent with each other and with the location where

the undamaged set of bullet casings were found. Accordingly, Wilson cannot show that it is more likely than not that no reasonable juror would have convicted him if Wallace's evidence had been presented with the trial evidence. *See Schlup*, 513 U.S. at 327.

Wilson thus fails to show that the court of appeals reached the wrong result in denying his actual innocence claim. More importantly, for purposes of summary reversal, he cannot demonstrate that the court's decision was "clearly erroneous"—that *no* reasonable court could conclude that Wilson failed to show that, more likely than not, *any* reasonable juror would have had reasonable doubt, in light of Wallace's evidence. *See California v. Prysock*, 453 U.S. 355, 364 (1981) (Stevens, J. dissenting) (summary reversal not warranted because state court's decision was "at least reasonable, and is clearly not . . . patently erroneous"). The petition should be denied.

C. Wilson's case is not "representative" of cases in which courts may have misapplied *Schlup*, and Wilson's additional arguments for summary reversal or plenary review are unpersuasive.

Wilson attempts to show that this case is representative of a trend in which federal courts have misconstrued the *Schlup* standard as equivalent to the *Jackson* sufficiency-of-the-evidence standard. He shows that a district court wrongly said that the two standards were "essentially equivalent," and he shows that some other courts, primarily district courts, wrongly used "could" in stating *Schlup*'s and *House*'s probabilistic standard of "more likely than not, any reasonable juror *would* have found reasonable doubt" in light of the new evidence. (Pet. 23–25.)

Wilson does not adequately discuss any of these cases to assess whether their misstatements of the legal standard affected the outcome. But no matter. The Seventh Circuit committed no such errors here, so Wilson's case is not "representative" of these other cases or an "ideal vehicle" to call out apparent errors in other cases. As discussed, the amended decision Wilson asks this Court to review employed a probabilistic analysis throughout, addressing the likelihood that a reasonable jury would have drawn inferences of guilt from particular facts. (Pet-App. 21a–23a.) It plainly did not apply the *Jackson* standard. The errors Wilson highlights in these other cases only serve to distinguish his case from them. Regardless of what happened in any other case, the court of appeals applied the *Schlup* standard in Wilson's case in concluding that he failed to make a sufficient showing of actual innocence.

Wilson argues that, if this Court does not overturn the court of appeals decision, "it risks effectively closing the *Schlup* gateway in the Seventh Circuit." (Pet. 22.) Not so. That Wilson did not make a sufficient showing of actual innocence does not mean that the gateway is closed to any and all petitioners in the circuit. In fact, the Seventh Circuit has demonstrated a willingness to reach the merits of procedurally defaulted claims in "the extraordinary case" in which *Schlup*'s "demanding" requirements are met. *See House*, 547 U.S. at 538.

In *Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016),[6] the petitioner was convicted of murder, and his claims were procedurally defaulted in federal habeas. Asserting actual innocence, Jones presented "exceptional" new evidence: testimony from another man who had confessed to being the lone shooter. (Pet-App. 25a.) This man, the court of appeals explained here in discussing *Jones*, had "confessed to the shooting within days, identified the murder weapon, and given testimony that was consistent with the case's forensic evidence." (Pet-App. 25a.) The court concluded that *Jones* had made a sufficient showing of actual innocence for the court to reach his defaulted claims. (Pet-App. 25a.) The Seventh Circuit has shown that it will allow a petitioner who satisfies the actual innocence standard to pass through *Schlup*'s gateway.

In asserting that he has shown actual innocence, Wilson relies heavily on the State's concession in state court that Wilson was entitled to an evidentiary hearing on Wallace's newly discovered evidence. But as the court of appeals properly determined, "the federal standard for a showing of actual innocence demands more than what the State conceded" in state court. (Pet-App. 52a.) Quoting *Schlup*, 513 U.S. at 329, the court observed that "the meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty."

[6] *Jones* was authored by now-Chief Judge Sykes, who joined Judge Brennan in the majority in the present case.

(Pet-App. 20a.) The State did not concede actual innocence by acknowledging that Wilson was entitled to an evidentiary hearing.

Finally, Wilson, like Judge Hamilton, highlights inconsistencies in the eyewitness accounts, among them differing descriptions of Wilson's height, weight, and hair style, and delays among witnesses in identifying Wilson as the shooter. (Pet-App. 30a–32a.) But neither Wilson nor Judge Hamilton gives due credit to the likelihood that some reasonable jurors, despite these inconsistences, would have considered Wallace's testimony but found Wilson guilty beyond a reasonable doubt based on the four eyewitnesses' corroborating identifications of Wilson.

Again, Wallace's account, though found to be credible, was uncorroborated by any other witness. King's and Smith-Currin's identifications of Wilson were unequivocal—there was "no doubt in [King's] mind" that Wilson was the shooter. (Pet-App. 87a, 89a.) Importantly, their accounts of the shooting mirrored each other's: both saw Wilson emerge from an alleyway and start shooting. (Pet-App. 4a, 21a.) Coats offered similar testimony that she saw a person with Wilson's "silhouette" emerge onto the street and start shooting. (Pet-App. 5a.) According to law enforcement testimony, these accounts were consistent with the location where the undamaged casings were found. (Pet-App. 21a.)

As to evidence that Coats and Ross also identified Wilson as the shooter to law enforcement, Judge Hamilton appears to accept uncritically Coats's and Ross's disavowals of these identifications at trial. (Pet-App. 31a–32a.) But some reasonable

jurors would have believed impeachment evidence and law enforcement testimony about Coats's and Ross's identifications of Wilson to law enforcement—Coats wrote "I'm sure is shooter" on the photo lineup materials, after all—and not the witnesses' trial testimony that police pressured them into making the identification.

The court of appeals applied the controlling standard in *Schlup* to Wilson's actual innocence claim, and the court's conclusion that Wilson failed to make a sufficient showing of actual innocence was reasonable and correct. Wilson did not demonstrate that, more likely than not, no reasonable juror would have found him guilty beyond a reasonable doubt if Wallace's uncorroborated testimony were presented together with the trial evidence. Wilson has not shown that he is entitled to the extraordinary remedy of summary reversal or, alternatively, plenary review.

CONCLUSION

For the reasons discussed, this Court should deny the petition for writ of certiorari.

Dated this 1st day of February 2024.

Respectfully submitted,

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