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

REPLY BRIEF FOR PETITIONER

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Jerry S. Wilson seeks to open the actual-innocence gateway to excuse his procedural default with previously unavailable eyewitness testimony that the state court deemed "credible and worthy of belief." The new, credible testimony exposed the State's star witness against Wilson as the real perpetrator. The Seventh Circuit's decision keeping that gateway closed turned on the wrong question.

Instead of asking whether a jury likely would have convicted Wilson had it heard the new testimony—the mandated "probabilistic" inquiry under *Schlup* v. *Delo*, 513 U.S. 298, 329 (1995)—the court of appeals instead asked whether the evidence was still sufficient to sustain the conviction. That standard, borrowed from *Jackson* v. *Virginia*, 443 U.S. 307 (1979), is both inapposite and more exacting. The court's mistake was outcome determinative and reflects a real and disturbing trend in the lower courts away from *Schlup*.

The State all but admits as much. Unable to square its arguments with the undisputed facts below, the State obfuscates the record. For good reason. As Judge Hamilton explained, in light of the new and credible eyewitness testimony, the State implicitly recognizes (as it must) that it is more likely than not that any reasonable juror—considering the evidence as a whole—would have reasonable doubt that Wilson was the shooter.

This was not, as the State now repeatedly claims (at i, 1, 3–4, 14, 21, 25), a case in which "four eyewitnesses" unwaveringly accused Wilson of the crime. Instead, facing an equivocal record with no physical evidence tying Wilson to the shooting, the

State instructed the jury to focus "especially" on the testimony of its star witness, Antwan Smith-Currin. Pet. 26–27. The State also relied on a second witness (King) whose testimony was at best facially inconsistent. And its remaining two witnesses refused to identify Wilson at trial—*even after* the prosecutor confronted them with prior inconsistent statements. Against this backdrop, the testimony of a previously unknown eyewitness—Lakisha Wallace, who identified Smith-Currin as the shooter—would have, more likely than not, created reasonable doubt in the State's already-fragile case.

Attempting to shade the record in its favor, the State doubles down on the Seventh Circuit's error. According to the State (at 21), the decision below was correct because a reasonable juror nevertheless "could" have convicted Wilson—for example, because a reasonable juror "could" have believed the State's evidence impeaching its own witnesses after they recanted at trial their incriminating statements to the police. But the State's speculative nitpicking of the record does not answer what a reasonable juror *likely* would have done if presented with the new exculpatory testimony.

The State also concedes (at 13) that the Seventh Circuit's amended opinion—which purported to correct the errors Wilson identified—left unchanged the "majority opinion's framework and conclusion." This confirms that the Seventh Circuit's revision was nothing more than window dressing, which did nothing to remedy its fundamental error.

And in attempting to argue that there is no trend of lower courts improperly raising the burden on petitioners seeking to invoke *Schlup*, the State *admits* (at 22)

that numerous courts have made exactly that same error. The State then musters (at 24) only a single case with rarely seen facts as purported evidence that the lower courts are getting it right across the board today. That single case, however, only shows how far lower courts have strayed from *Schlup*.

This Court expressly has instructed that *Jackson* and *Schlup* are "by no means equivalent." *House* v. *Bell*, 547 U.S. 518, 538 (2006). Nonetheless, the Seventh Circuit (like other lower courts throughout the country) effectively collapsed those cases into a single inquiry and, in doing so, closed *Schlup*'s actual-innocence gateway. Such a fundamental mistake—a misreading of this Court's decisions with precedent-negating effects—justifies summary reversal or, alternatively, plenary review. See *Moore* v. *Texas*, 139 S. Ct. 666, 672 (2019) (per curiam).

I. THE SEVENTH CIRCUIT'S MISAPPLICATION OF *SCHLUP* NECESSITATES SUMMARY REVERSAL

A. The State Confirms that the Seventh Circuit Confused the Standard

In attempting to defend the Seventh Circuit's error, the State makes glaringly apparent (at 17–18) that the court of appeals failed to engage in *Schlup*'s probabilistic inquiry and instead applied *Jackson*'s inapposite and more exacting standard. Had the Seventh Circuit correctly applied *Schlup*, it would have concluded, as Judge Hamilton did, that Wallace's "credible * * * and consistent account in which Smith-Currin was the shooter and had a motive to blame Wilson" would have more likely than not given a reasonable juror reasonable doubt as to Wilson guilt. Pet. App. 32a (Hamilton, J., dissenting).

The State doubles down on the Seventh's Circuit's error. Just like the court of appeals, the State focuses (at 20) on whether the new testimony was "so compelling and unequivocal that no reasonable juror would have convicted Wilson in the light of it." But this inquiry eliminates *Schlup*'s "probabilistic" assessment and instead asks only whether a reasonable juror *could* have convicted Wilson. 513 U.S. at 329.

Under *Schlup*, the question is one of probability: is it more likely than not that the jury "would" have convicted had it seen the new evidence? *House*, 547 U.S. at 538. "[T]he mere existence of sufficient evidence to convict" is not "determinative." 513 U.S. at 330. *Jackson*, by contrast, asks whether the jury had the "power" to (or, "could") convict based on the evidence; i.e., whether sufficient evidence supported its verdict. *Ibid*. This is a significantly higher hurdle than *Schlup*, and for good reason: a successful *Jackson* claim results in the release of the prisoner—on the grounds that the jury lacked *authority* to convict. A successful *Schlup* claim, in contrast, is simply a "gateway claim" that excuses procedural default if the prisoner can show that *it is more likely than not* that the new evidence would give a reasonable juror "reasonable doubt." *House*, 547 U.S. at 554.

The likelihood of reasonable doubt is the cornerstone of *Schlup*, but—repeating the Seventh Circuit's error—the State fails to meaningfully engage with the reasonable-doubt standard at all. Instead, despite acknowledging the many "inconsistenc[i]es" in the trial evidence against Wilson, the State nakedly asserts (at 25) that Wallace's new testimony would not have moved the needle. But the State fails to explain *why* it is more likely than not that a reasonable juror would have

found Wilson guilty despite Wallace's "credible" testimony identifying Smith-Currin as the shooter, particularly in light of the inconsistencies in the testimonies of Smith-Currin and King. Just like the court of appeals, the State "do[es] not adequately come to grips with the likelihood of a reasonable person reaching such conclusions or jurors' obligation to demand proof beyond a reasonable doubt." Pet. App. 29a (Hamilton, J., dissenting).

Moreover, the State's attempt (at 19–20) to cast the inconsistencies in the eyewitness accounts of Wallace, Smith-Currin, and King as a credibility dispute proves the point. Additional evidence calling into question the State's evidence against Wilson only increases the likelihood that any reasonable juror would have had a reasonable doubt as to Wilson's guilt. The State's preferred analysis—asking whether its evidence still would have been sufficient to convict—is the *Jackson* inquiry, not *Schlup*. See *House*, 547 U.S. at 538.

The State's questioning (at 17) of whether the Seventh Circuit's "revisions" to its original opinion were even necessary confirms that the Seventh Circuit continued to apply the wrong standard in its amended opinion. The Seventh Circuit may have changed the word "could" to "would" throughout to pay lip service to *Schlup*. But as the State concedes (at 13), the amended opinion—which purports to correct the original opinion's tacit employment of *Jackson*—did not change the "framework [or] conclusion" of the original opinion. Recognizing this problem, the State later contradicts itself by asserting (at 17)—again, without explanation—that the changes in the amended opinion "no longer discuss what a juror 'could' reasonably conclude

from specific evidence in the record," but instead purportedly "now addresses the likelihood that" a juror would have convicted Wilson. The State's tortured attempt to rationalize the Seventh Circuit's approach only demonstrates that the court's approach improperly blurred the line between *Schlup* and *Jackson* into oblivion.

B. Wallace's Testimony Would Have Created Reasonable Doubt

Despite the State's attempt to gloss over unfavorable facts, the record amply demonstrates that *Schlup*'s gateway must open here. For example, although the State asserts (at 1, 4) that "four eyewitnesses" supposedly identified Wilson to police, the State elides three critical facts:

(1) two of those witnesses recanted at trial and *refused to identify Wilson* even after being confronted with their out-of-court statements to police;[1]

(2) the third witness was involved in a melee during the shooting and offered inconsistent testimony when describing the shooter; and

(3) the fourth, Smith-Currin, acknowledged at the pre-trial hearing that other witnesses thought he was the shooter and is the same person that Wilson's new witness has identified as the real shooter.

Indeed, at trial, the State went so far as to acknowledge that this was not "an easy case," but encouraged the jury to base a conviction "[e]specially" on Smith-Currin's testimony. D.C. ECF No. 42-54 at 106:23-107:21, 109:13-14.

Other examples of the State's attempts to shade the record abound. The State relies heavily (at 20) on Wallace's testimony that she may have heard multiple

[1] The State concedes (at 21), buried in the middle of a paragraph, that two of its four eyewitnesses—"Coats and Ross"—refused to identify Wilson at trial, forcing the State to rely on "impeachment evidence and law enforcement testimony."

shooters, but fails to grapple with the fact that the presence of multiple shooters could only make it *harder* for any reasonable juror to convict Wilson—especially given that the State's sole theory at trial was that there was a single shooter. Pet. App. 65a (Hamilton, J., dissenting). Similarly, the State points (at 4) to "ballistics evidence"—two sets of bullet casings, one old, damaged, and likely unrelated to the crime—that is purportedly consistent with Wilson committing the crime. But the location of the casings was equally consistent with *anyone*—including Smith-Currin—shooting the victim while in the street. And, more importantly, the State ignores that none of this ballistics evidence—indeed, no physical evidence whatsoever—actually tied Wilson to the crime. All it tended to show was that a shooting had occurred.

The State also ignores that the only evidence of any motive in the entire case came from Wallace, who credibly testified that she heard Smith-Currin—the State's "key" witness (and the true shooter, according to Wallace)—"say that he planned to blame the crime on Wilson" because he was angry at Wilson for spending time with his girlfriend. Pet. App. 27a (Hamilton, J., dissenting); see Pet. App. 9a.[2] This provides context for a reasonable juror as to why, *a month* after telling police that he did not see the shooter, Smith-Currin suddenly became certain it was Wilson. See Pet. App. 31a (Hamilton, J., dissenting).

The State attempts (at 21) to downplay Wallace's testimony as "uncorroborated by any other witness," whereas "King's and Smith-Currin's accounts of the shooting"

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[2] The admissibility of this evidence has no bearing on the *Schlup* inquiry, which requires considering *all* "relevant" evidence, including hearsay. *Schlup*, 513 U.S. at 327–28.

were purportedly "consistent with each other." But the State fails to mention that King's description of the shooter varied greatly from Smith-Currin's (and also did not match the descriptions of the other two, recanting witnesses). Each witness provided different accounts of the shooter's skin tone, height, hair style, clothing, and location at the time of the shooting. See Pet. App. 31a (Hamilton, J., dissenting); see also Pet. 7–8. And none of the State's two "eyewitnesses" who identified Wilson at trial claimed initially that he or she saw Wilson pull the trigger—Smith-Currin waited a month, and King first told police that her friend saw Wilson shooting. Pet. App. 31a (Hamilton, J., dissenting).

Despite its best efforts, the State cannot change the fact that the state habeas court found Wallace's testimony to be "credible and worthy of belief." Pet. App. 10a. And, as in *House*, that testimony "has called into question" the "central" evidence "connecting [Wilson] to the crime"—the testimony of Smith-Currin, whom Wallace identified as the real shooter. 547 U.S. at 553–54. Accordingly, any objective assessment of the record makes clear that, had the jury heard Wallace's credible testimony along with the inconsistent testimony from the other eyewitnesses, it is more likely than not that "no reasonable juror would have convicted [Wilson] in the light of the new evidence." *Schlup*, 513 U.S. at 327; accord *House*, 547 U.S. at 554.

C. Summary Reversal Is Justified

The State agrees (at 14) that summary reversal is appropriate when the court of appeals "commit[s] [a] fundamental error that this Court has repeatedly admonished [it] to avoid." See *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022)

(Thomas, J., dissenting from denial of certiorari). Just so here. The State's attempt (at 15) to create a one-way ratchet—asserting that summary reversal is warranted only when habeas relief has been granted—is meritless. See *Christeson* v. *Roper*, 574 U.S. 373, 378 (2015) (per curiam) (summarily reversing where lower court misapplied "interests of justice" in finding petitioner's case time-barred and remanding for further proceedings); *Tharpe* v. *Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam) (court of appeals erred in denying certificate of appealability where this Court's "review of the record compels a different conclusion"). No authority supports the State's results-first, analysis-second approach to summary reversal.

The State does not and cannot dispute that summary reversal is warranted where, as here, the court below fundamentally misapprehends and misapplies this Court's governing precedent. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (utilizing the "summary reversal procedure * * * to correct a clear misapprehension of the" governing standard). This Court's intervention is needed to correct the Seventh Circuit's mistaken understanding of the actual-innocence showing required to excuse procedural default and ensure the continued vitality of *Schlup*'s probabilistic inquiry into "the likely impact of the [new] evidence on reasonable jurors." *House*, 547 U.S. at 538.

II. THIS COURT'S INTERVENTION IS NECESSARY BECAUSE LOWER COURTS ARE CHRONICALLY MISAPPLYING *SCHLUP*

As the petition explains (at 23–25), the lower courts have increasingly misapprehended, misapplied, or altogether ignored *Schlup*. The State offers no real answer to this concern. Nor could it. Indeed, despite *House*'s unequivocal instruction

that *Schlup* and *Jackson* are "by no means equivalent," *House*, 547 U.S. at 538, lower courts continue to treat them as "essentially equivalent," see, *e.g.*, *Sacco* v. *Greene*, 2007 WL 432966, at *6 (S.D.N.Y. Jan. 30, 2007). These courts have turned the *Schlup* framework on its head. A court that begins by asking whether, considering the new evidence, a reasonable jury *could* still find the defendant guilty never engages in the *Schlup* analysis at all.

The State baldly asserts (at 22) that there is no "trend" of commingling of the two standards. But it cites only a single successful *Schlup* case as its exclusive evidence that the courts are getting it right. Opp. 23–24 (citing *Jones* v. *Calloway*, 842 F.3d 454 (7th Cir. 2016)); but see *Sibley* v. *Culliver*, 377 F.3d 1196, 1207 (11th Cir. 2004) (holding that petitioner's evidence did not meet the *Schlup* standard because "a reasonable juror could still quite possibly have concluded that" petitioner had the requisite intent).[3]

If anything, the State's heavy reliance on *Jones* only confirms that relief is warranted here. In *Jones*, "[t]he physical evidence introduced at trial was limited" and, just like here, the conviction primarily "rested on testimony from several eyewitnesses," whose "accounts diverged in significant respects" and "w[ere] all over the map." 842 F.3d at 458–59, 462. However, another man was previously convicted

[3] The State's assurances that no problem exists ring hollow given that it repeats the same error as those decisions in attempting to defend the Seventh Circuit's approach here. Compare, *e.g.*, Opp. 3 (arguing that "some reasonable jurors would have relied on the corroborating evidence of the four eyewitnesses who identified Wilson as the shooter"), with *Sibley*, 377 F.3d at 1196 (rejecting petitioner's *Schlup* claim because "a reasonable juror could still quite possibly have concluded that" petitioner had committed the crime).

for the same murder and "consistently maintained that he—and he alone—shot" the victim. *Id.* at 456. What neither the State nor the Seventh Circuit explains is why the confession in *Jones* should be treated any differently than Wallace's testimony here—particularly in light of the fact that the state court already found Wallace's testimony "credible and worthy of belief." Pet. App. 10a.

At a minimum, the confusion among the lower courts confirms that this Court's intervention—through summary reversal or plenary review—is not simply warranted, but badly needed. A court applying *Jackson* to a petitioner's actual-innocence claim robs that petitioner of the opportunity to receive due consideration under *Schlup*. This Court should reaffirm what it set out to make clear in *House*: *Schlup* and *Jackson* are separate and distinct inquiries, and all that is required under *Schlup* is demonstrating that it is more likely than not that the new evidence is enough to create reasonable doubt. Wilson has met that burden here.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the court of appeals. In the alternative, the Court should set the case for full merits review and reverse the judgment below.

Respectfully submitted,

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