No. 23A-_____

IN THE

Supreme Court of the United States

JERRY S. WILSON,

Applicant,

v.

DAN CROMWELL,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jerry S. Wilson
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Pro Se

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant Jerry S. Wilson respectfully applies for a 60-day extension of time, to and including November 3, 2023, within which to file any petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The court of appeals denied Applicant's petition for panel rehearing and rehearing en banc on June 6, 2023. *See* Attachment 2. Unless extended, the time for filing any petition for a writ of certiorari will expire on September 5, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important and recurring question concerning the legal standard for showing actual innocence sufficiently to overcome procedural default, which this Court established in *Schlup v. Delo*, 513 U.S. 298 (1995). Nearly thirty years since *Schlup* was decided, confusion remains in the circuit courts concerning the proper application of the actual innocence standard and the balancing of the entire evidentiary record in view of the newly discovered evidence. As evident from the two opinions issued by the Seventh Circuit in this case and by the split-panel result, courts often misunderstand that the actual innocence standard must be analyzed in the context of the constitutional requirement that a jury may not convict a criminal defendant unless it finds guilt beyond a reasonable doubt, a misunderstanding that stems from courts misreading *Schlup* to conclude that showing a likelihood that reasonable doubt would exist in the minds of reasonable jurors is insufficient to meet the actual innocence

standard. *See, e.g.* Attachment 1 at 19–20, Attachment 3, at 19–20. Clarification by this Court is necessary to resolve this confusion.

2. Applicant Jerry Wilson is a federal inmate. Applicant was charged and convicted on one count of reckless homicide and two counts of reckless endangerment in connection with a shooting that took place in Milwaukee, Wisconsin, on May 23, 2009. At trial, the State's case centered on the testimony of four eyewitnesses: Mr. Smith-Currin, Ms. King, Ms. Ross, and Ms. Coats. Of these, Mr. Smith-Currin was the State's key witness, and he identified Applicant as the shooter on the stand. However, his testimony at trial was inconsistent in some respects with his testimony at Applicant's preliminary hearing and he did not identify Applicant as the shooter to police until a month after the shooting despite being interviewed by the police on the night of the crime. Ms. King's testimony at trial was likewise inconsistent with her prior account of events and she also did not identify Applicant as the shooter on the night of the crime. The State's other two witnesses—Ms. Ross and Ms. Coats—recanted on the stand their prior identification of Applicant to police, explaining that they were previously pressured by police into identifying Applicant. The State was forced to impeach both Ms. Ross and Ms. Coats with their prior statements to police. In sum, as the court of appeals recognized, "the accounts of the trial witnesses varied" significantly, including as to the shooter's height, clothing, and hair style. Attachment 1 at 6. Moreover, minimal physical evidence was collected at the crime scene and none linked Applicant to the shooting. The jury nonetheless convicted Applicant on all counts.

3. Several months after trial, in the fall of 2010, Applicant became aware of another potential eyewitness to the crime whom his trial counsel failed to locate and interview, although he did not learn her name until early to mid-2011. Applicant's family thereafter was able to locate the new eyewitness, Lakisha Wallace, but his postconviction counsel also failed to investigate and interview her. In 2012, Applicant finally obtained an affidavit from Ms. Wallace, who loved directly next to the crime scene and stated that instead of Applicant, Ms. Wallace saw the State's key witness—Mr. Smith-Currin—commit the crime. She also provided a motive for the shooting (something the State never provided to the jury at trial) and Mr. Smith-Currin's later statements pinning the blame on Applicant.

4. Applicant then filed a state collateral proceeding, which eventually arrived at the Wisconsin Supreme Court in 2016. In that court, the State filed a response to Applicant's collateral petition, in which it admitted that Applicant was entitled to an evidentiary hearing on the newly discovered testimony of Ms. Wallace. The State further admitted that if Ms. Wallace's testimony was found to be credible, "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." Attachment 1 at 8 (internal quotation marks omitted). And after the state trial court held an evidentiary hearing on remand, even though it denied Applicant's request for a new trial, the state trial court nonetheless concluded that Ms. Wallace's testimony "was credible and worthy of belief." Attachment 1 at 10.

5. After the state court of appeals affirmed and the Wisconsin Supreme Court declined review, Applicant filed an amended federal habeas petition,[1] alleging ineffective assistance of trial counsel and postconviction counsel, both of whom failed to investigate, locate, and interview Ms. Wallace. The district court denied Applicant's habeas petition as procedurally defaulted and held that Applicant's showing of actual innocence did not excuse that procedural default.

6. The Seventh Circuit granted a certificate of appealability and appointed appellate counsel to Applicant. Following briefing and oral argument, in a 2-1 split opinion issued on January 23, 2023, the court of appeals affirmed, purportedly applying the *Schlup* standard and concluding that Applicant did not show actual innocence sufficiently to excuse his procedural default. *See* Attachment 3. The majority explained that even with Ms. Wallace's testimony, reasonable jurors "could" have found the State's witnesses credible, "could" have ignored the inconsistencies in their testimony, and "could" have still convicted Applicant. Attachment 3 at 21–25. Judge Hamilton dissented, arguing that the majority lost sight of the fact that under *Schlup*, "hypothetical jurors would have to examine all the new and old evidence and be convinced of guilt *beyond a reasonable doubt*." Attachment 3 at 28. According to Judge Hamilton, the combination of the State's concession that it was reasonably probable that Ms. Wallace's testimony would have created reasonable doubt in the minds of reasonable jurors if found credible, the state trial court's finding that Ms. Wallace's

[1] Applicant timely filed an original habeas petition in 2013, which was stayed pending the conclusion of Applicant's state court proceedings.

testimony was "credible and worthy of belief," the lack of any physical evidence tying Applicant to the shooting, and the failure of any witness at trial to consistently identify Applicant as the shooter was more than sufficient to meet the actual innocence standard.

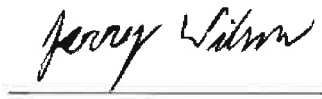
7. On March 8, 2023, Applicant filed a petition for panel rehearing and rehearing en banc, arguing that the majority misunderstood did the *Schlup* standard, which requires asking not whether reasonable jurors *could* have convicted despite the new evidence, but whether reasonable jurors *would* have convicted beyond a reasonable doubt in light of the new evidence. On June 1, 2023, the court of appeals issued an amended opinion, in which the panel majority substituted the word "would" for the word "could" in many places, but largely left its analysis the same. *See* Attachment 1. Judge Hamilton again dissented, emphasizing that in light of Ms. Wallace's credible testimony and the State's otherwise-shaky case, no reasonable juror would have convicted Applicant beyond a reasonable doubt. The court of appeals denied Applicant's petition for panel rehearing and rehearing en banc on June 6, 2023. *See* Attachment 2.

8. "For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days." Sup. Ct. R. 13.5. Good cause exists here because Applicant is currently proceeding *pro se* and additional time is necessary to allow Applicant to determine whether he will pursue a petition for certiorari on his own and/or to locate counsel who could assist him with the petition *pro bono*. Applicant is not aware of any party that would be prejudiced by a 60-day extension.

Accordingly, Applicant respectfully requests that the time to file any petition for a writ of certiorari be extended by 60 days, to and including November 3, 2023.

August 11, 2023

Respectfully submitted,



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