No. _____

IN THE

Supreme Court of the United States

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

Petitioner,

v.

FRANK E. GABLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Oregon Evidence Code Rule 804(3)(c), like Federal Rule of Evidence 804(b)(3)(B), allows admission of an out-of-court statement against penal interest only if the declarant is unavailable and the statement is supported by corroborating circumstances that clearly indicate its trustworthiness. Does that rule of evidence violate the Due Process Clause, as interpreted by *Chambers v. Mississippi*, 410 U.S. 284 (1973), when it excludes a third-party confession that is recanted by the declarant in court and inconsistent with known facts about the crime?

2. Respondent did not present a *Chambers* claim in state court, but the Ninth Circuit reached the merits under *Schlup v. Delo*, 513 U.S. 298 (1995), which allows the courts to excuse a default when a habeas petitioner presents reliable new evidence establishing actual innocence. Are recantations by trial witnesses and a recanted third-party confession sufficient to satisfy *Schlup*?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Heidi Steward, Acting Director of the Oregon Department of Corrections, and Frank Gable. Max Williams is the former Director of the Oregon Department of Corrections and was named as the respondent in the lower courts.

RELATED PROCEEDINGS

State v. Gable, No. 90C-20441, Oregon Circuit Court, Marion County. Judgment entered July 12, 1991.

State v. Gable, No. A71159, Oregon Court of Appeals. Opinion issued April 20, 1994.

State v. Gable, No. S041282, Oregon Supreme Court. Order denying review issued June 21, 1994.

Gable v. State, No. 95C12041, Oregon Circuit Court, Marion County. Judgment entered January 4, 2001.

Gable v. State, No. A113425, Oregon Court of Appeals. Opinion issued January 18, 2006.

Gable v. State, No. S053467, Oregon Supreme Court. Order denying review issued August 1, 2006.

Gable v. State, No. 95C12041, Oregon Circuit Court, Marion County. Judgment on remand entered December 12, 2006.

Gable v. State, No. A134838, Oregon Court of Appeals, Affirmed without opinion on June 8, 2011.

Gable v. State, No S059686, Oregon Supreme Court. Opinion issued June 27, 2013.

Gable v. Oregon, No. 13-6701, Supreme Court of the United States. Petition for writ of certiorari denied November 18, 2013.

*Gable v. William*s, No. 07-CV-00413-AC, United States District Court for the District of Oregon. Judgment entered April 18, 2019.

Gable v. Williams, Nos. 19-35427, 19-35436, United States Court of Appeals for the Ninth Circuit. Opinion issued September 29, 2022.

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JURISDICTION

The Ninth Circuit issued its opinion on September 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

Or. Rev. Stat. § 40.465 provides, in relevant part:

> **Rule 804. Hearsay exceptions when the declarant is unavailable.**
>
> (1) "Unavailability as a witness" includes situations in which the declarant:
>
> > (a) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of a statement; [or]
> >
> > (b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so[.]
> >
> > * * *

(3) The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

* * *

> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

STATEMENT OF THE CASE

1. Around 7 p.m. on January 17, 1989, the director of the Oregon Department of Corrections—Michael Francke—was stabbed to death in front of his office. App. 32a–36a. A custodian (Hunsaker) saw a confrontation between two men in the parking lot and described the height, clothing, and escape route of the person who fled the scene. App. 38a–39a.

After an extensive investigation, the state tried respondent for the murder. App. 32a–33a. The

prosecution presented eyewitness testimony from two of respondent's acquaintances (Swearingen and Harden) that they saw him commit the murder; a third acquaintance (Childers) testified that he saw respondent driving away from an area near the murder scene around the time of the crime. App. 39a–44a. Several witnesses testified that respondent told or implied to them that he had committed the murder. App. 48a–55a. Respondent acknowledged to the police that he might have made incriminating statements to others and might have been driving by the murder scene on the night of the crime, and he said that he was the only living person who knew what happened to Francke. App. 57a, 60a–61a, 63a, 68a. He also made statements correctly predicting what certain witnesses (including Swearingen, Harden, and Childers) were going to say, without any explanation of how he would know that unless he were guilty. App. 64a–68a.

2. At his trial, respondent sought to introduce, over the state's hearsay objection, evidence that a man named Crouse had confessed to the murder. App. 68a. Early in the highly publicized investigation, Crouse told police several inconsistent stories recounting his involvement or non-involvement in the murder. *See* App. 74a–83a. He first claimed only to have seen the altercation—which, contrary to Hunsaker's eyewitness account, he said involved four or five people. App. 74a–75a. He then told several different versions of events indicating that he was, in fact, involved in the murder. He stated that he killed Francke in exchange for $300,000 from a stranger named "Juan," App. 75a; that he killed Francke in a

"freak accident" during a fistfight, App. 76a–77a; and that he committed the murder during the course of breaking into Francke's car, App. 77a–80a. He then recanted those statements, contending that he had not killed Francke. App. 80a. Days later, Crouse recanted his recantations. App 80a–81a. Finally, after claiming that he had declined a $10,000 offer from high-ranking prison officials to kill Francke and after none of his claims could be corroborated, he denied any involvement in Francke's death and acknowledged that his prior statements had been false. App. 22a, 82a–83a; *see also* 9th Cir. E.R. 323, 1113–17.[1]

The police investigated but were unable to corroborate any of Crouse's statements. The knife that Crouse identified as the murder weapon did not match Francke's wounds and had no trace of blood on it. 9th Cir. E.R. 827–28, 837–38. The clothing that Crouse said he was wearing did not match what Hunsaker—the custodian who was an eyewitness—described and had no blood on it. 9th Cir. E.R. 825, 837. And after Crouse took the police to a field where he said that he had buried evidence, the police rented a backhoe, dug throughout the field, and found nothing. 9th Cir. E.R. 838–39.

The jury heard that Crouse had confessed, but that the police had been unable to corroborate his story and that he had eventually recanted. 9th Cir.

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[1] References to "9th Cir. E.R." and "9th Cir. S.E.R." are to the Excerpts of Record and Supplemental Excerpts of Record filed in the Ninth Circuit. Other record references are to the exhibits or transcripts filed in the district court as docket entries 33–60.

E.R. 322–23. Respondent nonetheless wanted to admit the out-of-court confessions themselves as evidence for the jury to consider. App. 113a.

Respondent contended that the out-of-court confessions were admissible under the hearsay exception for statements against penal interest, as set forth in Oregon Evidence Code Rule 804(3)(c), which applies when the declarant is "unavailable" to testify and "corroborating circumstances clearly indicate the trustworthiness of the statement." App. 113a; *see also* Or. Rev. Stat. § 40.465. Outside the jury's presence, the trial court allowed defense counsel to call Crouse to the witness stand to determine if he was available to testify. App. 113a–114a. Counsel first asked Crouse whether he killed Francke, and Crouse said no. App. 114a. Although Crouse then invoked his Fifth Amendment privilege in response to further questions, the trial court concluded that Crouse had waived his privilege against self-incrimination as to questions about whether he committed the murder by answering the first question. App. 114a–115a. The trial court therefore held that Crouse's out-of-court confessions did not qualify for admission under the rule for statements against penal interest. App. 115a. Specifically, the trial court held that—given Crouse's in-court testimony denying responsibility for the murder—Crouse was not "unavailable" to testify on that subject, and one of the conditions for use of the statement-against-interest hearsay exception was therefore unsatisfied. App. 115a.

3. The jury convicted respondent of aggravated murder, and he was sentenced to life in prison. App. 33a. On appeal he argued, among other things, that

the trial court erred in excluding Crouse's out-of-court statements under Oregon Evidence Code Rule 804(3)(c). App. 118a; *see also* Exh. 106, at 114–126. The state responded that those statements did not meet either of the rule's requirements: Because the trial court concluded that Crouse waived any privilege against self-incrimination, he was not "unavailable" to testify as to whether he committed the murder, and furthermore his statements—which contradicted one another and were at odds with the facts of the crime in key respects—were not sufficiently corroborated to be "clearly" trustworthy. Exh. 107, at 80–93. The Oregon Court of Appeals affirmed the conviction, addressing other issues but rejecting respondent's Rule 804 argument in a sentence. *State v. Gable*, 873 P.2d 351, 358 (Or. App.) ("Defendant's remaining assignments of error do not require discussion"), *rev. den.*, 877 P.2d 1202 (Or. 1994). Respondent did not make a federal constitutional claim for admission of Crouse's statements in state court. App. 118a.

4. After unsuccessfully seeking post-conviction relief in the state courts, respondent sought habeas relief in federal district court, which had jurisdiction under 28 U.S.C. § 2254. Respondent alleged (among other claims) that the state trial court violated the Due Process Clause, as interpreted by *Chambers v. Mississippi*, 410 U.S. 284 (1973), by excluding Crouse's out-of-court statements. App. 24a. Respondent admitted that he had procedurally defaulted that constitutional claim by not raising it in state court, but he argued that the federal courts should reach it under *Schlup v. Delo*, 513 U.S. 298

(1995), which allows the courts to excuse a default when the habeas petitioner presents reliable new evidence of actual innocence. App. 34a. As new evidence he cited Crouse's statements as well as recantations made in the intervening decades by several witnesses, including Swearingen, Harden, and Childers. App. 83a–93a. Swearingen had recanted before trial and testified in Gable's defense; Harden recanted after being paid to do so by a website promoting respondent's innocence; and Childers recanted but later recanted his recantation, saying that he stands by his trial testimony. App. 85a; 9th Cir. E.R. 115–25.

The district court granted habeas relief, and the Ninth Circuit affirmed. App. 3a. The Ninth Circuit concluded that respondent's new evidence satisfied *Schlup*, permitting the court to reach the merits of the procedurally defaulted *Chambers* claim. App. 13a–24a. The court concluded that the recantations were so compelling that no reasonable juror could fail to credit them and that, without their testimony and in light of Crouse's recanted confessions, the remaining evidence of respondent's guilt would be insufficient to convince any reasonable juror. App. 18a–20a, 24a.

On the merits, the Ninth Circuit concluded that *Chambers* and the Due Process Clause required admission of Crouse's out-of-court statements. App. 26a–30a. The court gave two reasons for that conclusion. First, it held that "[t]he state court's applications of the Oregon evidence rules was incomplete and almost certainly wrong," because Crouse was "unavailable" to testify as a matter of

state law. App. 27a. The Ninth Circuit therefore reasoned that "[h]is hearsay statements against interest should have been admitted under [Oregon Evidence Code] Rule 804(3)(c)." App. 27a. Second, it held that "even assuming the state court's application of its evidentiary rules was correct," the exclusion violated respondent's due process rights because "Crouse's confessions have strong indicia of reliability." App. 28a. In particular, the court concluded that Crouse's "botched burglary" story matched "non-public facts about the murder that only a participant to the crime would know." App. 22a, 28a. Although it acknowledged that Crouse made other inconsistent statements to the police that could not be corroborated, including that the crime was a murder-for-hire scheme or part of a government conspiracy, the court ultimately concluded that "Crouse's 'botched burglary' confession is far more consistent with the evidence than his recantations." App. 22a–23a.

Having concluded that Crouse's statements were credible, the Ninth Circuit held that due process required their admission over the state's hearsay objection because the evidence of respondent's guilt "pales in comparison to Crouse's detailed and accurate confessions, made under circumstances that strongly support their reliability." App. 30a. It therefore affirmed the grant of habeas relief to respondent. App. 30a.

REASONS FOR GRANTING THE PETITION

A. The merits ruling warrants summary reversal because it exceeds proper habeas relief and plainly misapplies *Chambers*.

Even if the Ninth Circuit correctly excused respondent's procedural default, the court's basic errors in adjudicating the merits of respondent's claims warrant summary reversal. The Ninth Circuit held that respondent is entitled to habeas relief because the state court misapplied a state rule of evidence and, even if it did not, Crouse's hearsay statements had strong indicia of reliability. But the former reason is not grounds for habeas relief, and the latter is simply wrong.

1. The Ninth Circuit improperly second-guessed the state courts on a matter of state evidence law.

The first reason the Ninth Circuit gave for granting relief—that the hearsay "should have been admitted under [Oregon Evidence Code] Rule 804(3)(c)," App. 27a—is not a valid basis for habeas relief. In concluding that the state courts had misapplied Oregon Evidence Code Rule 804(3)(c), "the Ninth Circuit must have assumed * * * that federal habeas relief is available for an error of state law." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). That assumption is incorrect. *Id.*

Under this Court's well-established case law, "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984); *see also Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("We have stated many times that

federal habeas corpus relief does not lie for errors of state law.") (quotation marks omitted). As this Court has explained, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). And "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam).

The state trial court excluded Crouse's hearsay statements under a state rule of evidence. Respondent challenged that ruling on appeal, and the state appellate courts affirmed the trial court's ruling. App. 71a–72a. That should be the end of the matter for purposes of federal habeas relief. This Court summarily reversed the Ninth Circuit for a similar error in *Swarthout*, and it should do so here.

2. The recanted confession was not sufficiently trustworthy to implicate the Due Process Clause.

The Ninth Circuit's alternative holding—that due process required admission of Crouse's out-of-court statements because they had "strong indicia of reliability," App. 28a—fares no better. As discussed below, there is a significant question about the extent to which due process, as explicated by *Chambers*, overrides the hearsay rule at issue here. But at a minimum, *Chambers* requires admission of hearsay statements only if the statements bear "persuasive assurances of trustworthiness." 410 U.S. at 302. In *Chambers* itself, for example, the evidence at issue

was a third party's confession to a shooting that was made under oath and corroborated by eyewitness testimony identifying the third party as the shooter. *Id.* at 287–89.

Crouse's statements here bore no such persuasive assurances of trustworthiness. Unlike the confession in *Chambers*, Crouse's statements were not sworn under oath. To the contrary, he denied committing the crime in his only sworn testimony on this subject, as noted above. App. 114a. Nor was Crouse's confession corroborated, as was the confession in *Chambers*, by eyewitness testimony identifying him as the murderer.

Beyond simply being uncorroborated, Crouse's statements about the murder contradicted each other and key facts of the crime. Over the course of nine months, Crouse offered multiple, inconsistent different stories about the murder, including stories in which he was a paid hitman and part of a government conspiracy. App. 74a–83a. Police could not corroborate any of those stories, and Crouse ultimately recanted all of them. App. 83a.

The Ninth Circuit was flatly wrong to conclude that Crouse's statements had "strong indicia of reliability" because he confessed "multiple times" and his statements were corroborated by "non-public facts about the murder that only a participant to the crime would know." App. 28a. First, the reliance on "multiple" confessions ignores the inconsistencies between them as well as the Ninth Circuit's recognition that Crouse's wild claims about murder for hire and government conspiracies were not

corroborated. App. 23a. And even the least fanciful story—the "botched burglary" story in the middle, which the Ninth Circuit deemed credible, App. 21a–22a; *see also* 9th Cir. E.R. 1028–50 (transcript of interviews)—got basic facts wrong, which is why law enforcement ultimately determined that it was not credible. For example:

- Crouse identified the knife he supposedly used. 9th Cir. E.R. 1031. It did not match Francke's wounds, and the police took it apart and found no evidence of blood. 9th Cir. E.R. 827–28, 837–38; *see also* 9th Cir. E.R. 839 (defense counsel stipulates to this inconsistency).
- Crouse identified the clothing he was wearing that night and said that he got blood on it. 9th Cir. E.R. 1031, 1034, 1036, 1041, 1045. The clothing was "totally different" from what the custodian Hunsaker, who saw the attack, described, and the police found no trace of blood on it. 9th Cir. E.R. 825, 837; *see also* 9th Cir. E.R. 839 (defense counsel stipulates to the lack of detectable blood).
- Crouse told the police that the knife was in his left hand so that he could leave his right hand free for punching. 9th Cir. E.R. 1029. The autopsy indicated that the wounds were "not consistent" with left-handed stabs. 9th Cir. E.R. 831.
- Crouse said that he stabbed Francke in the stomach and right forearm. 9th Cir. E.R. 1029–30. There were no wounds there. 9th Cir. E.R. 825–26.

- Crouse said that he used a wire to break into Francke's car. 9th Cir. E.R. 1037, 1042. The police were not able to get in that way when they tried. 9th Cir. E.R. 826–27.

The Ninth Circuit nonetheless concluded that the car-burglary story was credible because it was "corroborated by other evidence, including non-public facts about the murder that only a participant to the crime would know." App. 28a. Although the court did not explain what that corroboration was, earlier in the opinion it identified several "key details that were consistent with the evidence but not yet public, like the number and type of wounds Francke suffered." App. 21a. But here too, the Ninth Circuit was wrong on almost every significant point:

"Key detail" in opinion	**Record evidence**
"He claimed he stabbed Francke three times[]."	Crouse did not claim to have stabbed Francke three times. In an earlier statement, he said he had stabbed Francke "about five times." App. 44. Respondent stipulated at trial that the pictures from the autopsy did not substantiate Crouse's description of the number and type of wounds. 9th Cir. E.R. 839.

"Key detail" in opinion	**Record evidence**
The stabs were "in the heart, arm, and torso."	The heart wound was public knowledge. 9th Cir. E.R. 195 (news article from January 1989 saying that "[a]n autopsy report showed that he died from a stab wound to the heart"). As the panel acknowledged, Crouse said that the arm stabbing was in the right forearm but Francke's wound was in the left bicep. App. 21a. Crouse said that the other wound was to the "stomach," not the "torso." 9th Cir. E.R. 1029. Francke was not stabbed in the stomach. 9th Cir. E.R. 826.

"Key detail" in opinion	**Record evidence**
Crouse "accurately identified his other injuries: he said he slashed Francke's arms and hands, and hit Francke on the left side of his face and eyeglasses"; "Francke had tears on his hand and forearm and bruising and an abrasion on his left eye and forehead."	The hand tears were not a "typical defense type injury," Tr. 6427; they were instead consistent with punching glass. Tr. 6410–11, 6450–53. News reports had already revealed that Francke broke the glass by the office door in an effort to get back into the building after the stabbing. 9th Cir. E.R. 197. The head abrasions were likely caused by Francke's glasses when he fell over. Tr. 6406.
"Crouse also admitted he wore a tan jacket, which matches Hunsaker's description of the fleeing assailant's coat."	Crouse did not describe his jacket as tan during the "botched burglary" story; he mentioned both a green jacket and a white jacket. 9th Cir. E.R. 1031. Hunsaker's description was public information. 9th Cir. E.R. 194 (front-page article from January 1989 saying that "[t]he man was described as wearing dark pants and a light-colored coat").

The Ninth Circuit also suggested that Crouse's confessions were credible because self-inculpatory statements are inherently reliable, citing Federal Rule of Evidence 804(b)(3). App. 28a. But the federal rule, like the state rule of evidence at issue here, requires self-inculpatory hearsay statements offered in a criminal case to be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B). That requirement reflects that self-inculpatory statements are *not* inherently reliable in the absence of corroboration. *See* Fed. R. Evid. 804 advisory committee's note (explaining that the corroboration requirement was included because of concerns about "fabrication"). As one court noted, "[t]he need for corroborating evidence is especially apparent in high-profile cases, as it is not uncommon—for a variety of reasons—for individuals to make statements claiming responsibility for notorious crimes they did not commit." *People v. Thibodeau*, 106 N.E.3d 1145, 1149 n.2 (N.Y. 2018) (noting that "200 persons confessed to kidnapping the Lindbergh baby"). In this case, for example, the record suggests that at least eight people confessed to the crime at one time or another. 9th Cir. E.R. 321. Moreover, Crouse in particular may have had a penchant for incriminating himself falsely: In one of the interviews in this case, Crouse also claimed to have killed his sister, 9th Cir. E.R. 976, but there is no evidence that he did so.

The Ninth Circuit could find that Crouse's hearsay statements had "strong indicia of reliability," App. 28a, only by taking a highly selective and distorted view of the record. Whatever due process might

require if the statements *did* have those strong indicia of reliability, the statements did not come close to satisfying that standard.

3. Summary reversal is warranted.

This Court frequently grants summary reversal when a court of appeals plainly errs in granting habeas relief. Habeas proceedings "intrude[] on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Because of that intrusion, erroneous grants of habeas relief particularly warrant this Court's attention even in cases that might not otherwise present a legal issue that merits review. *See, e.g.*, Stephen M. Shapiro *et al.*, *Supreme Court Practice* 5–46 (11th ed. 2019) (noting that "most of the cases in recent years [in which the Court has summarily reversed] have involved the grant of habeas corpus relief to state prisoners contrary to clearly settled precedent, an area raising significant federal concerns").

The Court has summarily reversed grants of habeas relief in dozens of cases in recent years, many of them from the Ninth Circuit. *See, e.g.*, *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam); *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (per curiam); *Kernan v. Cuero*, 138 S. Ct. 4 (2017) (per curiam); *Lopez v. Smith*, 574 U.S. 1 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam); *Cavazos v. Smith*, 565 U.S. 1 (2011) (per curiam); *Felkner v. Jackson*, 562 U.S. 594 (2011) (per curiam); *Swarthout*, 562 U.S. 216; *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Middleton v. McNeil*, 541

U.S. 433 (2004) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002) (per curiam).

To be sure, most of those cases involved the court of appeals' misapplication of the standard in 28 U.S.C. § 2254(d), which forecloses habeas relief unless the state court's adjudication of a claim was contrary to or an unreasonable application of this Court's precedent. That standard is not at issue here because respondent did not present his federal constitutional claim to the state courts, so those courts did not have an opportunity to adjudicate the claim. But the reasons for summary reversal apply equally here: The Ninth Circuit's clear misapplication of the law, if not corrected by this Court, will result in the unjustified reversal of a serious conviction.

That error warrants this Court's attention and is appropriate for summary reversal. Summary reversal is especially warranted because it will be difficult, if not impossible, to retry this case more than three decades after the crime. *Cf. Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (summarily reversing an award of habeas relief in a capital case because "[a]ny retrial here would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution") (emphasis in original).

B. Alternatively, this case presents issues that warrant plenary review.

If the Court does not summarily reverse, it should grant the petition and set the case for argument. Both

the Ninth Circuit's understanding of *Chambers* and its application of *Schlup* warrant further review by this Court.

1. The *Chambers* ruling implicates the constitutionality of the unavailability requirement in hearsay rules.

a. State and federal hearsay rules typically require unavailability for statements against interest.

State and federal hearsay rules typically separate the exceptions into two categories: those that require that the declarant be "unavailable" to testify and those that are admissible even if the declarant is available. *See, e.g.*, Fed. R. Evid. 803 (exceptions that apply regardless of availability); Fed. R. Evid. 804 (exceptions that require unavailability). As the advisory committee on the proposed federal rules explained, the distinction reflects a difference in quality of the evidence. Fed. R. Evid. 804 advisory committee's note. Some hearsay statements possess qualities that provide such strong guarantees of trustworthiness that they are equal in value to live testimony. *Id.* Other hearsay statements are "admittedly * * * not equal in quality to testimony of the declarant on the stand" but nonetheless have some indicia of trustworthiness. *Id.* For those statements, the unavailability requirement reflects the preference for sworn testimony if possible: "[T]estimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant." *Id.*

Under the federal rules, like the state rules at issue here, statements against interest fall into the second category: statements that are not of equal value to sworn testimony but are preferable to hearing nothing at all from the declarant. Fed. R. Evid. 804(b)(3); Or. Rev. Stat. § 40.465(3)(c). That means that when the declarant is available to testify about the matter, out-of-court statements against interest are not admissible—unless, of course, they fall within some other hearsay exception or are admitted for a purpose other than proving the truth of the matter asserted. *See, e.g.*, Fed. R. Evid. 801(c)(2) (defining hearsay in part as a statement offered to prove the truth of the matter asserted).

This case offers a textbook example of how the unavailability requirement affects the admissibility of a statement against interest. Respondent wanted to introduce out-of-court statements by Crouse that were against his penal interest because they implicated him in various ways in the Francke murder. Apparently expecting that Crouse would invoke his Fifth Amendment privilege against self-incrimination, respondent called him to the stand outside the jury's presence to ask him if he committed the murder. Had Crouse refused to answer that question, he likely would have been deemed unavailable under the state rule of evidence: Either the state court would have allowed him not to answer and he would have been "exempted by ruling of the court on the ground of privilege," or the court would have ordered him to answer but Crouse would have "[p]ersist[ed] in refusing to testify concerning the

subject matter of a statement." Or. Rev. Stat. § 40.465(1)(a)–(b).

But Crouse instead answered the question, testifying under oath that he did *not* kill Francke. App. 114a. Although he then refused to answer other questions, the trial court ruled that Crouse had waived his privilege against self-incrimination about the murder because he voluntarily testified as to that issue *before* he invoked. App. 115a. The court made it clear that if respondent chose to call him before the jury and Crouse tried to invoke his privilege, the court "would tell him that he cannot do that. I would tell him to answer the question." App. 115a. Because Crouse was neither exempted by court ruling from testifying nor persisted in refusing to testify after being ordered to do so, he was not unavailable and the out-of-court statements against interest were not admissible.

The case would have played out exactly the same way under the federal rules. As noted above, Rule 804(b)(3) allows hearsay statements against interest only if the declarant is unavailable, and Rule 804(a)(1)–(2) makes a declarant unavailable in these circumstances only if "the court rules that a privilege applies" or the person "refuses to testify about the subject matter despite a court order to do so." The state and federal rules reflect the same preference for in-court testimony over out-of-court hearsay when the two are not of equal quality. And when, as here, the declarant is available to testify, the out-of-court hearsay is not admissible to prove the truth of the matter asserted.

b. This Court should decide whether *Chambers v. Mississippi* invalidates the unavailability requirement.

The Ninth Circuit nonetheless held that the exclusion of Crouse's out-of-court statements violated respondent's right to due process under *Chambers*, because the statements bore sufficiently strong indicia of reliability. App. 30a. In other words, it held that *Chambers* requires admission of statements against interest that bear strong indicia of reliability even if, as here, the declarant is available to testify. The upshot is that the rule's unavailability requirement is unconstitutional in those circumstances.

That is an extraordinary conclusion. This Court has made it clear that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). And even when those rules prevent a criminal defendant from presenting relevant evidence, they "do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (quotation marks omitted). Only "rarely" has this Court found a rule of evidence to be so arbitrary or disproportionate as to unconstitutionally infringe on a defendant's rights. *Nevada*, 569 U.S. at 509.

Chambers was one of those rare cases. The state court in that case prevented the defendant from introducing evidence of an out-of-court confession to

the crime by a third party on the basis of two evidentiary rules, both of which this Court found problematic. First, the state court invoked "a Mississippi common-law rule that a party may not impeach his own witness." 410 U.S. at 295. That rule was arbitrary rather than reasonable because it was a "remnant of primitive English trial practice" that bore "little present relationship to the realities of the criminal process." *Id.* at 296. Indeed, the state did not seek to defend or explain the underlying rationale of that rule in this Court. *Id.* at 297. Second, although Mississippi law recognized a hearsay exception for statements against the declarant's interest, it limited that exception to statements against *pecuniary* interest and flatly banned statements against the declarant's *penal* interest. *Id.* at 299. This Court found that distinction "mechanistic[]" when applied to evidence that "was well within the basic rationale of the exception for declarations against interest." *Id.* at 302.

Chambers itself emphasized that in reaching that conclusion, it was "establish[ing] no new principles of constitutional law." *Id.* And *Chambers* has been characterized as "an exercise in highly case-specific error correction," one so "fact-intensive" that it is difficult to discern any holding from the case. *Montana v. Egelhoff*, 518 U.S. 37, 52–53 (1996) (plurality op.).

Yet some lower courts have refused to take this Court at its word and instead read *Chambers* as standing for a broad proposition that due process requires the admission of reliable hearsay evidence without regard to the declarant's availability. The

Oregon Supreme Court, for example, concluded that "the Due Process Clause, as interpreted in *Chambers* and similar cases, required the trial court to disregard the 'unavailability' requirement of [Oregon Evidence Code] 804(3)(c)" when a defendant sought to introduce an "otherwise trustworthy" out-of-court statement against penal interest. *State v. Cazares-Mendez*, 256 P.3d 104, 119 (Or. 2011). The Ninth Circuit's decision here is to the same effect.

That approach is in tension not only with how this Court has characterized the holding of *Chambers* but also with how it has conducted the due process analysis in cases since *Chambers*. In those cases, this Court has focused on whether the rule of evidence itself is rational, not whether it has resulted in exclusion of trustworthy evidence in a particular case. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (explaining that the Constitution "prohibits the exclusion of defense evidence under *rules* that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote") (emphasis added); *Rock v. Arkansas*, 483 U.S. 44, 56 (1987) (examining "whether the interests served by a *rule* justify the limitation imposed on the defendant's constitutional right to testify") (emphasis added).

The question whether due process overrides the unavailability requirement deserves this Court's attention. It implicates the constitutionality of the federal and state rules of evidence that require unavailability for certain categories of hearsay, including statements against interest. And it offers the Court an opportunity to clarify whether the

Chambers analysis focuses on the rule itself or on its application in a particular case.

This case presents an appropriate vehicle to resolve the question. If this Court agrees that the proper analysis focuses on the rule itself, then it should conclude that the well-established unavailability requirement—which reflects the preference for live testimony over hearsay when the two are not of equal value—withstands constitutional scrutiny. If so, the Ninth Circuit erred in concluding that due process required admission of Crouse's statements against interest even though he had waived his self-incrimination privilege and was available to testify.

2. The expansive application of *Schlup* by the Ninth Circuit warrants review.

This case also presents an appropriate vehicle to resolve the second question presented, which concerns the scope of this Court's ruling in *Schlup*. Because respondent did not present his due process claim to the state courts, the Ninth Circuit could not reach the merits unless it first found a basis to excuse the procedural default. *Schlup*, 513 U.S. at 314–15. The Ninth Circuit held that this case fell within the "actual innocence" exception identified in *Schlup*. App. 24a. *Schlup* requires the habeas petitioner to support the claim of innocence with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. The habeas petitioner then must show that, in light of that new evidence, "'*no* juror, acting

reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (emphasis added; quoting *Schlup*, 513 U.S. at 329). This Court has cautioned that "tenable actual-innocence gateway pleas are rare." *Id.*; *see also House v. Bell*, 547 U.S. 518, 538 (2006) (emphasizing that the *Schlup* standard is "demanding" and seldom met).

The Ninth Circuit's ruling here presents arguably the most expansive application of *Schlup* by any federal court of appeals in a published decision, both in its assessment of the new evidence as sufficiently reliable and in its no-reasonable-juror analysis. Both aspects warrant this Court's review.

a. The decision below is in tension with other appellate decisions about witness recantations.

To trigger the *Schlup* analysis, the habeas petition must first proffer reliable new evidence of innocence. *Schlup* itself identified three types of evidence that would pass the threshold of reliability: exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence. 513 U.S. at 324. An example of sufficiently "dramatic new evidence" of that sort can be found in the only case in which this Court concluded that the *Schlup* standard was satisfied: DNA evidence establishing that semen found on a murder victim came from someone other than the habeas petitioner in that case. *See House*, 547 U.S. at 529–30, 540–41.

Respondent presented nothing of the sort here: no DNA or other physical evidence excluding him or

tying a different person to the murder, and no trustworthy eyewitness accounts identifying someone else as the murderer. Instead, his new evidence—other than the Crouse hearsay statements, whose unreliability has already been discussed above—was a series of recantations from trial witnesses who had testified either that they saw respondent commit the crime or that he had made incriminating statements to them, together with allegations that those witnesses had been subjected to irregular or coercive interrogation tactics such as repeated polygraphing. *See* App. 83a–94a (summarizing that evidence)).

Although the Ninth Circuit found those recantations sufficiently reliable to satisfy *Schlup*, that ruling is in considerable tension with how other federal courts of appeals treat recantation evidence. Those courts have identified two problems with relying on recantation evidence in this context: first, recantations may undermine the credibility of the evidence of guilt but generally do not affirmatively establish innocence; and second, recantations—especially by witnesses who have little to lose by recanting—are inherently untrustworthy.

A good example of the first problem is *Hyman v. Brown*, 927 F.3d 639 (2d Cir. 2019), which involved a shootout in an apartment building. A key eyewitness from the original trial testified under oath in the habeas proceedings that she had lied and did not witness the shootout; her recantation was supported by testimony from other witnesses. *Id.* at 651–52. The Second Circuit accepted the district court's finding that the recantation was credible. *Id.* at 662. But it explained that even if the witness did not see the

shooting, that did not mean that the habeas petitioner (Hyman) was actually innocent. Evidence that the witness "lied in identifying Hyman as a participant" is "quite different" from affirmative evidence that some other identified person committed the crime. *Id.* at 665. The witness's "failure to see the shootout means she cannot inculpate petitioner (or anyone else), but neither can she exonerate him. She simply has no eyewitness evidence bearing on either petitioner's guilt or his innocence." *Id.* A recantation of that sort might raise questions "as to the sufficiency of the prosecution's case," but it does not indicate "likely innocence, much less do so compellingly." *Id.* Although the court did not "foreclose the possibility that, in some circumstances, a recanted identification based on an admitted lack of knowledge" might satisfy *Schlup*, *id.* at 665–66, its analysis of the value of recantation evidence is difficult to square with the Ninth Circuit's reasoning here.

More generally, the other federal courts of appeals have uniformly recognized that recantations generally should be viewed with the "utmost suspicion." *United States v. Kearney*, 682 F.2d 214, 219 (D.C. Cir. 1982) (citing decisions from the Second, Fourth, Fifth, Eighth, and Tenth Circuits); *see also Dobbert v. Wainwright*, 468 U.S. 1231, 1233–34 (1984) (Brennan, J., dissenting from denial of certiorari) (noting that "[r]ecantation testimony is properly viewed with great suspicion" because, among other reasons, it "upsets society's interest in the finality of convictions" and "is very often unreliable and given for suspect motives"). Recantations are

particularly suspect when—as here—the witnesses have "nothing to lose by recanting." *Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007).

This case presents a good vehicle for the Court to explain how recantation evidence should be treated in the *Schlup* analysis. The recantations here may cast doubt on the credibility of witnesses who testified at respondent's original trial and either identified him as the murderer or reported incriminating statements that he made to them. But the recantations are not themselves affirmative evidence of innocence. That is, none of the recantations are inconsistent with respondent's guilt; even if the recanting witnesses had lied, that would not show that respondent did *not* commit the murder. If, as the Second Circuit suggested in *Hyman*, such recantations are not sufficient evidence of actual innocence to trigger the *Schlup* inquiry, then the Ninth Circuit erred here.

This Court's explanation of how to view recantation evidence likely will affect many cases. As one court has noted, "attempts are numerous by convicted defendants to overturn their criminal convictions by presenting affidavits of recanting witnesses." *Haouari*, 510 F.3d at 353 (cleaned up). The frequency with which the issue comes up, and the tension between the Ninth Circuit's decision here and the Second Circuit's decision in *Hyman*, justifies plenary review.

b. The Ninth Circuit erred in finding the *Schlup* standard met.

Even if respondent's new evidence were sufficient to trigger the *Schlup* inquiry, the Ninth Circuit's

questionable no-reasonable-juror analysis would warrant further review. Under *Schlup*, respondent is excused from his procedural default only if "it is more likely than not that *no* reasonable juror would have convicted him." 513 U.S. at 327 (emphasis added). Respondent's showing here does not meet that standard, for two reasons.

First, not all reasonable jurors would find the recantations credible. Swearingen—who testified to the grand jury that she saw respondent commit the murder—recanted before trial and testified on respondent's behalf, saying that she had lied to the grand jury. App. 41a–43a. The jury heard her recantation and apparently chose not to credit it. And Harden—the other eyewitness who testified that he saw respondent commit the murder—recanted only after being paid by a website promoting respondent's innocence. 9th Cir. E.R. 115–16, 121. In any event, he too was heavily impeached at trial, and the jury apparently believed him anyway. *See, e.g.*, 9th Cir. E.R. 610–16, 627–29, 637–43, 649–51, 659–61, 671–73, 676–80, 688–90, 699–701.

Some of the other recanting witnesses later recanted their recantations, a fact that the Ninth Circuit omitted from its analysis. For example, the Ninth Circuit cited two witnesses—Jayne and Walker—whose recantations it said gave respondent a "loose alibi" for the evening of the murder. App. 15a. But Jayne, respondent's former wife whose recantation was an affidavit provided to respondent's legal team saying that she now recalled respondent being at home until 8 or 9 on the evening of the murder, 9th Cir. E.R. 220, later provided another

affidavit reiterating that she testified truthfully at trial when the events were fresher in her mind. 9th Cir. E.R. 127. And Walker, who in 1993 told respondent's investigator that after the trial "all of a sudden, it just came to me" that he had seen respondent at home the evening of the murder, 9th Cir. E.R. 282–83, twelve years later told a newspaper reporter that his recantation "wasn't true" and that he had been a heavy methamphetamine user in 1993. Exh. 391, at 14. A decade later, Walker flip-flopped yet again. 9th Cir. S.E.R. 249–53. But at a minimum, his conflicting statements over the years underscore why reasonable jurors could reach different conclusions about which version of his story to credit.

The Ninth Circuit offered reasons why *some* jurors might nonetheless credit the recantations, but none was so strong that *all* reasonable jurors would do so. Although recanting witnesses claimed that their original testimony was the product of "investigative misconduct" related to polygraphing, App. 17a, Swearingen and Harden both implicated respondent *before* they took any polygraphs. *Compare* 9th Cir. E.R. 730–31, 733–36, 748 (Swearingen's statements in October 1989), *with* 9th Cir. E.R. 190–93 (Swearingen's first police polygraph in November 1989); *compare* 9th Cir. E.R. 151–52 (reporting Harden's statements made on January 18, 1990), *with* 9th Cir. E.R. 188–89 (Harden's polygraph on January 20, 1990). Their accounts were corroborated by respondent's own statements to police that Harden and Swearingen likely would be able to place him at the scene of the murder, before the police told him about either of their statements. App. 65a–

68a. The accounts are not undercut by the absence of testimony from Hunsaker—the custodian—that mentioned other bystanders, App. 39a, because it would have been dark at 7 p.m. in January. And Childers—who testified that he saw respondent driving away from the murder scene and that respondent later confessed to him—is not "now unsure" whether his trial testimony was accurate. App. 19a. In the intervening years he suffered a seizure and has memory loss, but although he no longer can remember all the details he stands by his trial testimony and specifically remembers respondent explaining why he had committed the murder. 9th Cir. E.R. 123–25. Respondent himself corroborated Childers's statement that he saw respondent driving away from the murder scene that night by correctly predicting that Childers was the witness who could place him at the scene. App. 67a.

Many of the witnesses in this case told inconsistent stories and had other credibility problems. Recantations (and then recantations of recantations) may add to the inconsistencies, but they do not mean that *no* reasonable juror would credit their trial testimony, especially when the jurors in respondent's criminal trial did not view the proliferation of inconsistent stories as creating a reasonable doubt regarding respondent's guilt.

Second, even if all reasonable jurors completely discounted all testimony from the recanting witnesses, some reasonable jurors still likely would find respondent guilty of murder. The most important aspect of the remaining evidence is that respondent repeatedly told others that he had committed the

charged murder. Indeed, he admitted to police that he told his wife that he had killed Francke, although he characterized that conversation as "joking around," and that he "might" have made statements to other friends that could be understood as claiming responsibility for the murder. App. 57a, 63a. During police interviews, respondent made statements implicitly admitting that he had been running away from the scene of the murder near the time of the murder by identifying—without prompting—the witnesses who could place him there. App. 65a–68a. Further, respondent's other statements indicated a consciousness of guilt. For example, at one point, when asked directly whether he killed Francke, respondent did not deny it or even remain silent. Rather, he answered: "maybe so, maybe not." App. 68a. And when an officer responded by asking if respondent intended to "take this to the grave," he answered, "You bet I am." App. 68a. On another occasion, respondent claimed that he and God were the only ones with knowledge of who killed Francke. App. 60a–61a. That statement suggests that, aside from Francke, respondent was the only person present at the murder.

Other inculpatory evidence also remains unaffected by the recantations. As the Ninth Circuit acknowledged, one non-recanting witness (Perkins) testified that respondent told her the morning after the murder that he "fucked up big time" and that she would "read about it in the papers." App. 6a, 19a (cleaned up). The Ninth Circuit did not mention Warilla, who recounted respondent's admission to having "stabbed a guy in a parking lot" while

"breaking in the guy's car." 9th Cir. E.R. 931–34. Warilla did not testify at trial, but there is no evidence that he ever recanted. And although the Ninth Circuit thought that the testimony from Jayne (respondent's former wife) that he was not home the night of the murder could now be impeached by more recent statements she made, App. 15a–16a, she never recanted her statements that respondent told her—not in a joking manner—that he was involved in the murder and "stuck the guy." 9th Cir. E.R. 128–29.

As with its assessment of the reliability of Crouse's statements, the Ninth Circuit's *Schlup* analysis reflects a selective view of the record that ignores the countervailing evidence. Although any *Schlup* ruling is necessarily fact-intensive, this Court has the opportunity here to clarify the no-reasonable-juror analysis in a manner that will be helpful to the lower federal courts in resolving future cases. The Ninth Circuit's observation that "[t]he record in successful *Schlup* claims is rarely cut and dry," App. 11a, reflects a fundamental misunderstanding of the standard, which requires a record so cut and dry that *no* reasonable juror would vote for guilt. *Schlup*, 513 U.S. at 329.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse the Ninth Circuit. Alternatively, the Court should grant the petition and set the case for oral argument.

Respectfully submitted,

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