Case Nos. 19-35427 and 19-35436

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK E. GABLE, Petitioner-Appellee, v. MAX WILLIAMS, Respondent-Appellant.	D.C. No. 07-CV-00413-AC

BRIEF OF *AMICUS CURIAE* FORENSIC JUSTICE PROJECT IN SUPPORT OF AFFIRMANCE FOR APPELLEE GABLE

Appeal from the United States District Court
for the District of Oregon
The Honorable John V. Acosta, Magistrate Judge

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I. STATEMENT OF AMICUS

The Forensic Justice Project is a nonprofit dedicated to preventing and correcting wrongful convictions related to forensics. FJP seeks to develop the intersection between science and law. FJP files pursuant to FRAP 29. All parties have consented to submitting this brief.

FJP appears to ask the court to recognize the context in which wrongful convictions may arise, especially when the State fails to develop objective forensic evidence and, instead, obtains a conviction by relying on eyewitness accounts produced using unreliable interrogation tactics.

No party, party's counsel, or person other than FJP's counsel, (1) authored the brief in whole or part or (2) contributed money that was intended to fund preparing or submitting the brief.

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II. SUMMARY

The standard in post-conviction to prove "actual innocence" under *Schlup v. Delo* is measured in relation to the State's burden to prove guilt beyond a reasonable doubt. The "beyond a reasonable doubt" standard is the highest that the law requires, and anything short of that ***is*** innocence.

No court has ever delineated the categories of evidence upon which the State can rely to prove guilt beyond a reasonable doubt. Yet, the State, here, proposes a post-conviction rule to limit the evidence upon which a petitioner can rely to prove the opposite—that no reasonable juror could find guilt beyond a reasonable doubt. The State's proposed rule is anathema to our system of justice.

The *Schlup* standard is not limited to evidence that is more rigorous than that on which the State relied to convict. The inquiry, instead, focuses on new evidence of innocence—whatever it may be—as compared with evidence of guilt—whatever it may be—to determine how a reasonable jury would find on a more likely than not basis.

Credible recantation evidence can be sufficient to prove actual innocence. To determine whether the recantation is reliable, the court should consider the context of the original statement as well as the context of the recantation. Known causes of wrongful conviction, like unreliable and coercive interrogation tactics, can provide context to explain why a witness offered false testimony at trial and

why a reasonable juror applying the reasonable doubt standard would find a subsequent recantation more reliable.

III. ARGUMENT

A. The burden to prove "actual innocence" must be understood in light of the State's burden to prove guilt in the first instance.

The district court found that Mr. Gable satisfied his burden to prove "actual innocence" under *Schlup*. On appeal, the State argues that the *Schlup* burden can be satisfied only with "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[1] The State is wrong.

The State's proposed rule would require the petitioner to satisfy a standard that is higher than the standard to prove guilt in the first instance. As discussed below, the *Schlup* standard does not require evidence that is more rigorous than that used to prove guilt beyond a reasonable doubt. A *Schlup* claim is not based on affirmative proof that the petitioner did not commit the crime; it is based on the absence of guilt beyond a reasonable doubt.[2] A person is "actually innocent" under *Schlup* if the court finds that it is more likely than not that no reasonable juror

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[1] State Opening 16.

[2] *Schlup v. Delo*, 513 U.S. 298, 328 (1995).

could find guilt beyond a reasonable doubt.[3] Innocence under our justice system is anything less than guilt beyond a reasonable doubt.[4]

Because the standard to prove "actual innocence" under *Schlup* is measured by whether a reasonable juror would find guilt beyond a reasonable doubt, it is necessary to understand what it means to prove guilt "beyond a reasonable doubt."

1. The standard to prove guilt beyond a reasonable doubt is the highest standard that the law requires.

The "beyond a reasonable doubt" standard is the highest standard under the law because the State must overcome a strong presumption in favor of innocence. Anything less than guilt beyond a reasonable doubt ***is*** innocence.

The law presumes that persons charged with crime are innocent until proven guilty by competent evidence.[5] The standard to prove guilt beyond a reasonable doubt arises out of the presumption of innocence.[6]

The Supreme Court recognizes that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of

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[3] *Id.*

[4] *See Doe v. Menefee*, 391 F.3d 147, 163 (2nd Cir. 2004).

[5] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[6] *In re Winship*, 397 U.S. 358, 363 (1970).

our criminal law."[7]

The presumption of innocence and the State's burden of proof beyond a reasonable doubt are logically similar, but communicate distinct meanings that together convey the highest regard for the prosecution's duty to produce evidence sufficient to take away a person's liberty[8]:

> [T]he rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, ***nothing but the evidence***, *i.e.*, no surmises based on the present situation of the accused.[9]

The State must produce affirmative evidence of guilt.[10] This was not always the case. Before the rise of jury trials, the accused was required to prove innocence.[11] Proof was obtained through torture, trials by battle, and "ordeals that involved significant physical challenges that determined the accused's factual guilt or factual innocence."[12] A combatant's success in trial by battle, or their survival

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[7] *Coffin*, 156 U.S. at 453.

[8] *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

[9] *Id.* at 484 (emphasis in original).

[10] *Id.* at 483 n.12.

[11] William S. Laufer, *The Rhetoric of Innocence,* 70 WASH. L. REV. 329, 330 (1995).

[12] *Id*.

free of scars from an "ordeal" of hot iron, boiling water, and cursed morsel, signaled that the accused was "factually innocent."[13]

Through the development of the jury trial, convictions were no longer based on irrational proofs. Modern standards emerged where burdens of production and persuasion began to shift from the accused to accuser.[14] Jurists, tracing modes of proof to God's judgment of Adam and Eve in Paradise, recognized the "logic of God's judgement of Adam: God could not condemn Adam without a trial because even God must presume that Adam was innocent until proven guilty."[15]

The "presumption of innocence" formally entered American jurisprudence in 1895 in *Coffin v. United States*, a Supreme Court case.[16] The Court addressed the failure of the lower court to instruct on the presumption of innocence by explaining the significance of the presumption in our justice system and concluded that it was error to refuse the instruction.[17] The Court has gone on to recognize that, although the presumption of innocence is not articulated in the Constitution, it is "a basic component of a fair trial."[18]

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[13] *Id.* at 330-31.

[14] *Id.* at 331.

[15] *Id.* at 115.

[16] *Coffin*, 156 U.S. at 453.

[17] *Id.* at 459.

[18] *Estelle v. Williams,* 425 U.S. 501, 503 (1976).

The "beyond a reasonable doubt" standard "provides concrete substance for the presumption of innocence."[19] The Court recognizes that "the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"[20] The Court further acknowledges that "[i]t is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty."[21]

The Oregon Supreme Court has commented that the reasonable doubt standard "rank[s] high among those distinctions that are commonly boasted to place our system of justice above those of supposedly less enlightened nations, including some in which a defendant perhaps may be haled before a court, confronted with some modicum of incriminating evidence, and invited to persuade the tribunal that he [or she] has not committed a crime."[22]

Although courts and scholars disagree on the precise language that should be used to define the "beyond a reasonable doubt" standard, all agree that the standard

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[19] *In re Winship*, 397 U.S. at 363.

[20] *Id.* at 364.

[21] *Id.*

[22] *State v. Williams*, 828 P.2d 1006, 1025 (1992) (Unis, J., dissenting).

is the highest that the law recognizes. Some courts have defined it to require "moral certainty," a phrase that conveys "the highest degree of certitude" short of "absolute certainty."[23] Other courts have said it is "proof that precludes every reasonable hypothesis except guilt…[and] is inconsistent with any other reasonable conclusion."[24] The Supreme Court's early articulation requires "a subjective state of near certitude of the guilt of the accused."[25]

The presumption and the burden of proof describe "the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt."[26] As discussed below, the post-conviction standard to prove "actual innocence" under *Schlup* is measured in the context of whether a reasonable juror would find guilt beyond a reasonable doubt.

2. The standard to prove "actual innocence" is measured in relation to the standard to prove guilt beyond a reasonable doubt.

The *Schlup* Court established a procedural claim of "actual innocence" as a gateway to consider an otherwise barred constitutional claim.[27] A *Schlup* petitioner must establish that "it is more likely than not that no reasonable juror

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[23] *Victor v. Nebraska*, 511 U.S. 1, 12 (1994).

[24] *State v. Billie*, 2 A.3d 1034, 1044 n.13 (Conn. App. Ct. 2010).

[25] *In re Winship*, 397 U.S. at 364.

[26] *Taylor*, 436 U.S. at 483 n.12.

[27] *Schlup*, 513 U.S. at 315 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

would have convicted him in the light of the new evidence."[28] The inquiry requires the court to "consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'"[29] It is based on the "total record" that the court "must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'"[30]

The purpose of the "actual innocence" gateway is to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[31] The gateway recognizes that it would be a "fundamental miscarriage of justice" to convict one who is actually innocent of the crime.[32]

Prior to *Schlup*, the Court referenced the actual innocence standard in *Murray v. Carrier*[33] and *Sawyer v. Whitley*.[34] The *Carrier* standard required a petitioner to show that a violation "***probably*** resulted in the conviction of one who

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[28] *Id.* at 327.

[29] *House v. Bell*, 547 U.S. 518, 538 (2006).

[30] *Id.* (citing *Schlup*, 513 U.S. at 329).

[31] *Schlup*, 513 U.S. at 324.

[32] *Id.*

[33] 477 U.S. 478, 496 (1986).

[34] 505 U.S. 333, 336 (1992).

is actually innocent."[35] The *Sawyer* standard was higher, requiring proof "by clear and convincing evidence."[36]

The *Schlup* Court discussed the purpose of the actual innocence gateway and adopted the more lenient *Carrier* standard, rejecting its own more stringent precedent in *Sawyer*.[37] The Court determined that the more lenient standard is appropriate because justice merits extra protection.[38] A *Schlup* claim is proved on a "more likely than not" basis, equating to a "51% or greater" certainty standard.[39]

The phrase "actual innocence" is confusing because it suggests that the standard requires affirmative proof of innocence.[40] The State, here, advocates for definitive proof by narrowly construing the types of evidence necessary to meet the standard.[41] But the Supreme Court holds that the *Schlup* standard "does not require absolute certainty about the petitioner's guilt or innocence."[42] A *Schlup* petitioner

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[35] *Carrier*, 477 U.S. at 496 (emphasis added).

[36] *Sawyer*, 505 U.S. at 336.

[37] *Schlup*, 513 U.S. at 324.

[38] *Id.* at 326-27.

[39] *Smith v. Baldwin*¸ 466 F.3d 805, 822 (9th Cir. 2006), *rev'd en banc* 510 F.3d 1127 (2007).

[40] *Carriger v. Stewart*, 132 F.3d 463, 477 (9th Cir. 1997).

[41] State Opening 16.

[42] *House*, 547 U.S. at 538.

is not required to eliminate all inference of guilt.[43] He is required, instead, to show the likely effect of new evidence on reasonable jurors applying the reasonable doubt standard.[44]

A *Schlup* claim of actual innocence is not the same as a claim of actual innocence under *Herrera*,[45] another Supreme Court case that addressed a free-standing claim of innocence. A *Herrera* claim is substantive because the petitioner seeks relief on the basis of his innocence alone. A *Schlup* claim, to the contrary, is procedural because the petitioner seeks recognition of his innocence in order to address a claim of constitutional error at trial.

Courts recognize that "[u]se of the term 'actual innocence' in both cases has blurred the meaning of the phrase."[46] Where a *Herrera* petitioner must provide "more convincing evidence" to prove that "he did not commit the crime," a *Schlup* petitioner "need only demonstrate that a constitutional violation at trial has probably resulted in the conviction of an individual whom no reasonable juror would have found guilty beyond a reasonable doubt[.]"[47]

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[43] *Id.* at 553-54.

[44] *Id.* at 539.

[45] 506 U.S. at 393.

[46] *State v. Pope*, 2003 MT 330, *48, 80 P.3d 1232 (2003).

[47] *Id.*

To be clear, *Schlup* still requires a finding of "innocence." But, the standard recognizes that the system does not provide a mechanism to definitively prove innocence before a jury.[48] The system presumes innocence.[49] Courts, therefore, recognize that "[b]ecause our legal system has no means of defining innocence independently of the finding of reasonable doubt…, the [*Schlup*] analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence."[50] Indeed, the *Schlup* Court chose the lower *Carrier* standard precisely because that standard "reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt."[51]

Schlup does not require a petitioner to adduce evidence to definitively prove his innocence because that is not the question. The question is: What would be the effect of the new evidence on reasonable jurors applying the reasonable doubt standard?[52] The question requires the court to consider the likely conduct of reasonable jurors who are faced with the task of determining whether the State has proved guilt beyond a reasonable doubt. The question for those jurors is not: Is

[48] *See Schlup*, 513 U.S. at 328.

[49] *Coffin*, 156 U.S. at 453.

[50] *Menefee*, 391 F.3d at 163 (citing *Schlup*, 513 U.S. at 328).

[51] *Schlup*, 513 U.S. at 328.

[52] *House*, 547 U.S. at 538.

the defendant innocent? The question for those jurors is: Has the State proved guilt beyond a reasonable doubt?

Although a habeas petitioner comes before the court without the benefit of the presumption of innocence, the *Schlup* analysis requires the court to assess the evidence as the jury would.[53] Where, under *Herrera*, the court would presume guilt and require a more convincing level of proof to undermine that presumption, the same cannot be said to be true to establish a procedural claim of innocence under *Schlup*.[54]

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[53] *See id.* ("[T]he court must make a 'probabilistic determination about what reasonable, ***properly instructed*** jurors would do.' The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.") (emphasis added). *Cf. Schlup*, 513 U.S. at 326 n.42 ("Schlup comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt. Our reference to *Winship* is intended merely to demonstrate that it is quite consistent with our jurisprudence to give content ***through a burden of proof*** to the understanding that fundamental injustice would result from the erroneous conviction and execution of an innocent person.") (emphasis added).

[54] *Compare Herrera*, 506 U.S. at 442-43 (Blackmun, J., dissenting) ("[C]onviction after a constitutionally adequate trial strips the defendant of the presumption of innocence. The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, but once the government has done so, the burden of proving innocence must shift to the convicted defendant….When a defendant seeks to challenge the determination of guilt after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence, not just raising doubt about his guilt.") *with Schlup*, 513 U.S. at 315-16 ("More importantly, a court's assumptions about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup's case than in Herrera's. In *Herrera*, petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free….Schlup, in contrast,

If the district court determines that it is "more likely than not that any reasonable juror would have reasonable doubt" in light of the new evidence, the district court must find that the petitioner has successfully established "actual innocence" under *Schlup*.[55]

As discussed below, the district court need not limit the types of evidence on which it can rely to determine if the standard is met.

B. The type of evidence that can be used to prove "actual innocence" is not limited.

The State represents that the ***only*** types of evidence that can meet *Schlup* are "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[56] This court has never expressed such a constrained rule,[57] and the *Schlup* standard does not support one.

1. Limiting the types of evidence upon which a petitioner can rely to prove innocence would be contrary to law and logic.

No court has ever ruled that the government can rely on only specific types of evidence to meet the "beyond a reasonable doubt" burden—the highest burden

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accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial.").

[55] *House*, 547 U.S. at 538.

[56] State Opening 16.

[57] *See*, *e.g.*, *Majoy v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002); *Carriger*, 132 F.3d at 478.

under the law. It would be irreconcilable to limit the types of evidence upon which a post-conviction petitioner can rely to prove that no reasonable juror could find guilt beyond a reasonable doubt.

Under *Schlup*, the district court must determine whether, in light of new evidence, any reasonable juror would have reasonable doubt.[58] That standard is fact-specific and varies from case to case.[59] *Schlup* requires only that the new evidence be "reliable."[60]

The *Schlup* Court listed as examples of reliable evidence "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[61] But the Court never limited the inquiry to only those categories of evidence.[62] In *House v. Bell*, the Court specifically wrote that "although 'to be credible' a gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial,' ***the habeas court's analysis is not limited to such evidence***."[63]

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[58] *House*, 547 U.S. at 538.

[59] *Schlup*, 513 U.S. at 332.

[60] *Id.* at 324.

[61] *Id.*

[62] *See id.*

[63] *House*, 547 U.S. at 537 (emphasis added).

The *House* Court recognized that the petitioner there had "presented some new reliable evidence"[64] that implicated another suspect (the victim's husband) in the murder for which the petitioner had been convicted. The new evidence included testimony from one witness who heard the victim's husband confess, from another who said the victim's husband asked her to lie about his alibi, and from another who said that she saw the victim with injuries suggesting prior abuse by the husband.[65] Although the Court also relied on DNA evidence, the Court did not limit its analysis to "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence."[66]

The Court's discussion in *House* supports the conclusion that reliability is a fact-specific determination that is not subject to the bright-line rule advanced by the State here. This court's rulings are consistent.[67] In *Carriger v. Stewart*, this court found that *Schlup* was satisfied where the prosecution's witness confessed in court that he, and not the petitioner, committed the murder.[68] In *Majoy v. Roe*, this court remanded for a hearing to determine the reliability of a recantation,[69]

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[64] *Id.*

[65] *Id.* at 540-553.

[66] *Id.*

[67] *See Carriger*, 132 F.3d at 478.

[68] *Id.*

[69] *Majoy¸* 296 F.3d at 776.

suggesting that a *Schlup* claim can be predicated on new evidence of a recantation, if reliable.

2. Innocence is more than just DNA.

The State suggests a standard that would require evidence akin to DNA in every case. Innocence is more than just DNA.

Since the first post-conviction DNA exoneration in 1989, more than 2,570 prisoners have been exonerated across the country.[70] Although DNA was used to exonerate 507 of those innocent prisoners, the vast majority (80%) were proved innocent through non-DNA evidence.[71]

DNA cases have grabbed the attention of the public, the legislature, and the courts.[72] Yet, DNA is not always available, or material, to establish innocence. In 2002, Barry Scheck from the Innocence Project estimated that eighty percent of felony cases do not involve biological evidence amenable to DNA testing.[73] Other commentators have estimated that "only about ten percent of criminal cases have any biological evidence."[74] Even in cases where DNA evidence was initially

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[70] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

[71] *Id.*

[72] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57-58 (2008).

[73] *Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 221 (2002).

[74] Nina Martin, *Innocence Lost*, S.F. Mag., Nov. 2004, at 78, 105. *See also* Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly*

available, that evidence may become lost, destroyed, or degraded over time. The underlying wrongful conviction still exists despite the lack of DNA to prove it so.[75] Yet wrongful convictions in cases where DNA is not available have "largely escaped notice."[76] DNA exonerations have taught us a great deal about the causes of wrongful conviction, but those cases should not create the misconception that DNA is the only conclusive way to establish innocence.

From study of exonerations around the country, researchers have learned that the underlying causes of wrongful conviction are present regardless of whether DNA exists to prove innocence. The primary causes of wrongful conviction include false testimony of informants, eyewitness misidentification, faulty or misleading forensic evidence, false confessions, government misconduct, and ineffective assistance of counsel.[77] These causes are just as likely to produce a wrongful conviction in a case where exculpatory DNA exists as in a case where

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Discovered Non-DNA Evidence in State Courts, 47 ARIZ. L. REV. 655, 656-57 (2005).

[75] David Michael Risinger, *Innocents Convicted*, 97 J. CRIM. & CRIMINOLOGY 761, 773 (2006-07) ("[I]t is extremely important to remember that the conditions that cause wrongful convictions in non-DNA cases—the vast majority of cases—remain unaffected by [the development of post-conviction DNA testing statutes]. We must [instead] use post-conviction DNA exonerations wisely to throw light on the more general problem.")

[76] Medwed, *supra* n.74, at 656-57.

[77] Innocence Project, https://www.innocenceproject.org/#causes.

DNA does not exist or is not relevant. It is just as important to provide post-conviction relief to prisoners who have newly-discovered non-biological evidence of innocence—such as confessions by the actual perpetrator, statements by new witnesses, and recantations—as it is to provide relief to prisoners who have newly-discovered DNA evidence of innocence. The court should focus on the ***causes*** of wrongful conviction, as well as the evidence that later confirms that the conviction was wrongful.

3. Credible recantation evidence can be sufficient to meet the *Schlup* standard.

Recantations are important evidence of innocence because that evidence can undermine confidence in the conviction.

The "beyond a reasonable doubt" standard requires proof to the utmost certainty of every fact necessary to constitute the crime charged.[78] If the State rests on eyewitness accounts to fulfill its proof for conviction, evidence that those witnesses have recanted will undermine that proof. If the State is left without proof sufficient to satisfy its burden, the district court can find that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a

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[78] *See*, *supra*, Section III(A)(1).

reasonable doubt. The question is not the type of evidence at issue; the question is whether the new evidence (*e.g.*, the recantation) is reliable.[79]

Wrongful convictions have been discovered as a result of later recantations, but courts generally distrust recantation evidence. Some courts interpret recantations as evidence of witness unreliability, rather than as accurate new testimony.[80] Some judges compare the recanting witness's demeanor to that during the original testimony and find that a difference is indicative of lying in the recantation. Some courts fear that recantations are the product of duress, coercion, or a hidden motive to help the defendant. Many courts fear that accepting a witness recantation in one case will open the floodgates.

Concerns about recantations undervalue the importance and reliability of recantations that has been proved through exonerations around the country. The concerns also fail to include any analysis of the circumstances under which the original inculpatory statements were made.

According to a 2013 study by the National Registry of Exonerations, of the 1,068 exonerations around the country at that time, at least 250 of them (23%) involved witness recantations.[81] In some exoneration cases, courts initially

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[79] *See House*, 547 U.S. at 537.

[80] Shawn Armbrust, *Reevaluating Recanting Witnesses*, 28 B.C. THIRD WORLD L. J. 75, 82 (2008).

[81] Alexandra Gross and Samuel Gross, *Witness Recantation Study* at 2 (May 2013),

rejected witness recantations and the prisoner was later proved innocent with DNA evidence. The very first DNA exoneration—that of Gary Dotson—came after the court rejected a recantation.[82] Dotson was convicted of rape in 1977. The alleged victim, Cathleen Crowell, described her assailant to a sketch artist and later identified Dotson in a photo array, lineup, and at trial. Dotson was convicted. In 1985, Crowell recanted to her pastor. She said she fabricated the rape allegation because she had consensual sex with her boyfriend the day before and feared that she may be pregnant, a fear that was never realized. Crowell said that she created the rape story in case she needed to explain the pregnancy to her parents. She said she identified Dotson after police pressured her, pointing out how closely Dotson resembled the composite sketch.

When Crowell recanted, the court found Crowell's trial testimony was more credible than her recantation and affirmed Dotson's conviction. Dotson made several further attempts to prove his innocence, but his efforts were rejected by the courts. Crowell's recantation was ultimately corroborated when DNA proved that semen found in Crowell's underwear on the night of the alleged rape was that of her boyfriend. Dotson's exoneration came four years after the victim recanted.

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http://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf

[82] National Registry of Exonerations, Gary Dotson, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186.

Had DNA evidence been unavailable, the courts would have continued to hold Dotson in prison, believing Crowell's trial testimony was true and her recantation false.

Other DNA exonerations have followed the same pattern. In 1985, Jerry Watkins was convicted of the murder of an eleven-year-old girl based on testimony from jailhouse informant Ackaret.[83] Ackaret testified that Watkins confessed when they were in a holding cell. Two years later, Ackaret swore in a court filing that he had learned of the details of the crime not from Watkins, but from investigators. The courts rejected the recantation and affirmed Watkins' conviction. In 2000, DNA proved Watkins' innocence. Watkins was released from prison thirteen years after Ackaret's recantation.

In 1999, Clarence Elkins was convicted of murdering his mother-in-law and raping his niece.[84] The niece identified Elkins at trial. Elkins was convicted. In 2002, the niece recanted to an investigator, and Elkins moved for a new trial. Elkins offered a videotaped deposition of the niece recanting, but the court found the recantation lacked credibility. The judge believed that the niece recanted under family pressure and found that, in her recantation, she was hesitant. The judge contrasted the recantation with the original trial testimony and found that the

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[83] Armbrust, *supra* n.80, at 91.

[84] *Id.* at 97.

child's demeanor at trial was more consistent with a truthful witness. Three years later, DNA proved Elkins was innocent and the niece's recantation was, in fact, the truth.

The sources of error that lead to wrongful convictions exist whether or not there is DNA to prove that the conviction was wrongful. When a court is faced with a defendant claiming innocence who raises recantation evidence, the court should analyze the case for sources of error known to contribute to wrongful convictions. The court should look for evidence that corroborates the recantation, including the circumstances that gave rise to the initial false statement.[85]

C. Courts should consider a recantation in context when assessing its reliability.

This court, in *Jones v. Taylor*, held that a court faced with recantation evidence must consider the circumstances giving rise to the recantation,[86] but failed

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[85] *See*, *e.g.*, *State v. McCallum*, 561 N.W.2d 707 ¶¶ 23-24 (1997) ("We agree with the court of appeals that the difficulty in this kind of case is manifest: How can a defendant corroborate the recantation of an accusation that involves solely the credibility of the complainant, inasmuch as there is no physical evidence and no witness….[T]he degree and extent of the corroboration required varies from case to case based on its individual circumstances….Under these circumstances, requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon any wrongly accused defendant. We conclude, under the circumstances presented here, the existence of a feasible motive for the false testimony together with circumstantial guarantees of the trustworthiness of the recantation are sufficient to meet the corroboration requirement.").

[86] 763 F.3d 1242, 1248 (9th Cir. 2014).

to consider the circumstances giving rise to the original testimony later asserted to be false. When faced with two competing statements from a witness, the court should consider the circumstances giving rise to ***each*** statement to determine how a reasonable juror would weigh that evidence. When the circumstances include improper interrogation tactics, the original testimony is suspect.

1. Improper interrogation methods are a source of error known to result in false evidence and wrongful convictions.

Improper interrogation methods are a known source of error in wrongful conviction cases.[87] These interrogation methods have long been studied in the context of false confessions, and researchers are now beginning to address the same concerns when interrogations lead to false testimony from independent witnesses.[88] Psychologists have done extensive research into the methods of interrogation and the use of psychological techniques that may result in false testimony.[89]

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[87] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 4 (2010).

[88] Danielle M. Loney et al., *Coercive Interrogation of Eyewitnesses Can Produce False Accusations*, Journal of Police and Criminal Psychology (February 2015); Timothy E. Moore, *Shaping Eyewitness and Alibi Testimony with Coercive Interview Practices*, The Champion (October 2014).

[89] Kassin, *supra* n.87; Saul M. Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 39 LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 15 (2010); Gisli H. Gudjonsson, *Psychological Vulnerabilities During Police Interviews. Why are They Important?*, 15 LEGAL AND CRIMINOLOGICAL PSYCHOLOGY 161 (2010).

(a) Background on Interrogation Methods

From the late nineteenth century through the 1930s, police used "third-degree" methods of interrogation in which officers inflicted physical or mental pain and suffering on suspects to elicit confessions.[90] The methods ranged from direct physical assaults (*e.g.*, simulating suffocation by putting the suspect's head in water, beatings, and kicking) to indirect suffering (*e.g.*, prolonged confinement, deprivation of sleep, and threats of harm).[91] Experts found the methods resulted in large numbers of coerced false confessions.[92]

From the 1930s to the 1960s, the "third-degree" method declined and was replaced by psychological interrogation techniques.[93] Psychological interrogation is the norm today, despite the recognition in *Miranda v. Arizona* that these methods are inherently coercive and "created for no purpose other than to subjugate the individual to the will of his examiner."[94] The *Miranda* Court found that, although not involving physical intimidation, the interrogation environment "carries its own badge of intimidation" that "is equally destructive of human dignity."[95]

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[90] Kassin, *supra* n.87, at 6.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] 384 U.S. 436, 457 (1966).

[95] *Id.*

This is true for suspects and witnesses. Where witnesses are threatened with prosecution or other harms if they do not cooperate (*i.e.*, provide information police want), there is no difference in status.[96] The witness is interrogated as though he were the offender.[97] Researchers have astutely remarked: "If coercive interrogation procedures can get people to surrender their own autonomy, how difficult can it be to coerce nonsuspects to implicate a suspect and by doing so cooperate with law enforcement?"[98]

(b) Problems with Specific Interrogation Methods

Social scientists have isolated a number of problems arising from psychological interrogation methods, including:

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[96] *See*, *e.g.*, F.E. Inbau, et al., *Criminal Interrogation and Confessions* 336-37 (2013) (5th ed.) (In this training manual for law enforcement, authors write: "Whenever a witness or other prospective informant refuses to cooperate because he is deliberately protecting the offender's interests or because he is antisocial or antipolice, an investigator should seek to break the bond of loyalty between the witness and the offender or ***accuse the witness of the offense and proceed to interrogate the witness as though he were actually considered the offender***….***When all other methods have failed, the investigator should accuse the subject of committing the crime (or of being implicated in it in some way) and proceed with an interrogation as though the person was, in fact, considered to have involvement in the crime.*** A witness or other prospective informant, thus, faced with a false accusation, may be motivated to abandon his efforts to protect the offender or to maintain antisocial or antipolice attitudes.") (emphasis added).

[97] *Id.*

[98] Moore, *supra* n.88.

1. Prolonged interrogation can exacerbate distress and heighten the need to extricate oneself from the situation. Psychologists explain that, "under stress, people seek desperately to affiliate with others for the psychological, physiological, and health benefits" associated with fundamental human needs.[99] Sleep deprivation can increase the susceptibility to influence and impair decision-making abilities.[100] Interrogations that last many hours with the subject in isolation increase anxiety and the incentive to escape by capitulation.[101] The *Miranda* Court recognized that this type of interrogation "exacts a heavy toll on individual liberty and trades on the weakness of individuals."[102]

2. The presentation of false evidence can alter a subject's perceptions, beliefs, and memories. The use of false evidence during interrogation is a controversial tactic.[103] The Supreme Court recognized that deception can induce involuntary confessions, although the Court has never prohibited such tactics.[104] The danger of using false evidence is that people start to distrust their own

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[99] *Id.*

[100] *Id.* at 45.

[101] *Id.*

[102] *Miranda*, 384 U.S. at 455.

[103] Kassin, *supra* n.87, at 12.

[104] *See*, *e.g.*, *Miranda*, 384 U.S. at 455 n.24.

memories when confronted with trusted (albeit false) evidence.[105] The "proof" heightens the subject's anxiety level, inhibiting concentration and diminishing cognitive capacity.[106]

3. Subjective questioning can alter memory or give subjects an easy way to capitulate. In a psychological interrogation, the officer does most of the talking, especially in the early part of the interrogation.[107] The officer may deliberately or inadvertently convey details that alter the subject's version of events. Courts across the country have begun to recognize the very real impact of suggestive questioning on witness memory.[108] Even when a subject does not come to "remember" new details, that subject can easily adopt new information "leaked" through interrogation as a way to escape.[109]

Law enforcement agencies in other parts of the world have moved away from this highly-confrontational interrogation approach and, instead, developed a more objective approach aimed at fact-finding rather than just obtaining confessions.[110] Officers using the "PEACE" model "never resort[ ] to threats,

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[105] Kassin, *supra* n.89, at 45.

[106] Moore, *supra* n.88, at 37.

[107] *Id.* at 35.

[108] *See*, *e.g.*, *State v. Lawson*, 291 P.3d 673, 687 (Or. 2012).

[109] Moore, *supra* n.88, at 35.

[110] Kassin, *supra* n.89, at 40, 46-47.

promises, and intimidation, or the kind of maximization and minimization tactics through which threats and promises are often implied."[111]

Social scientists suggest that the ill-effects of psychological interrogation methods may be even more pervasive with witnesses, as opposed to suspects.[112] Witnesses are subjected to the same anxiety-producing techniques that cause suspects to search desperately for escape. Implicating another in the crime may be that means of escape and has few, if any, negative consequences for the witness who is then commended by police for his cooperation.

Courts should not be surprised when the witness later recants. And courts should not reject a recantation because it may not appear conclusive the way that DNA does. Discounting recantations that come after the use of improper interrogation methods incentivizes the use of those methods to secure convictions.

2. The interrogation methods in this case undermine the reliability of the initial testimony and support the reliability of the recantations.

Mr. Gable has offered a number of witness recantations. The district court properly considered the recantations in light of the interrogation tactics that have produced false testimony in cases of known wrongful conviction. The court also properly considered the sheer number of independent, unrelated witnesses alleging

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[111] *Id.* at 47.

[112] Moore, *supra* n.88; Loney, *supra* n.88.

false testimony as a result of police pressure as further evidence to corroborate the recantations.

(a) Repeated Use of Polygraphs

A number of witnesses in this case initially denied any knowledge about the murder, but changed their stories during interrogations in which the witnesses were repeatedly subjected to polygraph examinations and told the tests proved that they were lying.

The use of false polygraph evidence has been linked to wrongful convictions in other cases. In 1986, Dennis Halstead was convicted of rape and murder after his co-defendant, Kogut, confessed to the crime and implicated Halstead.[113] Kogut was polygraphed three times and then interrogated for more than 18 hours, during which police told him that he failed the polygraph. Kogut ultimately signed a confession, settling on a version of the facts that had changed five times before. Halstead spent 17 years in prison before his conviction was overturned after DNA proved his innocence. Kogut's conviction was ultimately overturned two years later, and the court found that Kogut's confession after the polygraphs was contradicted by DNA and other forensic evidence. The use of misleading evidence, like false polygraph results, can result in false testimony.[114]

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[113] National Registry of Exonerations, Dennis Halstead, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3273.

[114] *See also* National Registry of Exonerations, Johnnie Savory,

(b) Use of Incentives

A number of witnesses in this case were offered incentives to testify against Mr. Gable, even though the witnesses initially denied having any information.

As some commentators put it, "when the criminal justice system offers witnesses incentives to lie, they will."[115] Senior Ninth Circuit Judge Stephen S. Trott has written extensively about the dangers of "using rewarded criminals or witnesses."[116] Indeed, 45.9% of the first 111 death row exonerations since 1970 involved false testimony from incentivized witnesses. Such testimony is the leading cause of wrongful convictions in capital cases, most of which do not involve DNA evidence.[117]

The same problem exists in non-capital cases. In 1987, Christopher Abernathy was convicted of murder after an acquaintance, Allen Dennis, told police that Abernathy admitted to killing a young girl.[118] More than 15 years later, Dennis recanted his testimony, revealing that police promised him lenient treatment on unrelated charges and gave him $300 to buy clothes. In 2014, DNA

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http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4630.

[115] Armbrust, *supra* n.80.

[116] Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

[117] *Id.*

[118] National Registry of Exonerations, Charles Abernathy, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4640.

excluded Abernathy as the perpetrator, and Abernathy was finally released, twenty-eight years after Dennis falsely implicated him.

(c) Threats of Charges

Several witnesses in this case implicated Mr. Gable only after police threatened them or their family members with charges. It does not appear that those witnesses were suspects when they were threatened with charges.

The ability to leverage such a threat is evident: a witness under intense police pressure may implicate another to save himself. In 1978, Joseph Sledge was convicted of murder in North Carolina.[119] At trial, the most critical evidence for the prosecution was the testimony of two prison inmates—Baker and Sutton—each of whom testified that Sledge confessed to them in prison. Sledge was convicted and sentenced to life. Thirty-five years later, in 2013, Baker recanted. Baker said he had implicated Sledge because police threatened to charge him with the murder unless he cooperated. In 2015, Sledge was finally exonerated after DNA proved his innocence.[120]

This court has recognized a constitutional violation when police exert "improper influence" over exculpatory witnesses by subjecting those witnesses to

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[119] National Registry of Exonerations, Joseph Sledge, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4627.

[120] *See also* National Registry of Exonerations, Johnny Wilson, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3454.

threats, intimidation, and fear to produce inculpatory testimony.[121] It has yet to be decided whether the same rule applies to neutral witnesses subjected to the same tactics.

* * *

In several of the exoneration cases discussed above, the exonerees were fortunate to have biological evidence available to prove innocence. Several of those DNA exonerees, however, also offered recantation evidence that was ignored or discounted. Recantation evidence should be considered for what it represents: evidence that something went wrong. When coupled with evidence of conduct proven to be a source of error in other wrongful convictions, that recantation evidence should be given serious consideration to support a claim for actual innocence.

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[121] *See*, *e.g.*, *U.S. v. Juan*, 704 F.3d 1137, 1141-42 (9th Cir. 2013).

IV. CONCLUSION

Amicus FJP asks the court to recognize that "actual innocence" under *Schlup* is not limited to specific categories of proof. FJP asks the court to recognize that recantation evidence can be sufficient to prove "actual innocence" under *Schlup* if the recantation evidence is reliable. FJP further asks the court to rule that, to determine whether recantation evidence is reliable, the court should consider the recantations in light of the circumstances that gave rise to the recantation as well as the circumstances that gave rise to the original statements later asserted to be false.

Dated: March 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I certify that the Amicus Brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,999 words.

DATED this 19th day of March, 2020.

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CERTIFICATE OF FILING

I certify that on March 19, 2020, I directed the foregoing AMICUS BRIEF to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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