No. 12-941

IN THE
Supreme Court of the United States

WILLIAM ERNEST KUENZEL,

Petitioner,

v.

KIM T. THOMAS, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents.

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

BRIEF OF FORMER DISTRICT ATTORNEYS, ROBERT M. MORGENTHAU, GILBERT I. GARCETTI, AND E. MICHAEL MCCANN, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the court of appeals misapply the *Schlup v. Delo* standard by requiring Kuenzel to overcome a "presumption of guilt" when assessing his new evidence?

2. Did the court of appeals misapply the *Schlup* standard by engaging in only a piecemeal review of each item of new evidence and asking whether that item alone undermined the state's case, rather than assessing all the evidence together and determining whether it was more likely than not that no reasonable juror would find guilt beyond a reasonable doubt?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Robert M. Morgenthau, Gilbert I. Garcetti, and E. Michael McCann are former district attorneys who collectively possess over 100-years' experience prosecuting criminal matters. *Amici* write from the unique perspective of having overseen and been ultimately responsible for more than 7,000,000 criminal prosecutions. *Amici*'s offices recruited and trained thousands of prosecutors who now serve in state and federal executive, judicial, and legislative capacities throughout the United States.

Amici possess a continuing interest in maintaining and preserving the integrity of prosecutors' offices across the country and public confidence in our criminal justice system. A prosecutor's failure to comply with his legal and ethical obligations has the potential to cause harm well beyond the confines of a particular case. A prosecutor's violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in a capital case is especially disturbing.

Amici acknowledge the truism that prosecutors' offices and juries occasionally make mistakes, even if ever so rarely. As human beings, we are inherently fallible; as district attorneys and jurors, we are no different. Yet, a credit to our justice system is that it

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of *amici curiae*'s intent to file this brief and have consented to *amici curiae's* filing of this brief.

embraces meaningful checks and balances. Prosecutors are required to seek justice, not a "win."

With this in mind, *amici* respectfully urge this Court to clarify what a petitioner, who presents procedurally defaulted, post-conviction claims of constitutional error, must do to obtain *habeas corpus* review in federal court. *Amici* believe that how this Court defines the standard in such cases will affect the degree of confidence that our society places on jury verdicts and, in particular, on death sentences.

There is no greater societal punishment than the imposition of the death penalty and, correspondingly, no greater injustice than the execution of one who is actually innocent. The unfortunate reality is that evidence suitable for DNA testing, and where DNA evidence can positively identify the true perpetrator of a crime sufficient to overcome a strong presumption of guilt, exists in only a small percentage of cases.

Against this backdrop, *amici* urge the Court to confirm that when courts review a first federal habeas petition raising procedurally defaulted constitutional claims, they should not impose an additional obstacle to review by requiring the petitioner to overcome a presumption of guilt. Adding such a requirement to the *Schlup v. Delo* standard would improperly divest federal courts of their historic equitable power to grant habeas relief where state courts decline to undertake such review.

The farther the *Schlup* standard strays from providing a means of ensuring the fairness and accuracy of convictions, the less the interests of justice will be served. When a mistake is made, the

review process must allow a reasonable opportunity to correct that mistake.

Amici respectfully submit that this case presents an ideal opportunity for this Court to clarify the *Schlup* standard and eliminate the division and confusion among lower courts on this vital issue.

SUMMARY OF ARGUMENT

The *Schlup v. Delo*, 513 U.S. 298 (1995), standard requires a reviewing court to determine if new evidence makes it more likely than not that any reasonable juror would now have reasonable doubt about petitioner's guilt. 513 U.S. at 329. When this standard is satisfied, petitioners move on to argue their procedurally defaulted habeas claims. This Court should therefore grant certiorari in this case to resolve the deep divide in the circuits over this issue, and to clarify that habeas petitioners do not need to overcome a presumption of guilt in order to pass through the *Schlup* gateway.

Here, the Eleventh Circuit improperly applied a presumption of guilt to its review of the new evidence.

Rather than limiting the presumption to its intended purpose—shifting the burden of proof to the petitioner—the Eleventh Circuit *also* applied the presumption to its evaluation of the evidence. The court's conclusions rested on the assumption that the jury's credibility determinations or assessments of weight regarding conflicting evidence are presumed valid. Surely this Court did not create a standard designed to allow review of, and possibly order a new trial based upon, constitutional violations, and then infect the tool of forgiveness with the trial jury's uninformed conclusions.

The Eleventh Circuit also erred by not reviewing all of the new evidence in its totality and assessing whether it demonstrated that no reasonable juror would have convicted him. Instead, the court reviewed each piece of new evidence on its own and

found that each piece, alone, would not have changed the outcome of Kuenzel's trial. This misapplication of the *Schlup* standard would likely result in the rejection of "actual innocence" claims in all cases other than those in which a single irrefutable piece of new evidence—such as DNA evidence—establishes a defendant's innocence. This is not the standard that this Court announced in *Schlup* and applied more recently in *House v. Bell*, 547 U.S. 518 (2006).

SUMMARY OF FACTS

The case against Kuenzel rested almost entirely on the testimony of Harvey Venn—Kuenzel's alleged accomplice who pleaded guilty in exchange for his testimony against Kuenzel. (A.200a.) In his final summation to the jury, the Talladega County District Attorney submitted that "Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony." (A.198a.) The prosecutor, Mr. Rumsey, later echoes his plea: "I submit this case is not all circumstantial evidence. There is a lot of direct evidence. I submit that Harvey Vinn [sic] told you the best he could." (A.211a.)

Venn testified at trial that he waited in his car "drunk and … doped up" while Kuenzel entered the convenience store. (A.200a.) Venn claimed that a shot rang out, Ms. Offord fell, and Kuenzel rushed back into the car, directing Venn to "Haul ass." (A.32a.) Multiple witnesses physically present at the convenience store that night identified Harvey Venn. (A.202a–03a.) But none identified Kuenzel. Venn also had the victim's blood spatter on his pants—the only physical evidence tying any person to this crime. (A.204a.)

Only one prosecution witness, April Harris, testified that she "believed" that she saw Kuenzel in the store with Venn as she was driving by on that rainy evening. Harris, having met Venn and Kuenzel once, testified that she recognized Venn's car as she was driven past the convenience store. (A.164a.) At trial, Harris was the only witness who "believed" that *both* Venn and Kuenzel were inside the store shortly before the crime took place. *Kuenzel*

v. State, 577 So. 2d 474, 514–15 (Ala. Crim. App. 1990). This belief is based on her having seen Venn's car in the parking lot of the convenience store. (A.164a.)

Kuenzel's inexperienced and undercompensated appointed trial counsel conducted virtually no factual investigation, in part, because he unreasonably assumed "the evidence that was readily available to [him] seemed sufficient to win the case." (A.174a.) Believing the prosecution's case to be "extremely weak," and observing that the District Attorney shared his perception "that the prosecution's case was problematic," trial counsel concedes that he "may not have been adequately prepared for the guilt phase of Mr. Kuenzel's trial." (A.173a–74a.) Nonetheless, trial counsel presented alibi evidence that Kuenzel was asleep on his couch, shortly before the crime, a great distance away from the convenience store. Trial counsel also presented evidence that Kuenzel's shotgun was not the murder weapon—a claim necessarily disbelieved by the trial jury because Venn falsely testified that the gauge of the shotgun he admittedly possessed was not the same gauge as the shotgun used in this crime.

Mr. Kuenzel, for over two decades, has complained that his trial was fatally undermined by constitutional violations under *Strickland v. Washington*, 466 U.S. 668 (1984) and *Brady*. Kuenzel claims that his trial counsel's performance was deficient under *Strickland* and that the deficiency severely prejudiced his defense. *See, e.g.*, (A.171a–79a)

At trial and throughout post-conviction proceedings, Kuenzel's counsel also repeatedly requested production of all exculpatory and/or impeaching materials. The state denied the existence of any such materials. In 2010, however, counsel for Kuenzel received previously unproduced documents that cast serious doubt on the strength and credibility of the prosecution's case.

Kuenzel never had the opportunity to argue his *Brady* and *Strickland* claims because post-conviction review of this case has been denied for over two decades on the basis of a procedural default.

The district court, acknowledging, in this case, its own "trepidation regarding [the] jury's finding,"[2] determined that an evidentiary hearing to reassess all of the evidence was unnecessary, largely because "the evidence brought forward does not establish positive proof of innocence … some evidence that positively refutes the possibility that the defendant committed the crime." (A.68a.) According to the district court, "increas[ing] the level of doubt about the credibility of prosecution evidence, and particularly the testimony of Venn," did not warrant passage through the *Schlup* gateway. (A.68a.) The district court acknowledged that Venn's "account of the murder" is "full of problems." (A.59a.) But despite the weakness of Venn's testimony, the district court stated that it was "not so incredible as to be utterly unbelievable to any reasonable juror." *Id.* The Eleventh Circuit affirmed, also concluding

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[2] (A.138a.) ("This court's own trepidation regarding a jury's finding does not mean the petitioner has made a showing of actual innocence.").

that Kuenzel's new evidence did not render the trial testimony completely unbelievable or affirmatively establish that Kuenzel was innocent. (A.11a–13a.)

ARGUMENT

William Kuenzel has a far stronger case for passing through the *Schlup* gateway and having his defaulted claims reviewed by a habeas court than Paul House or Lloyd Schlup. By interpreting a single footnote to mean that the trial evidence and jury determinations should be weighted heavily against a petitioner, the Eleventh Circuit erroneously and improvidently loaded the dice against Kuenzel. Given the strength of Kuenzel's case, the absence of any post-conviction review, the looming specter of an execution absent a forum in which to present claims of constitutional error, and the division and confusion in the lower courts about how to apply *Schlup*, this Court should grant the petition for certiorari.

I. THE CIRCUITS ARE SPLIT ON WHETHER THE *SCHLUP* STANDARD INCLUDES A "PRESUMPTION OF GUILT" THAT HABEAS PETITIONERS RAISING DEFAULTED CLAIMS MUST OVERCOME.

In *Schlup v. Delo*, this Court established the standard that a habeas petitioner must meet in order to obtain the opportunity, on a first federal habeas review, to present his claim that his trial was infected by constitutional error: "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new evidence. 513 U.S. at 327. The court made clear that this standard was less exacting than the standard applied in cases where a petitioner claimed that his execution would violate the Eighth Amendment (*Herrera v. Collins*, 506 U.S. 390 (1993)); that he

could not constitutionally be subject to the death penalty (*Sawyer v. Whitley*, 505 U.S. 333 (1992)); or that there was insufficient evidence of guilt at trial (*Jackson v. Virginia*, 443 U.S. 307 (1979)).

In order to obtain review of the merits of his constitutional claims, Schlup only had to convince a habeas court that the new evidence "raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error." *Id.* at 317. This Court reaffirmed this standard in *House v. Bell*: "A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." 547 U.S. at 538.

In Kuenzel's case, however, both the district court and the Eleventh Circuit raised the bar considerably above where this Court set it in *Schlup*. The district court insisted that Kuenzel show that "it is more likely true than not true that *no* reasonable juror *could* believe Venn's account of the shooting," (A.57–58a) (emphasis added) thus raising the *Schlup* bar to the same height as the standard applied in the very different case of a habeas petitioner who challenged the sufficiency of the evidence, but did not identify any constitutional defects in his trial. *See Jackson*, 443 U.S. at 319 (in cases challenging the sufficiency of the evidence, the question is whether "no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt"). The Court in *Schlup* specifically rejected the higher *Jackson* standard in cases like

Kuenzel's. *See Schlup*, 513 U.S. at 327, 330 (holding that the *Schlup* standard was lower than the *Sawyer* standard, and that the *Sawyer* standard, in turn, is lower than the *Jackson* standard).

The Eleventh Circuit, in turn, held that Kuenzel must overcome "a strong," even "conclusive," presumption of guilt. (A.10a, 14a.) It then considered each piece of new evidence presented by Kuenzel and determined that this evidence (individually), did not overcome the presumption by "establish[ing]" Kuenzel's innocence. (A.11a–14a.) ("A strong presumption of guilt is present when a case comes to us at this stage. We are not persuaded that we are faced with a fundamental miscarriage of justice. Petitioner therefore has not overcome the procedural bar to the review of the merits of his federal habeas petition and cannot obtain habeas relief in this case.…") The Eleventh Circuit thus effectively raised the *Schlup* bar *even higher* than the bar applied in *Sawyer* where a petitioner challenged the constitutionality of his execution, but did not assert that he was innocent of the charges. *See Sawyer*, 505 U.S. at 336 (such a petitioner "must show by *clear and convincing evidence* that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty"). But this Court in *Schlup* expressly rejected the "more stringent *Sawyer* standard" for cases like Kuenzel's. *Schlup*, 513 U.S. at 326–27.

The Eleventh Circuit's application of a presumption of guilt—like the other circuits that have applied this presumption—was based on a misreading of a footnote in *Schlup*. In footnote 42, this Court noted that "Schlup comes before the

habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt." *Schlup*, 513 U.S. at 326 n. 42. But the context of this statement makes clear that the Court was simply stating that Schlup, unlike a criminal defendant "who has merely been accused of a crime," bore the burden of proving his entitlement to habeas relief. *Id.* Thus, "[h]aving been convicted by a jury of a capital offense, Schlup no longer has the benefit of the presumption of innocence." *Id.* The Court was merely making clear that Schlup, like any habeas petitioner convicted of a crime, bore the burden of producing new evidence demonstrating his entitlement to relief from the district court.

The Court's actual holding in *Schlup* makes clear that it did not apply a "presumption of guilt" as part of its analysis in the manner that the Eleventh Circuit did. That is, it was plain that Schlup just had to convince the district court that it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. This Court did not impose an even higher burden of proof on Schlup to overcome a "presumption of guilt" while also establishing "that *no* reasonable juror would convict." *See, e.g.*, *Doe v. Menafee*, 391 F.3d 147, 173 (2d Cir. 2004).

That a presumption of guilt is not part of the *Schlup* standard was made clear in *House v. Bell*, in which this Court found that the petitioner had met the *Schlup* standard and was entitled to habeas review of his constitutional claims despite the substantial evidence of guilt that remained even after incorporating House's new evidence into the

total record. 547 U.S. at 553–54. This Court did not even *mention* a presumption of guilt, let alone apply it as part of the *Schlup* analysis. Nor did Chief Justice Roberts's dissent in that case.

Thus, under *Schlup* and *House*, a petitioner does not need to prove his innocence to an absolute certainty, demonstrate that no reasonable juror *could* have voted to convict in light of the new evidence, or show by "clear and convincing evidence" that no reasonable juror would have found reasonable doubt. Nor must he rebut each piece of evidence presented by the prosecution. Rather, he must simply convince the habeas court that any properly instructed juror, presented with the total evidence, would more likely than not see reasonable doubt in the prosecution's case.

Applying a presumption of guilt is not only inconsistent with the language and logic of the *Schlup* "more likely than not" standard, but it also completely changes the nature of a habeas court's assessment of the existing and new evidence. For instance, this Court has made clear that a habeas court should not assume the credibility of the prosecution's trial witnesses if the petitioner's new evidence undermines that credibility. *See House*, 547 U.S. at 538–39 ("If new evidence so requires, this may include consideration of the credibility of the witnesses presented at trial."). Rather, a reviewing court should examine *all* of the evidence and determine how a reasonable juror likely would have assessed it, including witnesses' credibility. But the Eleventh Circuit, applying a presumption of guilt, assumed the credibility of the prosecution's witnesses and then asked whether each piece of new evidence,

on its own, "establish[ed]" that the witnesses' testimony was wrong, or the evidence would have completely "prevent[ed]" a reasonable juror from believing that testimony. *See, e.g.* (A.12a) ("[t]hat Venn changed his story after becoming a cooperating witness does not *establish* that the first story was true or that his later story was false….") (emphasis added).

Indeed, the Eleventh Circuit's error is most evident in its conclusion that Harris's grand jury testimony "would not prevent a reasonable juror from believing Harris's testimony at trial." (A.13a.) This conclusion *only* makes sense if the district court assumed that Harris's trial testimony was credible. Otherwise, there is no basis for the district court's belief that the jury would have credited Harris's trial testimony over her grand jury testimony. The problem with such an assumption is obvious: the trial jury only believed Harris's trial testimony because *it was not aware* that Harris had earlier given conflicting testimony.

As this Court explained in *House*:

> Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial."

547 U.S. at 538–39 (quoting *Schlup*) (citations omitted).

II. THE COURT OF APPEALS ERRED BY EXAMINING EACH PIECE OF NEW EVIDENCE ON ITS OWN AND ASKING WHETHER THAT EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF TRIAL, RATHER THAN WEIGHING ALL OF THE EVIDENCE TOGETHER AND ASKING WHETHER, CONFRONTED WITH ALL OF THE EVIDENCE, A JURY LIKELY WOULD HAVE REASONABLE DOUBT ABOUT THE PETITIONER'S GUILT.

Schlup and *House* establish quite clearly that a habeas court in a case like this should weigh all of the evidence *in toto* and predict whether a reasonable juror likely would have found reasonable doubt in the prosecution's case. *See, e.g., House*, 547 U.S. at 538 ("*Schlup* makes plain that the habeas court must consider '"all the evidence,"' old and new, incriminating and exculpatory"); *see also Schlup*, 513 U.S. at 329.

Indeed, this Court emphasized that "the inquiry does not turn on discrete findings regarding disputed points of fact." *House*, 547 U.S. at 539–40. And while the Court in *House* found that particular evidence, "considered in isolation," "might well" be "disregarded" by a reasonable jury, "in combination" the evidence "likely would reinforce other doubts as to House's guilt." *Id.* at 552–53.

Yet, here, the court of appeals took precisely the opposite approach. It considered each category of new evidence on its own and asked whether it was enough to "establish" that Kuenzel was innocent, or that a key prosecution witness was necessarily lying:

--"About the first category of 'new evidence'—the court found that Venn's possession of a 16-gauge gun (same gauge as the murder weapon)—contrary to his trial testimony that he only possessed a 12-gauge gun—"does not *undermine* Venn's story that Petitioner shot Linda Offord"—since it "does not *establish* that Venn used that gun to murder Offord, does not *establish* that Petitioner had no 16-gauge shotgun, and also does not *establish* that Petitioner did not use Venn's supposed 16-gauge shotgun to commit the murder."

--"About the second category of 'new evidence'—that Venn was alone for a few minutes with his then-girlfriend at close to ten in the evening on the night of the murder"—the court found that this evidence "does not *establish* Petitioner's location at the time of the crime—at about eleven o'clock—or Venn's location at the time of the crime."

--"About the third category of 'new evidence'—that Venn bore some signs of struggle when interviewed by police shortly after the murder, and that the victim's body bore some signs of an altercation"—the court found that this evidence did not "*establish*" either that Venn murdered Offord or that Petitioner did not murder Offord."

--"About the fourth category of 'new evidence'"—*i.e.*, "that Venn told a story to detectives immediately after the crime—a story that implicated someone other than Petitioner as being with Venn on the night of

> the murder—that differed from the one he later told to police and then to the jury at trial"—the court found that this evidence "would not *prevent* a reasonable juror from believing Venn's testimony at trial. That Venn changed his story after becoming a cooperating witness does not establish that the first story was true or that his later story was false."
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> --As for "[t]he final category" of new evidence—April Harris' "equivocation" in her grand jury testimony about whether she saw Petitioner in the store with Venn and the differences between that testimony and her later witness statement and trial testimony—the court found that this evidence "would not *prevent* a reasonable juror from believing Harris' testimony at trial."

(A.11a–13a.) (emphases added). By engaging in this piecemeal analysis, the court ignored what should have been plainly obvious—that the new evidence, *when viewed in its totality*, gravely undermined the credibility of Venn, the sole witness to the crime and the linchpin of the government's case, as well as of Harris, the only other person who testified that she believed she saw Petitioner in the store sometime before Offord was shot. Indeed—though this is not the *Schlup* standard—the new evidence here completely eviscerated the core of the prosecution's case by so thoroughly undermining its key witnesses.[3]

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[3] At the very end of its opinion, the Eleventh Circuit stated: "Taking all the evidence into account, we conclude that some reasonable jurors—weighing what was available at trial and

III. A PROPER APPLICATION OF THE *SCHLUP* STANDARD SHOWS THAT A REASONABLE JUROR, PRESENTED WITH ALL OF THE EVIDENCE, LIKELY WOULD HAVE HAD REASONABLE DOUBT AS TO PETITIONER'S GUILT.

If the district court or the Eleventh Circuit had correctly applied the *Schlup* standard by viewing all the evidence in its totality and not presuming Petitioner's guilt or assuming the credibility of the prosecution's chief witnesses, it would have had no choice but to find that any reasonable juror more likely than not would have had reasonable doubt as to Petitioner's guilt. Even before the new evidence was uncovered, the prosecution's case was weak, to say the least.

The core of the government's case was the testimony of Harvey Venn and April Harris. Venn was the only witness to testify that Petitioner killed Offord. And Harris was the only witness to testify that she *believed* Petitioner was in the store when Offord was killed (though she did not say who killed Offord). Harris's testimony was essential to the case against Kuenzel because Alabama's Criminal Code § 12-21-222 requires corroboration of the inherently

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what has since been presented—would have found Petitioner guilty." (A.15a.) But the body of its opinion makes clear, as shown above, that the Court in fact did not weigh all the evidence together, but examined each piece of new evidence one by one and determined that each piece did not, on its own, establish that Kuenzel is innocent or that Venn was lying. Although it mouthed the right words at the end, the Court's analysis makes plain that it did not properly review all the evidence *in toto*.

suspect testimony of an accomplice.[4] The prosecutor made the criticality of their testimony clear in his summation, despite his knowledge of evidence undermining their testimony that was not produced to defense counsel:

"Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony." (A.198a.) The prosecutor, Mr. Rumsey, later echoes his plea: "I submit this case is not all circumstantial evidence. There is a lot of direct evidence. I submit that Harvey Vinn [sic] told you the best he could." (A.211a.) Rumsey also reviews the list of witnesses who identified Venn and his car. (A.202a–04a.) Only one, April Harris, he claimed, "says she saw [both Venn and Kuenzel] in there." (A.203a.)

[4] **Corroboration of accomplice testimony.** A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient. Ala. Code § 12-21-222 (1975).

Harvey Venn

Harvey Venn's trial testimony was considered by the district court to be "the most critical evidence against petitioner." (A.66a.) Yet, the district court explicitly conceded that his "account of the murder" is "full of problems." (A.59a.) In 2009, prior to the introduction of Harris's grand jury testimony and exculpatory police notes of Harvey Venn interviews, the district court acknowledged its own "trepidation regarding [the] jury's finding" in this case. (A.138a.) Had the district court applied *Schlup* correctly, it would have permitted Petitioner to pass through the gateway.

The new evidence demonstrates, *inter alia*, the following:

a) Venn initially told the police that he was with another man at the crime scene, whom he described in detail (A.181a, 183a, 184a);

b) Venn corroborated a defense witness's testimony that Kuenzel was asleep when Venn returned to their home (A.184a);

c) Venn was alone with his girlfriend prior to the commission of the crime and at a time when Venn testified he was with Kuenzel (A.151a–155a);

d) The shotgun in Venn's possession was actually a 16-gauge (A.11a); and

e) Harvey Venn had injuries on the left side of his body days after the crime that were consistent with injuries observed on the right side of the victim's body, indicative of a struggle (A.11a–12a.)

The fact that a jury credited Venn's testimony provides a starting point, but is not determinative under *Schlup* of how a reasonable juror would now resolve evidentiary conflicts based upon the overall, newly supplemented record.

The starting point for Venn's testimony was: an "account of the murder" that is "full of problems" though "not so incredible as to be utterly unbelievable to any reasonable juror." (A.59a.) When viewed in light of all the new evidence, Venn's credibility is severely undermined, to the point that a reasonable juror likely would have had reasonable doubt.

April Harris

Along with Venn's first statements to the police, April Harris's grand jury testimony was inexplicably withheld for over two decades. Harris's grand jury testimony directly undermines her already weak trial statements "that she *believed* in her best judgment that she saw Petitioner and Venn in the store between ten and ten forty-five." (A.12a) (emphasis added). In addition to contradicting the time at which she told the trial jury she made her observation, the grand jury testimony also shows that Harris was not at all certain that she saw Kuenzel in the store, and that her "best judgment" was premised upon her positive observation of Venn's car:

> "Q: Okay, did you see something that you recognized or someone that you knew?
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> A: **All I saw was Harvey Venn's car** parked at the side of the building." (A.164a.) (emphasis added).

Harris testified before the grand jury that she associated Venn's car with Venn and Kuenzel based solely on a conversation she had had in the past with them.[5] Harris said that when she was driven by the store the night of the murder, she noticed two men at the counter, but she could not "under oath … say that it was [Venn and Kuenzel]." (A.165a.) Harris admitted that she "couldn't get any description … couldn't really see a face," but believed that it was them based on height and hair color. (A.167a.)

The prosecutor, obviously concerned about Harris's weak testimony, asked if she was recanting her earlier supposed positive identification. He asked as follows:

> "Q: "But you told [the DA investigator] back then that then that it was Kuenzel and Venn but now **you just can't say that positively**?" (A.169a.) (emphasis added).

Harris, in her response, unequivocally stated that she had *never* positively identified Kuenzel. She stated as follows:

> "A: **No, sir, not positively** … I said that I **believed** that it was them." (A.169a.) (emphasis added).

This previously undisclosed evidence reveals not mere equivocation as the Eleventh Circuit states (A.12a); it demonstrates Harris could only positively identify Venn's car and it was her mere speculative

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[5] "Q: Have you talked to either one of them or anything before? A: No, sir. Not -- the only conversation that we had was about the car, and since then I hadn't talked to either one of them. Hadn't even saw either one of them." (A.170a.)

"belief" that Kuenzel and Venn were present, based on her observation of Venn's car.

Harris's testimony was crucial at trial because she provides the *only* allegedly direct extrinsic corroboration that Kuenzel was with Venn after 8:00 p.m. on the night of the murder.[6]

On its own, the new evidence shreds the government's case. When viewed in combination with the trial evidence showing that Kuenzel was not with Venn after 8:00 p.m. and was not otherwise connected to this crime—*i.e.*, the eight witnesses physically present at the store that failed to identify Kuenzel as Venn's companion; Kuenzel's alibi; Floyd's interaction with Venn; Venn's initial statements to the police identifying and describing Pope as his companion—no reasonable juror would have found guilt beyond a reasonable doubt.

When all of the evidence, new and old, is viewed in its totality, Kuenzel's case is far stronger than the case presented by the petitioners in *Schlup* and

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[6] *Amici* note that in *Williams v. State*, the Alabama Court of Criminal Appeals reversed a conviction for murder where, as here, the corroborating witness only placed the defendant "in the area at the time of the murder," which "without more, does not 'raise a suspicion of [defendant's] guilt.'") 72 So. 3d 721, 722–23 (Ala. Crim. App. 2010). The test for determining whether there is sufficient corroboration of the testimony of an accomplice consists of "eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient evidence tending to connect the defendant with the commission of the offense." *Andrews v. State*, 370 So.2d 320, 321 (Ala. Crim. App. 1979), *cert denied*, 370 So.2d 323 (Ala. 1979). Even with the new evidence, Harris's trial testimony was insufficient corroboration of Venn's testimony under Alabama law.

House, primarily because the prosecution's evidence of guilt was far stronger in those cases than here. Eliminating the prosecution's evidence challenged by the petitioner's new evidence, in *Schlup* there remained two witnesses, each a law enforcement official, whose positive, eyewitness identifications remained entirely unchallenged and unaffected by the new evidence. *Schlup*, 513 U.S. at 331. Similarly, in *House*, this Court acknowledged that "aspects of the State's evidence—Lora Muncey's memory of a deep voice, House's bizarre evening walk, his lie to law enforcement, his appearance near the body, and the blood on his pants—still support an inference of guilt." *House*, 547 U.S. at 553–54.

In contrast, Kuenzel's new evidence decimates the prosecution's case, making it clear that any reasonable juror likely would have had reasonable doubt about Petitioner's guilt.

CONCLUSION

Amici respectfully urge this Court to grant petitioner's writ of certiorari.

Dated: February 28, 2013

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Appendix A

Amici include:

Robert M. Morgenthau:

Robert M. Morgenthau served as District Attorney for New York County from 1975 until his retirement from that post in 2009. Throughout his 35–year tenure as District Attorney, Mr. Morgenthau oversaw approximately 3.5 million criminal prosecutions, and crime in Manhattan dropped dramatically: by 2008 there were 90.4 percent fewer murders in New York County than in 1974, the year Mr. Morgenthau was first elected.

Prior to becoming District Attorney, Mr. Morgenthau served as the United States Attorney for the Southern District of New York. He has devoted his legal career to service of the public interest, actively working to vindicate the rights of crime victims while, at the same time, ensuring that the fully panoply of constitutional protections are afforded to those accused of crimes.

Mr. Morgenthau's career reflects a vigorous devotion to the twin principles of fairness and justice. In 1982, for example, Mr. Morgenthau initiated an action against the then-sitting Chief Judge of the New York Court of Appeals, charging him with violating the State's Constitution by unilaterally changing the judicial assignment system to permit appointment of supreme court judges based on suggestions from a panel of his own choosing. Driven by his belief that the Chief Judge's actions, although possibly well-meaning, were unconstitutional, improvident and necessitated a legal challenge, Mr.

Morgenthau personally embarked upon a politically fraught litigation that eventually reached the Court of Appeals, where he obtained a unanimous decision confirming that the Chief Judge's actions violated the laws of the State.

In 2009, Mr. Morgenthau was honored with the Paul H. Douglas Award for Ethics in Government in recognition of his significant contributions to the practice and embodiment of ethical behavior in government. In 2011, the New York State Bar Association honored Mr. Morgenthau with its highest honor, the Gold Medal, noting "his tremendous success" and "unsurpassed professionalism."

Most notably, Mr. Morgenthau played a crucial role in the exoneration of the "Central Park Five." In 1990, five young teenagers were convicted of the rape and brutal beating of a female jogger in Central Park, based in large part on their confessions. Twelve years later, Matias Reyes, came forward and stated that he was, in fact, the actual perpetrator.

Upon learning of Mr. Reyes's claim, Mr. Morgenthau ordered that Mr. Reyes be given a DNA test. When the results came back positive, his office conducted a painstaking, months-long investigation to corroborate Mr. Reyes's claim and determined that the new evidence came within the New York state statute governing newly discovered evidence. The District Attorney was time barred from moving to set aside the verdict, and Mr. Morgenthau told defense counsel that he should make a motion to set aside the verdict pursuant to that statute and indicated that the District Attorney's office would consent. The motion was made by defendants to set aside the

verdict. The District Attorney's Office consented and the court promptly set aside the verdict.

Gilbert I. Garcetti:

Gilbert I. Garcetti dedicated 32 years to serving the Los Angeles County District Attorney's office, this country's largest non-federal prosecutorial agency. Mr. Garcetti was Chief Deputy District Attorney for four years and, from 1992 until 2000, served as Los Angeles County's District Attorney. Mr. Garcetti was responsible for his office's decision to seek the death penalty in dozens of cases. Overall, Mr. Garcetti oversaw approximately 1.7 million criminal prosecutions.

During his time as District Attorney, Mr. Garcetti successfully presided over an especially active docket; his office filed more than a quarter million criminal cases each year, and achieved an overall conviction rate of 92 percent, including a murder conviction rate of 90 percent. The statistics confirm the dramatic results Mr. Garcetti achieved while in office: between 1993 and 2001, Los Angeles County experienced a 44 percent decrease in violent crimes, and the homicide rate dropped by half between 1992 and 2000.

As District Attorney, Mr. Garcetti squarely confronted a number of substantial issues gripping Los Angeles County, including domestic violence, hate crimes, welfare fraud and rampant street gangs. As a reflection of the professional and ethical manner in which Mr. Garcetti conducted himself and managed his time in office, in 2002 the Los Angeles City Council President appointed Mr. Garcetti to a

five-year term on the Los Angeles City Ethics Commission.

A central pillar of Mr. Garcetti's tenure was a dedication to imparting a respect for the unique role of a public prosecutor, and the importance of upholding their higher level of responsibility. In his time as District Attorney, Mr. Garcetti recruited and trained over 1,300 prosecutors. Each year, Mr. Garcetti personally met with every graduating class of new prosecutors, alone, for two hours. During those meetings, Mr. Garcetti explained that the district attorney's office's role is not only to prosecute cases, but also to dismiss cases in which the evidence no longer supports the guilt of the accused. Mr. Garcetti reinforced the practical reality that prosecutors, the police and even juries sometimes make errors, offering examples from his own experiences where he dismissed a case rather than let it go to a jury who would likely convict the defendant, but where he believed the evidence of guilt was lacking.

E. Michael McCann:

E. Michael McCann is the longest-serving District Attorney in Milwaukee County history. He presided over Wisconsin's busiest prosecutor's office from 1968 until his retirement in 2006, leaving the office after 38 years.

As District Attorney, Mr. McCann successfully prosecuted a number of high-profile cases, including the notorious case of Jeffrey Dahmer, in which he overcame Dahmer's insanity defense and secured multiple, consecutive life sentences. Mr. McCann also was unafraid to proceed in uncharted waters, as evidenced by his criminal prosecution of Chem-Bio Corporation for recklessly failing to detect evidence of cervical cancer in pap smears of women who died of cervical cancer, the first such prosecution of its kind.

Like Messrs. Morgenthau and Garcetti, Mr. McCann's career as a prosecutor reflects an unwavering respect for the special role that prosecutors play in our society. Mr. McCann taught his assistants that, while a defense attorney may zealously represent a client who appears guilty, a prosecuting attorney may proceed only if there exists sufficient evidence to indicate that the accused is guilty. He explained that this fundamental, ethical responsibility means that, if the prosecutor no longer believes the accused is guilty, that prosecutor is obligated to ask the judge for dismissal; if the judge refused, the prosecutor must address the jury and explain why he or she believed the accused no longer appeared guilty.

Reinforcing the impact his career has had upon the City of Milwaukee, Mr. McCann is not only the recipient of numerous awards, but, in fact, many awards are named after him, including the Milwaukee Bar Association's E. Michael McCann Distinguished Public Service Award and the E. Michael McCann Prosecutor of the Year award presented annually by the Wisconsin District Attorney's Association.