IN THE SUPREME COURT OF IOWA

JACOB LEE SCHMIDT,	)	
	)	
Applicant-Appellant,	)	
	)	
v.	)	SUPREME COURT 15-1408
	)	
STATE OF IOWA,	)	
	)	
Respondent-Appellee.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE EDWARD A. JACOBSON, JUDGE

APPELLANT'S SUPPLEMENTAL BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 1st day of August, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Applicant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jacob Lee Schmidt, 2123 Bryan Street, Sioux City, IA 51103.

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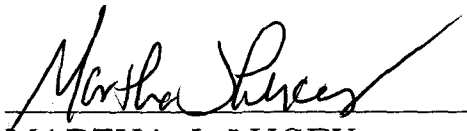

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STATEMENT OF THE CASE

The supplemental brief is submitted in response to the June 21, 2017, order of the Iowa Supreme Court.

ARGUMENT

JACOB SCHMIDT MUST BE GRANTED AN EVIDENTIARY HEARING.

The vast majority of cases are not decided by a trial, but are resolved by plea bargaining. Rhoads v. State, 880 N.W.2d 431, 436 (Iowa 2016). The United States Supreme Court acknowledged that ninety-seven percent of all federal convictions and ninety-four percent of state convictions are the result of guilty pleas. Missouri v. Frye, 566 U.S. 133, 143, 132 S.Ct. 1399, 1407 (2012). According to the Iowa Justice Data Warehouse, the following chart reflects the type of case resolutions in Iowa for the past three calendar years:

	2014	2015	2016
By Trial to Court	2,396	1,766	1,795
By Trial to Jury	610	582	498
Plea Agreement	5, 213	6,275	7,405

Order to Accept Plea	6,192	7,661	7,870

(Counts includes felony, indictable, simple, and OWI types)[1]

The problem of wrongful convictions is not limited to those who contest their guilt at trial. The manner of conviction makes little difference to the reliability of the underlying conviction. Rhoads v. State, 880 N.W.2d at 438. It is imperative that the Court fashion the procedure for actual innocence postconviction claims; not only for trials but for guilty pleas as well.

1. Freestanding vs Gateway Claims

A claim of actual innocence may be asserted, either as a "gateway" to review of another claim which is otherwise procedurally barred, or as a "freestanding" claim justifying relief in and of itself. A freestanding claim of actual innocence is rooted in several different concepts, including the constitutional rights to substantive and procedural due

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1 Counsel requested the data from the Division of Criminal and Juvenile Justice Planning. The data reflects information from ICIS. The data is a reflection of the official records contained in ICIS at the time the information was extracted to the Iowa Justice Data Warehouse. Note: the data may not accurately reflect simple misdemeanor dispositions because of the type of orders generally used. See https://humanrights.iowa.gov/cjjp; laura.roeder-grubb@iowa.gov

process, and the constitutional right not to be subjected to cruel and unusual punishment.

People v. Hamilton, 115 A.D.3d 12, 21 (N.Y. App. Div. 2014) (other citations omitted).

The United States Supreme Court has not recognized "freestanding" claims of actual innocence under the federal constitution. Herrera v. Collins, 506 U.S. 390, 416-17, 113 S.Ct. 853, 869 (1993). Herrera raised a freestanding claim of innocence in a habeas corpus petition challenging his death sentence as violating the Eighth Amendment's protection against cruel and unusual punishment and Due Process Clause of the Fourteenth Amendment. Id. at 398, 113 S.Ct. at 859. The Supreme Court noted that the showing of innocence was a gateway to consideration of an otherwise procedurally barred constitutional claim. Herrera, 506 U.S. at 404, 113 S.C. at 862. See also Schlup v. Delo, 513 U.S. 298, 314-315, 115 S.Ct. 851, 860-861 (1995)(Claim of innocence is "not itself a constitutional claim, but a gateway through which a habeas petitioner must pass to have his otherwise barred

constitutional claim considered on the merits."); House v. Bell, 547 U.S. 518, 536-540, 126 S.Ct. 2064, 2076-2078 (2006)(explaining Schlup standard for use in first habeas petition); McQuiggin v. Perkins, 133 S.Ct. 1924, 1934 (2013)(Miscarriage of justice exception in a first petition for habeas relief survived AEDPA's passage intact and unrestricted.). But a claim of innocence was not cognizable under the Eighth Amendment. Herrera, 506 U.S. at 404-05, 113 S.Ct. at 862. The Herrera Court noted that procedural, not substantive, due process applied. Substantive due process analysis would require the petitioner to be, in fact, innocent. And he was not because he has been convicted in an otherwise constitutionally fair trial. The relevant question was not whether due process prohibited the execution of an innocent person, but whether it permitted judicial review of a freestanding claim of innocence. The Court deferred to state expertise as to criminal procedure. Id. at 407-417, 113 S.Ct. at 864-869. However, the Court addressed Herrera's claim for

the sake of argument and rejected it. The Court proceeded under the assumption that "a truly persuasive demonstration of 'actual innocence' in a capital case where there was "no state avenue open to process such a claim" would be unconstitutional. Herrera, 506 U.S. at 417, 113 S.Ct. at 869.

Iowa Code section 822. 2[2] provides two means to raise a freestanding claim of actual innocence. Iowa Code §822.2(1)(a)(The conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state.); Iowa Code §822.2(1)(d)(There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.). This Court has not yet ruled either subsection provides such an opportunity. Schmidt asserted section 822.2(1)(d) provided such a means. Brief, p. 26. But he now recognizes subsection 822.2(1)(a) and/or the Iowa Constitution

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2 All references to the Iowa Code are to the 2017 version available at https://www.legis.iowa.gov/law/statutory

provide additional means to raise a freestanding claim. The recognition of the alternative means of raising freestanding claims of actual innocence may be important in cases, unlike the present case, where the new evidence may not meet the newly discovered evidence test.

Iowa Code section 822.2(1)(a) generally has been used to raise a claim of ineffective assistance of counsel during the trial proceedings. This usually is a matter of error preservation. However, the language chosen by the legislature does not limit such a constitutional claim to an error in the proceedings which resulted in his conviction. *Compare* 75 ILCS 5/122-1(a)(1) (Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that: (1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both). If a person is convicted of a crime he did not commit such a conviction violates the Iowa Constitution. Iowa

Const. art. 1, §1 (rights of person); Iowa Const. art. 1, §9 (no person shall be deprive of liberty without due process of law); Iowa Const. art. 1, §17 (cruel and unusual punishment).

A number of state courts have determined their respective state constitutions provide a freestanding claim of actual innocence. People v. Hamilton, 115 A.D.3d 12, 26 (N.Y. App. Div. 2014)(due process and cruel and unusual punishment; where the defendant asserts a claim of actual innocence the new evidence may be considered whether or not it satisfies the newly discovered evidence test); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996)(As a matter of Illinois constitutional jurisprudence a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as of matter of due process.); Montoya v. Ulibarri, 163 P.3d 476, 478 (N.M. 2007)(due process and cruel and unusual punishment). See also State v. Beach, 302 P.2d 47, 52-54 (Mont. 2013), overruled on other ground by Marble v. State,

355 P.2d 742, 748 (Mont. 2015)(recognizing both freestanding and gateway claims under Herrera and Schlup); Ex parte Elizondo, 947 S.W.2d 202, 204 (Tex. Ct. App. 1996)(same).

Several jurisdictions have statutes or rules that provide for actual innocence claims. See Arizona R. Crim. P. 32.1(h)(only from *Alford* pleas or trial as interpreted by State v. Fritz, 755 P.2d 444 (Ariz. Ct. App. 1988); D.C. Code Ann. §22-4135 (from trials and guilty pleas); VA. Code Ann. §19.2-327.10 (only from trials). Missouri and Connecticut recognize a freestanding claim of actual innocence as part of state habeas corpus. State ex. rel. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. 2003); Summerville v. Warden, 641 A.2d 1356, 1369 (Conn. 1994). See also Engesser v. Young, 856 N.W.2d 471, 481 n.3 (S.D. 2014)(listing states which allow freestanding claim of actual innocence by statute and case law). Lastly, the Wisconsin Supreme Court held it had inherent power and statutory authority to reverse a judgment of conviction and remit a case for a new trial in the interest of

justice. State v. Armstrong, 700 N.W.2d 98, 119-120 (Wis. 2005).

The reasoning of the Illinois Supreme Court is persuasive. The Illinois Supreme Court determined the Illinois Constitution provided both procedural and substantive due process when newly discovered evidence indicates a convicted person is actually innocent. Washington, 665 N.E.2d at 1336. In terms of procedural due process, the court "believed that to ignore such a claim would be fundamentally unfair." Id. "Imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process." Id. The Illinois Supreme Court disagreed with the Herrera Court's rejection of substantive due process as a means to recognize freestanding innocence claims because of the idea that a person convicted in a constitutionally fair trial must be viewed as guilty. Id. The court stated:

> We think that the Court overlooked that a "truly persuasive demonstration of innocence" would, in hindsight, undermine the legal construct precluding a substantive due process analysis. The stronger the claim—the more likely it is that a

convicted person is actually innocent—the weaker is the legal construct dictating that the person be viewed as guilty. A "truly persuasive demonstration of innocence" would effectively reduce the idea to legal fiction. At the point where the construct falls apart, application of substantive due process principles, as Justice Blackmun favored, is invited.

Washington, 665 N.E.2d at 1336 (citing Herrera, 506 U.S. at 436, 113 S.Ct. at 879 (Blackmun, J., dissenting)). The Illinois court ruled:

Procedurally, such claims should be resolved as any other brought under the Act. Substantively, relief has been held to require that the supporting evidence be new, material, noncumulative and, most importantly, " 'of such conclusive character' " as would " 'probably change the result on retrial.'

Washington, 665 N.E.2d at 1337.

In Hamilton, a New York Supreme Court Appellate Division held that where the defendant asserts a claim of actual innocence, "new evidence may be considered, whether or not it satisfies the [new evidence] factors" and "other legal barriers, such as prior adverse court determinations, which might otherwise bar further recourse to the courts." Hamilton, 115 A.D.3d at 25. The Hamilton Court also held "because punishing an actually innocent person is inherently

disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishment..." Id. at 26. The Iowa Constitution provides the same protection. Punishing an actually innocent person violates the Iowa Constitution.

The principles of federalism which informed the decision in Herrera do not constrain the Iowa Court in its determination of whether the protections within the Iowa Constitution allow a postconviction petitioner to assert a freestanding claim of actual innocence. Cf. Montoya v. Ulibarri, 163 P.3d 476, 483 (N.M. 2007)(discussing New Mexico constitution). "State sovereignty involves significant interest in preserving the accuracy of the state's own trial process and in ensuring correct determinations of guilt and innocence according to state law." Larry May and Nancy Viner, Actual Innocence and Manifest Injustice, 49 St. Louis U. L.J. 481, 488 (2005). Cf. State v. Cline, 617 N.W.2d 277, 289 (Iowa 2000), overruled on

other grounds in State v. Turner, 630 N.W.2d 601, 606 n.2 (Iowa 2001)(exclusionary rule also "protect[s] the integrity of the judiciary.").

2. *Statute of Limitation*

A claim of actual innocence is not barred by the statute of limitations

The three year statute of limitation in Iowa Code section 822.3 time bars claims presented in PCR outside the time period. Iowa Code §822.3. The statute of limitations operates as a procedural bar. State v. Edman, 444 N.W.2d 103, 105 (Iowa Ct. App. 1989). Appellate counsel cannot imagine a case where a credible actual innocence claim would not involve some type of new evidence; but counsel may lack imagination and there may be other types of issues. However, the Court may find the new evidence does not fit within the "newly discovered evidence" test. Given this potential limitation of the newly discovered evidence exception, there still must be a mechanism for the correction of the injustice of a conviction of a truly factual innocent.

The United States Supreme Court has recognized actual innocence as a gateway to review a claim that is otherwise procedurally barred. Herrera, 506 U.S. at 404, 113 S.C. at 862; Schlup, 513 U.S. at 314-315, 115 S.Ct. at 860-861; House v. Bell, 547 U.S. at 536-540, 126 S.Ct. at 2076-2078; McQuiggin v. Perkins, 133 S.Ct. at 1934. The Iowa Constitution provides for a freestanding claim of actual innocence. If a gateway claim can pass through the procedural bar, a freestanding claim certainly cannot be barred by a procedural rule. Due process is offended if an innocent person is convicted. Therefore, if the action is barred by the statute of limitations, an applicant's right to due process is violated. In the event an applicant's new evidence does not fall into the ground-of-fact exception, Iowa Code section 822.3 violates the Iowa Constitution's guarantee of due process.

Statutory

Iowa Code section 822.3 provides for the statute of limitations for filing an application for postconviction relief:

*** All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

Iowa Code §822.3. In Harrington, this Court clarified the difference between the ground-of-fact exception in section 822.3 and the newly discovered evidence claim for relief in subsection 822.2(1)(d):

... a postconviction-relief applicant relying on the ground-of-fact exception must show the ground of fact is relevant to the challenged conviction. By "relevant" we mean the ground of fact must be of the type that has the potential to qualify as material evidence for purposes of a substantive claim under section 822.2. We specifically reject any requirement that an applicant must show the ground of fact would likely or probably have changed the outcome of the underlying criminal case in order to avoid a limitations defense. A determination of that issue must await an adjudication, whether in a summary proceeding or after trial, on the applicant's substantive claim for relief.

Harrington v. State, 659 N.W.2d 509, 521 (Iowa 2003)(other citation omitted).

In cases where the applicant is asserting newly discovered evidence pursuant to section 822.2(1)(d), the district court can apply the existing ground-of-fact exception analysis as outlined in Harrington. *Every* ground of fact, if it has the requisite "nexus" with the challenged conviction, goes to the ultimate fact of establishing the defendant's non-guilt of the offense. See Harrington, 659 N.W.2d at 521 (discussing "nexus" requirement). For purposes of the ground-of-fact exception to the limitations period, however, the pertinent 'ground of fact' upon which Schmidt's PCR action relies is the fact that the victim recanted his allegations of sexual abuse. The recantation did not occur until seven years after Schmidt's guilty plea and, therefore, could not have been asserted within the limitations period. See Id. at 520-521 (PCR application based on witnesses' recantation of trial testimony triggered ground-of-fact exception to three-year limitations period).

The ground of fact must be the discovery of the new evidence not the petitioner's actual innocence. If the actual

innocence was the ground of fact, a petitioner would never meet the exception regardless of the circumstances of the new evidence – including Brady violations. Presumably, a person would, or reasonably should, know if he committed the act. Yet, while a petitioner may know he is innocent, section 822.3 ground-of-fact exception "must incorporate the notion that there had to be a possibility of success on the claim." Nguyen v. State, 829 N.W.2d 183, 188 (Iowa 2013)(discussing ground-of-law exception). Until the new evidence is uncovered, the applicant is still in the same situation as prior to the conviction. He cannot present this information even knowing he is innocent.

3. *Test to be applied*

Trial vs guilty plea

The evidence available for consideration will differ depending on whether the applicant entered a guilty plea or was convicted after a trial. Because of those differences, the test to apply will necessarily require different considerations.

As discussed above, it is possible an actually innocent person may petition the court with new evidence which may not meet the "newly discovered evidence" standard. For example, the petitioner may present an affidavit of a person who previously asserted his Fifth Amendment privilege against incrimination. This Court has held this does not qualify as newly discovered evidence. Jones v. State, 479 N.W.2d 265, 274 (Iowa 1991); Jones v. Scurr, 316 N.W.2d 905, 910 (Iowa 1982). Or the applicant may present scientific evidence which completely discredits the prosecution's theory but is not considered a "watershed development." More v. State, 880 N.W.2d 487, 509 (Iowa 2016). The Iowa Constitution's guarantee of due process and prohibition against cruel and unusual punishment requires the postconviction court hold a hearing if the petitioner makes a showing of actual innocence which warrants an exploration of the new evidence.

Trial

If the applicant was convicted following a trial, at a PCR hearing, the court should examine the evidence previously presented and evaluate any reliable evidence to determine if the new evidence probably would have changed the result of the trial. The applicant's evidence does not have to fit within the test for newly discovered evidence. However, the factors involved in determining whether evidence is newly discovered under the motion for new trial test remain relevant to the determination of whether or not the evidence presented by the applicant is reliable. Cf. Montoya, 163 P.2d at 487 (When examining freestanding claims the court is not constrained by the requirements applicable to motions for new trial; those factors remain relevant as the court reviews whether or not the evidence is reliable); Marble, 355 P.3d at 749 (the first four factors of the test also remain a viable resource when determining whether the new evidence should be considered).

Alternatively, if this Court declines to adopt the above test, under existing law in order to prevail in a PCR action

because of newly discovered evidence, the defendant must show:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

More v. State, 880 N.W.2d 487, 499 (Iowa 2016). This test for a motion for new trial has historically been applied to a claim of newly discovered evidence in a postconviction relief. Jones v. State, 479 N.W.2d at 274; Jones v. Scurr, 316 N.W.2d at 907; Harrington, 659 N.W.2d at 516; State v. Smith, 573 N.W.2d 14, 21 (Iowa 1997). The Iowa test for newly discovered evidence is consistent with many other jurisdictions. There are some variations in the tests; especially the requirement outlined in Iowa's fourth prong. See e.g. Armstrong, 700 N.W.2d at 130 (reasonable probability different result); Marble, 355 P.3d at 749 (viewed in light of evidence as a whole would establish petitioner did not engage in criminal conduct for which he was convicted); People v.

Coleman, 996 N.E.2d 617, 635 (Ill. 2013)(would probably lead to different result).

This Court should not adopt the test outlined in Schlup v. Delo. Schlup held that prisoners asserting innocence as a gateway to defaulted claims must establish that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. at 327, 115 S.Ct. at 867. See also House v. Bell, 547 U.S. at 536-37, 126 S.Ct. at 2076-2077 (discussing the Schlup standard). The application of the Carrier[3] standard adopted by the Schlup Court for an actual innocence gateway claim is not used to determine the ultimate question whether the applicant is entitled to new trial.

> [T]he application of the standard arises in the context of a request for an evidentiary hearing. In applying the *Carrier* standard to such a request, the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. Obviously, the Court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment. Cf. *Agosto v. INS*, 436 U.S. 748, 756, 98 S.Ct. 2081, 2087, 56

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3 Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986).

L.Ed.2d 677 (1978) ("[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Instead, the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.

Schlup v. Delo, 513 U.S. at 331-32, 115 S.Ct. at 869. Only once the applicant passes through the gateway by satisfying the Carrier standard, does the court grant a hearing on the otherwise procedurally barred constitutional claim. The constitutional claim does not involve the new evidence but is constitutional trial error.

The Iowa postconviction proceedings are governed by the Rules of Civil Procedure. Iowa Code §822.7. Summary judgment is appropriate when no genuine issue of fact exists and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981; Grissom v. State, 572 N.W.2d 183, 184 (Iowa 1997); Iowa Code §822.6 (summary disposition). Conversely, summary judgment is not appropriate where, as in

the present case, a genuine issue of material fact exists. The district court is not to make credibility determinations at the summary judgment stage. Frontier Leasing Corp. v. Links Engineering, LLC, 781 N.W.2d 772, 776 (Iowa 2010). The Schlup test would allow the district court to make credibility determinations on little information and prevent an actually innocent person from proving his claim. In general, courts prefer to decide cases on their merits. Orcutt v. Hanson, 163 N.W.2d 914, 917 (Iowa 1969); Peterson v. Eitzen, 173 N.W.2d 848, 852 (Iowa 1970)(calling the preference "strong"). Even if an applicant is making assertions that the district court finds improbable, the applicant is entitled to a trial if there is a genuine issue of material fact. Manning v. State, 654 N.W.2d 555, 562 (Iowa 2005). The Schlup test is inconsistent with Iowa law and is not applicable to an Iowa postconviction relief proceeding.

Guilty Plea

The test proposed for trials may not easily translate to cases where the applicant entered a guilty plea. Because no evidence was heard by a factfinder, the determination that the new evidence probably would have changed the result of the "trial" is inapplicable. Instead, after a hearing, the district court will need to determine had the applicant knew of the new evidence or had the new evidence been available prior to the entry of the guilty plea, there is a reasonable probability that he would not have plead guilty and would have insisted on going to trial. Cf. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006)(ineffective assistance of counsel affecting voluntariness of plea); Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985)(same). See also Buffy v. Ballard, 782 S.E.2d 204, 220-21 (W.Va. 2015)(In case involving a guilty plea is whether there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.). At a hearing, Schmidt should be given an opportunity to testify why he pled guilty

and if the witness had recanted prior to the entry of his guilty plea would he have insisted on going to trial.

This Court should reject the test established in South Carolina for applicants who pled guilty and move to vacate the plea based upon newly discovered evidence. The South Carolina Supreme Court held:

> when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 765 S.E.2d 123, 130 (S.C. 2014). The difficulty Appellant has with South Carolina's test is two-fold. First, the new evidence should not be required to meet the newly discovered evidence test. Two, in practice, how does the district court apply the "interest of justice" requirement for

vacation of the guilty plea prong? When does this apply? When the applicant would not have pled guilty but for the lack of information/evidence? Does the interest of finality in convictions outweigh the danger of conviction of an actually innocent person? When the applicant would be acquitted after a trial? When the applicant can show by clear and convincing evidence he is factually innocent and entitled to a dismissal? For all of these reasons, this Court should reject the South Carolina test.

This Court must adopt a test that can be understood by litigants and the bench alike. The test needs to be one that can be applied fairly and evenly to all applicants regardless of the type of new evidence. It also needs to be capable, if necessary, of a full and fair review by the appellate courts.

4. Burden and Quantum of Proof

The burden of proof in a postconviction relief action is on the petitioner who must establish the facts asserted by a preponderance of the evidence. Cleesen v. State, 258 N.W.2d

330, 332 (Iowa 1977). The same burden and quantum of proof must be applied in PCR claims asserting actual innocence.

However, several jurisdictions have adopted a clear and convincing standard. E.*g.* Montoya, 163 P.3d at 486; State ex rel. Amrine v. Roper, 102 S.W.3d at 548; Ex parte Elizondo, 947 S.W.2d at 209; Miller v. Comm'r of Corr., 700 A.2d 1108, 1132 (Conn. 1997); Engesser, 856 N.W.2d at 481. The clear and convincing standard of proof is not appropriate for the resolution of an Iowa PCR claim.

First, Iowa has a freestanding claim. Because the United States Supreme Court has not recognized a freestanding claim, any suggestion in Herrera to a heightened standard is unpersuasive. Second, requiring a higher burden in actual innocence PCR cases than any other PCR case is inappropriate. An actual innocence claim should be evaluated by the court as any other PCR claim. Cf. People v. Coleman, 996 N.E.2d at 636-37 (state's proposed clear and convincing

burden of proof which would make an actual innocence claim harder to prove than any other PCR claim is inappropriate). Third, the Iowa tests to be applied, either under existing law or Appellant's proposed tests, require "probably would have changed the result of the trial" or "reasonable probability" that he would not have pled guilty." There are no gradations to probably; either there is one or there is not. State v. Armstrong, 700 N.W.2d at 130. The probability determination cannot be made by the clear and convincing evidence standard. Thus, this Court should reject a clear and convincing evidence standard for actual innocence claims in PCR actions.

Lastly, the usual remedy for a successful PCR litigant is a new trial. Iowa Code § 822.7. If this Court were to adopt the standard that "a petitioner asserting a freestanding claim of innocence must convince the court by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence", similar to the New Mexico Court's

pronouncement in Montoya, 163 P.2d at 486, the remedy would not be a new trial, but a dismissal. Cf. Coleman, 996 N.E.2d at 638 (citing Washington, 665 N.E.2d at 1340 (McMorrow, J., specially concurring)(Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial.). In fact, the District of Columbia recognizes the different standards of proof and corresponding remedies. Upon consideration of the statutory factors, if the court concludes that is "more likely than not that the movant is actually innocent of the crime, the court shall grant a new trial." D.C. Code Ann. §22-4135(g)(2). If after considering the statutory factors, "the court concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice." D.C. Code Ann. §22-4135(g)(3). This Court

should adopt the reasonable probability of a different outcome test for actual innocent claims raised in a PCR action.

5. *Consideration of the evidence from the trial record and the postconviction hearing*

In practice, the PCR court would consider the record as a whole; the new evidence from the PCR hearing and the evidence presented at trial. If this Court requires the new evidence to meet the "newly discovered evidence" test, the district court would first determine if it meets the More test. If the Court agrees the new evidence need not meet the More test requirements, the district court would not be required to take this step. The PCR court then

> must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict. This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make. But the trial court should not redecide the defendant's guilt in deciding whether to grant relief.

People v. Coleman, 996 N.E.2d at 637-38. "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both

new and old, together." Id. at 638. If the court determines the applicant has met his burden, he is granted a new trial.

In practice, the reevaluation of the old evidence based upon the newly presented evidence is the same as what the PCR courts have been doing for years. As discussed in More,

> We now turn to the question of whether the verdict would have been different had the newly discovered evidence been available to More. We note that this is not a harmless error standard, or even the kind of prejudice associated in federal courts with ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692–93 (1984). Instead, the inquiry is whether, based upon all the evidence, the verdict probably would have been different in the case before us. *Jones*, 316 N.W.2d at 910; *State v. Hicks*, 277 N.W.2d 889, 896 (Iowa 1979). The question, of course, is case specific and fact intensive.

More v. State, 880 N.W.2d at 510.

6. *Consideration of the evidence from the guilty plea record and the postconviction hearing*

The district court must apply a subjective standard in the determination of whether an applicant has met his burden to prove by a preponderance of the evidence that *he* would not have pled guilty but instead insisted on a trial. Cf. Kirchner v. State, 756 N.W.2d 202, 206 (Iowa 2008)("we hold a subjective

standard for the measurement of prejudice shall be applied in the determination of whether a defendant would have accepted a plea offer and received a lesser sentence but for the ineffective assistance of counsel."). The applicant must present some credible, non-conclusory evidence that he would not have pled guilty had he knew of or had available for use the new evidence. Ordinarily, the applicant will need to testify as to what his thought process was at the time of the guilty plea.

In making the determination regarding the reasonable probability the applicant would not have entered a guilty plea, the court may consider: (1) the conclusive character of the new evidence; (2) the reasons why the applicant pled guilty; (3) how the new evidence changes the favorability of the plea agreement, if any; and (4) the applicant's understanding of the criminal trial proceedings and consequences of the conviction; not only the criminal consequences but the collateral consequences such as applicability of the special sentence in

Chapter 903B, sex offender registry, and disqualifications because of a felony conviction. The evaluation of the full consequences of the conviction is important because there may be lifelong and/or life-altering consequences of a conviction. The decision to enter a guilty plea may not only depend on the strength of the evidence against the defendant, but also the associated risks of all consequences if convicted of the charge. This list is not exhaustive. The consideration will depend on the circumstances of each case; therefore, a fact specific inquiry is necessary.

In determining if the new evidence would have caused the applicant to proceed to trial, the district court should use caution in substituting its judgment of what was "best" for the applicant. Additionally, the court should use caution in holding the applicant to an impossibly high standard – preponderance of the evidence is the proper quantum of proof. Courts often find the applicant's testimony "self-serving" and deny relief. Cf. Lowe v. State, No. 08–1551, 2009 WL

1677240, at *5 (Iowa Ct. App. June 17, 2009)(Lowe's testimony at the postconviction hearing was "self-serving."); Jentz v. State, No. 15–0710, 2016 WL 3002895, at *3 (Iowa Ct. App. May 25, 2016)(Potterfield, J., dissenting)(Of course, his testimony, like that of most witnesses, is "self-serving."); Stewart v. State, No. 14–0583, 2016 WL 4384423, at *1 (Iowa Ct. App. Aug. 17, 2016)(Without any further evidence, there is only evidence that some kind of plea offer was made and Stewart's "subjective, self-serving testimony" that she might have accepted it.); Dempsey v. State, 860 N.W.2d 860, 871 (Iowa 2015) (denying claim that a plea offer was rejected because of counsel's failure to properly advise defendant because there was "no objective evidence" to show how the misinformation affected the defendant's decision to reject the offer other than the defendant's "own subjective, self-serving testimony"); Smith v. State, No. 09-1518, 2010 WL 4867384, at *6 (Iowa Ct. App. Nov. 24, 2010)(Even if defendant had unequivocally testified that he would not have pled guilty had

he been aware of allegedly undisclosed information, a court does not have to accept this kind of self-serving claim.").

The district court should not consider the unproven, untested Minutes of Testimony as true to determine the applicant's guilt despite the new evidence. The new evidence need not exculpate the applicant as to the crime he voluntarily entered guilty pleas. This is not the standard or test to be applied. The materiality of the evidence does not require the applicant to prove that had he known or had available the new evidence it would have ultimately resulted in his acquittal. Cf. Buffy, 782 S.E.2d at 220 (Applying Brady standard). "Often the decision to plead guilty is heavily influence by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." Buffy, 782 S.E.2d at 216 (other citations omitted).

7. Type of evidence

The type of new evidence does not affect the district court's duty to evaluate the reliability[4] of the evidence. The district court is required to engage in the same consideration of the evidence, old and new, as in every other case where fact finding is required. The fact that the new evidence may consist of a recantation does not permit the district court to dismiss it out-of-hand.

The Iowa Supreme Court has repeatedly held that a witness' recantation testimony is looked upon with the utmost suspicion. Jones v. State, 479 N.W.2d at 275 (citing State v. Folck, 325 N.W.2d 368, 377 (Iowa 1982); State v. Frank, 298 N.W.2d 324, 328-29 (Iowa 1980); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980); State v. Compiano, 154 N.W.2d 845 (Iowa 1967)). However, as the Illinois Supreme Court

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4 The federal courts have required a claim of actual innocence to be both credible and compelling. A "credible" actual innocence claim "must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Lopez v. Miller, 915 F.Supp.2d 373, 399 (E.D.N.Y.2013).

recognized, the court needs to hear the evidence before deciding its veracity.

As in nearly every jurisdiction, Illinois courts have stated that recantations of trial testimony are to be viewed with suspicion. But a survey of persuasive cases throughout the country reveals that recantation statements should not simply be dismissed without further analysis. *See, e.g., Lopez v. Miller*, 915 F.Supp.2d 373, 402–08 (E.D.N.Y.2013)(analyzing at length the considerations federal courts have given to recantation testimony); *United States v. Ramsey*, 726 F.2d 601, 604–05 (10th Cir. 1984)(where the witness himself files an affidavit averring that his trial testimony was false, the trial court must at least decide if the recantation is to be believed).

People v. Montanez, 55 N.E.3d 692, 699-700 (Ill. App. Ct. 2016)(other citations omitted). See also People v. Wideman, 52 N.E.3d 531, 543 (Ill. App. Ct. 2016)("Courts have held that defendants will not be precluded from presenting a witness's recantation as newly discovered evidence, though they knew the witness to be perjuring himself or herself.").

The postconviction court is not required to believe the recantation (or other evidence), but has the duty to view the matter in its entirety to determine if an applicant has met his burden. The nature or characteristics of the new evidence

must be considered after a full and fair opportunity to present it in a hearing. The type of the evidence cannot be a justification for not granting a hearing.

CONCLUSION

Jacob Schmidt respectfully requests this Court reverse the district court's dismissal of his postconviction relief petition and remand for an evidentiary hearing.

Additional oral argument might assist the Court in resolving the questions presented in the June 21, 2017 order. If the Court schedules oral argument, counsel requests to be heard.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.44, and that amount has been paid in full by the Office of the Appellate Defender.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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