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IN THE SUPREME COURT OF IOWA
Supreme Court No. 15-1408

JACOB LEE SCHMIDT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

STATE'S SUPPLEMENTAL BRIEF PER JUNE 30, 2017 SUPREME COURT ORDER

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STATEMENT OF THE CASE

Nature of the Case.

Jacob Schmidt pleaded guilty in 2007 to one count of assault with intent to commit sexual abuse and one count of incest, in violation of Iowa Code sections 709.11 and 726.2 (2007). Judgment; Trial Information; Amended Trial Information; App. 6-7, 22-23, 29-34. Originally, Schmidt had been charged with three counts of third-degree sexual abuse and one count of incest. Trial Information; App. 6-7. The charges stemmed from allegations that Schmidt molested his younger half-brother.

In 2014, Schmidt requested postconviction relief, alleging that his brother had now recanted his accusations of sexual abuse. The postconviction court granted the State's request for summary dismissal on the basis that Schmidt's guilty plea waived all defenses not intrinsic to the plea. Ruling on Motion to Dismiss/Motion for Summary Judgment; App. 66-67. This appeal followed.

Course of Proceedings.

This appeal was originally decided by the Court of Appeals. *See Schmidt v. State*, 2016 WL4384697 (Iowa Ct. App. Aug. 17, 2016). The court found that the applicant's guilty plea waived all defenses, and he was not entitled to present a newly discovered evidence claim in postconviction proceedings. *Schmidt*, *id.* at *1. Schmidt sought and was granted further review by this court, and oral arguments were held on February 14, 2017. On June 30, 2017, the court requested supplemental briefing from the parties:

> Both parties' existing briefs and the court of appeals opinion primarily address the yes-or-no question whether a guilty plea always forecloses a subsequent challenge to a conviction based on the defendant's actual innocence, The supplemental briefs should address the standard to be applied if the court determines that a guilty plea does not always bar an actual innocence challenge, In other words, in deciding what action to take on a petition for postconviction relief raising actual innocence, how should the district court take into account the statute of limitations in Iowa Code section 822.3, the type of evidence of actual innocence (e.g. recantation or otherwise), what the record shows about the guilt of the defendant, and whether the defendant pled guilty or was found guilty after a trial, The briefing should also address the potential applicability of the four-part test for newly discovered evidence in *More v. State,* 880 N.W.2d 487, 499 (Iowa 2016), or the test

> applied by the United States Supreme Court in *Schlup v. Delo,* 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995) ("[I]t is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt"), or some other standard.

June 30, 2017 Order.

Facts.

According to the minutes of testimony, the applicant, Jacob Schmidt, and the victim, B.C., were half-brothers born of the same mother. Minutes of Testimony; App. 8. One day, B.C.'s father, Peter C., left the house momentarily and returned to retrieve a pack of cigarettes; he discovered 17-year-old Schmidt and 14-year-old B.D. in a bedroom, with their pants pulled down. Minutes of Testimony; App. 8. Peter C. observed Schmidt with his penis exposed, kneeling behind his younger brother on the bed. Minutes of Testimony; App. 8. Schmidt was attempting to penetrate B.C.'s anus when Peter C. unexpectedly appeared. Minutes of Testimony; App. 8.

B.C. would have testified that Schmidt's penis did touch the skin surrounding his rectum on that day. Minutes of Testimony; App. 8. Schmidt had forced B.C. to engage in oral sex and to have anal intercourse with him in the past, which he described as painful. Minutes of Testimony; App. 8. B.C. later spoke to a social worker at a

child advocacy center and detailed the abuse. Minutes of Testimony; App. 9. Schmidt was described as 6'3" and weighing between 350 and 400 pounds. Minutes of Testimony – Sioux City Police Report Attachment; App. 14. B.C. was described as intellectually low-functioning, around 4 ½ feet tall, and weighing between 75-90 pounds. Minutes of Testimony – Sioux City Police Report Attachment; App. 14.

Schmidt pleaded guilty to assault with intent to commit sexual abuse and incest. At the plea hearing, Schmidt engaged in an extended colloquy with the trial court and admitted several times that he was guilty of the crimes charged. *See* April 2, 2007 Plea Tr. p. 21, lines 2-14 ("I grabbed a child [B.C.] and tried to perform a sex act against his will"); Tr. p. 22, line 3 – p. 28, line 25 ("I performed a sex act [involving contact between Schmidt's penis and B.C.'s anus] on a minor child."). Additional facts will be discussed as relevant to the argument below.

ARGUMENT

I. Assuming That A Defendant Who Knowingly And Voluntarily Enters A Valid Guilty Plea Is Later Permitted To Allege Actual Innocence And Present Newly Discovered Evidence In Postconviction Proceedings, His Claim Should Be Evaluated Using A More Rigorous Standard Than The Test For Newly Discovered Evidence Applicable To Defendants Who Were Convicted After A Trial.

The State maintains and incorporates by reference its initial position that a defendant who has knowingly and voluntarily entered a valid plea of guilty is not entitled to challenge the plea on the basis of newly discovered evidence. Assuming, however, that a guilty plea will not automatically bar a later actual innocence claim, the State submits the following supplemental brief.

A. The Three-Year Time Bar Of Iowa Code Section 822.3:

Iowa Code section 822.3 contains the statute of limitations for postconviction proceedings. Section 822.3 provides that an application for postconviction relief must ordinarily 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." Iowa Code § 822.3 (2013). The three-year time bar 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 (2013).

Iowa Code section 822.2(1)(d) allows a convicted defendant to apply for postconviction relief on the basis of "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the internet of justice." Iowa Code § 822.2(1)(d). Section 822.2(1)(d) refers to newly discovered evidence. An applicant alleging newly discovered evidence must satisfy a familiar four-part test:

> 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); *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). Thus, a defendant who establishes that the existence of a new ground of fact or law is excused from the three-year time bar. *See Harrington, id.* at 519-21.

As it pertains to claims of actual innocence, however, the State continues to argue that a defendant who has chosen to plead guilty

and solemnly assert in court that he is indeed guilty is unable to avail himself of newly discovered evidence years later because that claim has been waived. "Notions of newly discovered evidence simply have no bearing on a knowing and voluntary admission of guilt." *State v. Speed*, 573 N.W.2d 594, *quoting State v. Alexander*, 463 N.W.2d 421, 423 (Iowa 1990). Assuming that this court determines a guilty plea does not always preclude a newly discovered evidence claim and assuming a defendant who pleaded guilty believes that he is actually innocent, that fact is known to him and could be asserted within the three-year statute of limitations. While subsequent newly discovered evidence may help to support his claim, the ground of fact on which he relies – his actual innocence – is best known to the defendant, and is known from the outset. A defendant in that scenario could pursue his claim though due diligence during the statutory three-year period. *See Walters v. State*, 2014 WL 69589, *5-6 (Iowa Ct. App. Jan. 9, 2014) (noting the victim's recantation was not the "ground of fact" that could not have been raised within the three-year time bar; rather, the ground of fact was his actual innocence, which could have been raised within the three-year time bar but was voluntarily relinquished); *see also Norris v. State*, 896 N.E.2d 1149, 1153 (Ind.

2008) ("A defendant knows at the time of his plea whether he is guilty or not to the charged crime. With a trial court's acceptance of a defendant's guilty plea, the defendant waives the right to present evidence requiring guilt or innocence.").

In sum, postconviction courts should apply the three-year statute of limitations to all claims unless a ground of fact or law could not have been raised within the three-year period. *See* Iowa Code § 822.3. Claims of newly discovered evidence fall into this category, but defendants who have pleaded guilty have "put a lid on the box" and have waived any claim challenging the State's evidence against them. *State v. Kyle*, 322 N.W.2d 299, 304 (Iowa 1982). While a defendant who has pleaded guilty is always able to allege ineffective assistance of counsel that bears on the voluntary or intelligent nature of the plea (*State v. Carroll*, 767 N.W.2d 638, 641-44 (Iowa 2009)), other postconviction remedies are generally not available to a defendant who has declared his guilt and waived his defenses. A defendant who asserts he is innocent, but has chosen to plead guilty, should not reap the benefit of the newly discovered evidence exception to the statute of limitations.

B. The Type Of Evidence Of Actual Innocence:

Evidence establishing a defendant's actual innocence can take various forms. In *Schlup v. Delo*, 513 U.S. 298 (1995), the United States Supreme Court discussed the concept of a gateway claim of actual innocence, and noted that a habeas petitioner must present "reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial" to establish his actual innocence and perhaps clear the way to allege substantive constitutional violations. *Schlup*, 513 U.S. at 324. However various types of evidence may be ranked in terms of quality, however, recantation evidence surely falls at the low end of the spectrum. As this court has long held, a witness' recantation is "looked upon with utmost suspicion." *Carroll v. State*, 466 N.W.2d 269, 273 (Iowa 1990) (*quoting State v. Frank*, 298 N.W.2d 324, 329 (Iowa 1980); *State v. Compiano*, 154 N.W.2d 845, 849 (Iowa 1967). The trial court is not required to believe the recantation. *Carroll*, 466 N.W.2d at 273. A recantation is "of course, is not new evidence in the real sense." On the contrary, it is but an assertion by affidavit that the former testimony given by the witness was false." *Compiano*, 154 N.W2d at 849. In evaluating a

recantation, the trial court should deny a new trial request if it believes the statements in the affidavit are false and is not reasonably well-satisfied that the witness's prior testimony was false. *Compiano, id.* Even if a critical witness has recanted, the recantation has been found to be insufficient to warrant relief if other independent evidence establishes the defendant's guilt. *Compiano, id.* at 850. "Skepticism about recantation is especially applicable in cases of child sexual abuse where recantation is a recurring phenomenon." *People v. Schneider*, 25 P.3d 755, 763 (Colo. 2001) (*citing State v. Tharp*, 372 N.W.2d 280, 282 (Iowa Ct. App. 1985) (noting "where families are torn apart there is great pressure on the child to make things right."). This is the case here. Although the applicant's younger brother recanted his allegations of abuse some nine years later, the recantation is particularly unpersuasive; the victim's father was an eyewitness to the crime. *See* Minutes of Testimony; Police Reports; App. 8, 11-19.

A DNA exoneration, on the other hand, is considered one of the most convincing types of newly discovered evidence. The Iowa legislature recognized the importance of DNA evidence when it enacted Iowa Code section 81.10, which allows convicted defendants

– even those who have pleaded guilty – to petition the court for DNA analysis under certain circumstances. *See* Iowa Code § 81.10(1-7)(2014). The results of the DNA analysis are reported to the parties and the court, and may be provided "for consideration in connection with requests for parole, pardon, reprieve, and communication." Iowa Code § 81.10(9)(2014) .

All of the other types of evidence will fall somewhere in between recantations and exculpatory DNA evidence. It will be for the postconviction court to weigh the newly discovered actual innocence evidence in light of the record before it in evaluating the claim. Whether misplaced physical evidence, a newly discovered eyewitness to the crime, or evolving scientific analysis, it is difficult to evaluate how a particular piece of evidence should be viewed by the postconviction court in establishing actual innocence in any particular case. *See Miller v. Commissioner of Correction*, 700 A.2d 1108, 1135 (Conn. 1997) (refusing to "cabin the particular type of evidence that must underlie the finding of innocence" and noting evidence and the inferences drawn from it come in all types, of ranging degrees of persuasiveness and reliability, and a judicial fact finder must look at it all and apply all of his or her powers of intellect,

common sense, judgment, reason, and knowledge of human nature in arriving at factual determinations"). At the margins, however, recantation and DNA analysis remain at the bottom and the top of the scale, and recantations should continue to be regarded with great suspicion.

C. The State Of The Record Regarding The Defendant's Guilt And Treatment Of Defendants Who Plead Guilty Versus Those Who Were Convicted After Trial:

The State combines the next two subjects listed in the court's supplemental briefing order because they are related. The topic of what the record shows regarding the defendant's guilt is intertwined with the question of whether the conviction resulted from a trial or a plea. The first question is dependent on the second. As this court recognized in the context of the wrongful imprisonment compensation statute and the requisite showing of actual innocence, there are critical differences in the level of record available:

> …[W]hile a plea bargain may occur in the shadow of a trial, and while the nature of the plea bargain may be affected by the merits, there nonetheless is no trial record [when a defendant pleads guilty]. Where a person convicted after a trial claims actual innocence under Iowa's compensation statute, the reviewing court has the benefit of a contemporaneously developed record to assist

> in the determination of whether the claimant has met his or his burden.
>
> In the guilty plea context, however, there will be no such record. As a result, the ability of the trial court to accurately determine a claim of actual innocence may be more difficult in the context of a plea bargain than when a claimant has been convicted at trial.

Rhoades v. State, 880 N.W.2d 431, 449 (Iowa 2016).

The level of available detail regarding the defendant's guilt in the guilty plea context hampers the court's ability to evaluate a newly discovered evidence claim in the same way. Regardless of the standard ultimately adopted to evaluate actual innocence claims in a postconviction context, the calculus must involve the interplay between the alleged newly discovered evidence and the remaining evidence of the defendant's guilt. This lack of an adequate record underscores the unfairness and the difficulty in permitting a newly discovered evidence challenge years after the defendant has relieved the State of its burden to present or maintain any evidence. Even if a guilty plea record contains minutes of testimony, witness statements and police reports, and the defendant's statements at the guilty plea proceeding establishing a factual basis for the plea, this information is a far cry from the quality and quantity of the evidence actually

presented and tested through cross-examination at a criminal trial. "There is an inherent paradox in the notion that someone who has stood in open court and declared, 'I am guilty,' may turn around years later and claim that he deserves to pass through the actual innocence gateway. Because a guilty plea waives the defendant's right to prove his actual innocence at trial…a strong argument can be made that a guilty plea should absolutely foreclose a postconviction claim of actual innocence…" (citation omitted) *Weeks v. Bowersox*, 119 F.3d 1342, 1355 (8th Cir. 1997) (Loken, J., concurring). This is especially true in the context of a free-standing actual innocence claim that a defendant has waived by his voluntary and intelligent plea.

D. The Standard To Be Applied In Evaluating Stand-Alone Claims Of Actual Innocence:

In this case, Schmidt argues for a free-standing actual innocence exception, rather than a gateway actual innocence claim that excuses procedural hurdles to allow an independent constitutional violation to be alleged. Defendant's Brief, 25-27. If this court concludes that criminal defendants who enter a valid guilty plea are entitled to assert a stand-alone claim of actual innocence under Iowa Code section 822.2(1)(d), the standard and burden of proof by which that claim is evaluated should be extraordinarily high.

The traditional newly discovered evidence four-part test recently reiterated in *More v. State*, *id.* is an inappropriate standard by which to evaluate an actual innocence claim, especially in the context of a valid guilty plea.[1] A finding that the defendant's newly discovered evidence would "probably change the result of trial" is too low a standard in this context. Concepts of finality require more. *See United States v. Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures, and by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. *The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.*") (emphasis added).

Viewed against the backdrop of a defendant's admitted guilt, his knowing relinquishment of the right to hold the State to its burden of proof, and the court's finding of a factual basis, a defendant later claiming actual innocence should be required to prove that he is actually innocent. Probability or likelihood of a different result is not

[1] A defendant who has gone to trial and been convicted will not need to avail himself of an actual innocence claim, because he can proceed without impediment to allege newly discovered evidence in postconviction proceedings.

a stringent enough standard, and a truly innocent defendant will be able to satisfy the most demanding standard and burden of proof.

The *Schlup v. Delo* standard by which gateway claims of actual innocent are evaluated in federal court should be the low bar used by this court to evaluate actual innocence claims. For a gateway claim, new evidence must establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt in light of all of the available evidence." *Schlup*, 513 U.S. at 327. As the Supreme Court has cautioned when discussing gateway claims of actual innocence, "tenable actual-innocence gateway pleas are rare." The tenable freestanding actual-innocence claim should be even rarer. *See Herrera v. Collins*, 50 U.S. 390, 417 (1993). In *Herrera*, the court observed:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for

> such an assumed right would necessarily be *extraordinarily high*.

Herrera v. Collins, 506 U.S. at 417. (emphasis added). The showing should be "truly persuasive." *Herrera, id.; id.* at 426 (O'Connor, J., concurring). The court declined to be more specific because Herrera could not prevail under any standard. *Id.* at 417-19.

Other courts have required a defendant making a stand-alone actual innocence claim to affirmatively prove his innocence. In *Carringer v. Stewart*, the Ninth Circuit adopted the position of Justice Blackmun's dissent in *Herrera*, noting that "[r]equiring affirmative proof of innocence is appropriate, because when a petitioner makes a free-standing claim of innocence, he is claiming that he is entitled to relief despite a constitutionally valid conviction." *Carringer v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (*citing Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting)).

The court came to the same conclusion in *Gould v. Commissioner of Correction*, 22 A.3d 1196 (Conn. 2011). Distinguishing actual, or factual, innocence from legal innocence, the Connecticut Supreme Court noted that new evidence serving to undercut the evidence presented in the first instance is inadequate to resort to this extraordinary remedy in the absence of affirmative

evidence of innocence. *Gould*, 22 A.3d at 562. "Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime, or that no crime actually occurred." *Id*. at 563. The court reversed a grant of state habeas relief in *Gould*, noting "the recantations by [two eyewitnesses] may demonstrate that there no longer is any credible evidence that the petitioners did commit the crimes of which they were convicted. What the habeas court's decision lacks is any discussion of affirmative evidence which would prove by clear and convincing evidence that the petitioner's did *not* commit the crimes." *Id*. at 1209. In concluding that the habeas court's judgment must be reversed and remanded for consideration under the proper standard, the court observed "we are mindful that it may seem unjust to allow a conviction to stand when the evidence on which the conviction rested has been discredited. It must be remembered, however, that once properly convicted, the petitioners no longer are cloaked in the mantle of the presumption of innocence." *Id*. at 1209. The State suggests that a requirement of an "affirmative showing of innocence" is an appropriately demanding standard for

actual innocence claims in Iowa and will serve to distinguish the rare case of the actually innocent defendant from the many who may claim to be.[2]

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[2] The State notes that several courts have fashioned their own specific tests to evaluate newly discovered evidence claims in the context of guilty pleas. Recognizing the inherent difficulty of conducting a fair evaluation of any newly discovered evidence when presented with a truncated guilty plea record, courts have taken various considerations into account. *See, e.g.*, *In re Reise*, 192 P.3d 949, 954 (Wash. Ct. App. 2008) (noting that the traditional newly discovered evidence factors are "difficult, if not impossible to apply when the moving party pleaded guilty instead of standing trial). The *Reise* court noted that the "passage of time always changes the quantity and quality of potential State's evidence; sometimes it becomes stronger, sometimes weaker. But by pleading guilty, the defendant gives up the right to force the State to prove its case with the potential evidence, weak or strong, and instead provides an alternate sufficient factual basis for guilt;" the court therefore concluded that the proper inquiry in determining whether a manifest injustice has occurred with regard to an earlier guilty plea is whether the new evidence would eliminate the factual basis underlying the plea. *Reise, id.* at 955-56; *see also Jamison v. State*, 765 S.E.2d 123, 129-30 (S.C. 2014) (in which the court added the element that "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."); *People v. Schneider*, 25 P.3d 755, 761-62 (Colo. 2001) (in addition to the traditional requirements of timing and due diligence, as well as a probable change in the result, the court added a requirement that the charges that were filed or to which the defendant pleaded guilty "were actually false or unfounded." *Schneider, id.* at 762.) In the end, the newly discovered evidence tests

If this court finds that the affirmative showing of innocence standard is too demanding, it should at the very least adopt an enhanced version of the *Schlup* standard. A *Herrera* stand-alone actual innocence claim has a higher burden of proof than the gateway claim preponderance standard of *Schlup*. *See House v. Bell*, 547 U.S. 518, 555 (2006) ("The sequence of the Court's decisions in *Herrera* and *Schlup*…implies at the least that *Hererra* requires more convincing proof of innocence than *Schlup*."). In evaluating stand-alone claims, some courts have changed the level of the burden of proof from the *Schlup* preponderance to the more demanding "clear and convincing." *See In Re Davis*, 2010 WL 3385081, *43-45 (S.D. Georgia 2010) (discussing free-standing claims of actual innocence at length and concluding in light of *Schlup* and *Herrera* that the standard for evaluating whether no reasonable juror would convict the defendant should be by "clear and convincing evidence" in stand-alone actual innocence cases rather than the lower "more likely than not" standard of *Schlup*); *Cribbs v. State*, 2009 WL 1905454 (Tenn.

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tailored to guilty pleas adopted by these courts vary, but the inability to measure the newly discovered evidence against a body of previously admitted evidence at trial requires an extraordinarily high standard in any case.

Crim. App. 2009) (using a clear and convincing standard to evaluate whether no jury would have convicted the defendant in light of new evidence and a stand-alone claim of actual innocence); *McKim v. Cassady*, 457 S.W.3d 831, 842-83 (Mo. Ct. App. 2015) (distinguishing between the clear and convincing standard for a stand-alone claim of actual innocence and the more-likely-than-not standard applied to gateway actual innocence claims in state habeas review.)

Regardless of which standard this court ultimately adopts, Schmidt cannot prevail here. Even the most lenient newly discovered evidence standard would require him to establish that the recantation would have probably changed the result. *See generally More, id.* Assuming a hypo0thetical trial, even a recantation by Schmidt's younger brother, described as intellectually challenged, would not counteract the eyewitness testimony from the victim's father, who walked into a bedroom unexpectedly to see the siblings on the bed, pants pulled down, with Schmidt attempting to penetrate his younger brother's anus. Minutes of Testimony; Police Reports; App. 8, 11-19. The victim's earlier statements detailing the abuse would impeach B.C.'s current version of events, and be more persuasive than the recantation, in which he notes "I want to see my brother and tell him

I am sorry and that I couldn't tell anyone before then," and "I decided to tell people when I turned 21 since I was a full adult at the time." Affidavit of B.C.; App. 56. Assuming this court permits Schmidt to make an actual innocence challenge to his valid guilty plea, it should nonetheless conclude that he cannot satisfy any burden of proof given the low quality of the recantation and the compelling nature of the other evidence of his guilt. Jacob Schmidt is not actually innocent, and he is not entitled to relief under any standard that this court may adopt.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this court affirm the applicant's convictions for assault with intent to commit sexual abuse and incest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,643** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: August 1, 2017

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