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No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN,
Petitioner
V.
FLOYD PERKINS
Respondent

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

BRIEF OF ALABAMA, COLORADO, GEORGIA, IDAHO, INDIANA, KANSAS, MAINE, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE

The States prosecute crimes and incarcerate criminals, so they have powerful interests in the finality of state-court judgments and society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). Those interests are undermined by the rule adopted below. That rule creates an unbounded equitable-tolling exception to the AEDPA statute of limitations based on a showing of "actual innocence," which is as costly as it is unjustified. The *amici* States thus stand to benefit, along with the justice system as a whole, if this Court reverses the Sixth Circuit.

To be clear, the *amici* States do not contend that no innocent person has ever been convicted of a crime. Law is a human institution, and fallibility is a universal human trait. It is thus a "truism, not a revelation" that our "system of criminal punishment" must accept the "possibility that someone will be punished mistakenly." *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring). That possibility is "sensitive and, to say the least, troubling." *Herrera*, 506 U.S. at 421 (O'Connor, J., concurring). And it fully justifies post-conviction procedures that enable persons who claim to be innocent to seek their release, such as the statutory exception to the one-year statute of limitations for federal habeas petitions based on new evidence. *See* 28 U.S.C. § 2244(d)(1)(D).

But society's universal concern with imprisoning the innocent does not justify the exception to the federal statute of limitations that the Sixth Circuit

created below. Even though society's interest in vindicating claims of innocence is important, there are countervailing interests that require all litigation to have an end. Congress struck the right balance between these interests, and the lower court struck the wrong one. The lower court's rule exacerbates the practical difficulties of post-conviction litigation and ignores the deleterious effects of false actual-innocence claims. *Amici* submit this brief to highlight these countervailing costs and explain why this exception to the statute of limitations is unjustified.

SUMMARY OF ARGUMENT

I. Respondent cannot justify the lower court's rule on the grounds that it provides a remedy for wrongful convictions. It appears that almost all States already provide a forum in which claims of actual innocence can be raised and litigated based on new evidence that arises many years after a trial and conviction. In fact, if Respondent had a legitimate claim, it seems clear that he could have filed a post-conviction petition in Michigan state court, instead of federal court. Moreover, executive clemency is the traditional remedy for wrongful convictions, and it continues to provide a meaningful backstop when prisoners have a legitimate claim of actual innocence. In light of these available remedies, the lower court's unlimited actual-innocence exception to the statute of limitations is unnecessary.

II. The lower court's rule also imposes substantial costs on the criminal justice system.

Congress enacted the one-year statute of limitations after finding that federal habeas litigation was plagued by unnecessary delay and repetition. The actual-innocence exception to the statute exacerbates those problems. It is difficult for States to litigate asserted constitutional violations years after a verdict; it is even harder to litigate claims of actual innocence. Witnesses, lawyers, and police officers will have moved or passed away, exhibits will have been misplaced, and the prisoner's evidence will be hard to rebut or place in context. These are the very concerns that compelled Congress to enact the statute of limitations.

The actual-innocence exception also poses a special problem because it is so easily manipulated by convicted criminals. Most claims of actual innocence are not legitimate. But convicted criminals have every incentive to make them. The cases of Roger Keith Coleman, Sirhan Sirhan, and Thomas Arthur illustrate the societal costs of litigating these claims years after a conviction. These persons are all clearly guilty, but their actual-innocence claims have nonetheless undermined the public's confidence in the criminal justice system and have delayed the finality of their convictions.

ARGUMENT

The costs of the Sixth Circuit's rule far outweigh its benefits. As explained below, the States already have put into place ample mechanisms to ensure that innocent people are not imprisoned. No one has shown that these mechanisms are insufficient for these persons. The Sixth Circuit's rule merely

ensures that guilty prisoners will use spurious and false claims of actual innocence to extend the review process and impose precisely the sorts of costs on the habeas system that AEPDA was designed to eliminate.

I. States already provide relief for legitimate claims of actual innocence.

There is little benefit to the lower court's equitable-tolling rule. Although society certainly has an interest in seeing that the wrongly convicted are not unjustly punished, the lower courts' actual-innocence exception is a costly federal solution to a problem that the States can solve for themselves. State officials do not want the wrongly convicted to remain in prison any more than federal courts do. The States therefore provide a mix of judicial and executive remedies for *legitimate* claims of actual innocence, which can be tailored to the specific needs of each State's criminal justice system. In light of these state-specific remedies, there is no compelling need for the federal courts to intervene.

A. State judicial remedies for wrongful convictions.

Federal habeas litigation is not the best way to resolve claims of innocence for state prisoners who have already been adjudicated guilty beyond a reasonable doubt. In fact, state courts are much friendlier, as a general matter, to actual-innocence claims than federal district courts. In many States, a

freestanding claim of actual innocence is itself grounds to vacate a conviction, regardless of whether there was a constitutional violation or procedural error in reaching the conviction. *See, e.g.*, Idaho Code Ann. § 19-4901(a)(6); Va. Code Ann. § 19.2-327.10; *People v. Ortiz*, 919 N.E.2d 941, 948-949 (Ill. 2009). But "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. Because federal habeas review is limited to the "clearly established" precedents of this Court, federal courts routinely deny habeas petitions based on freestanding claims of actual innocence. *Compare Ex parte Henderson*, 2012 WL 6027455 at *1 (Tex. Crim. App. Dec. 5, 2012) (ordering new trial because of new evidence of innocence), *with Sherrill v. Thaler*, 2012 WL 718942 at *7 (S.D. Tex. Mar. 5, 2012) ("[P]etitioner's actual innocence claim must be rejected because a freestanding claim of actual innocence is not a cognizable claim for federal habeas relief.").

The States have also developed innovative procedures to weigh and resolve claims of actual innocence. North Carolina is a good example. In 2006, the Legislature of North Carolina created an independent eight-member "Innocence Inquiry Commission" "to investigate and determine credible claims of factual innocence." N.C. Gen. Stat. § 15A-1461. The commission reviews claims by convicted prisoners that they are factually innocent and, if found valid, refers those claims to a special three-judge panel authorized to release the prisoners from

their sentence. *See* N.C. Gen. Stat. § 15A-1469. Although the Commission's proceedings are confidential, its decisions to grant relief are public. Most recently, in April of 2012, the Commission recommended full judicial review of a rape conviction after DNA analysis of hair samples found at the scene did not match the convict. *See State v. Grimes*, N.C. Innocence Inquiry Comm'n Op., 87-CRS-13541-42 (Apr. 11, 2012).[1]

It appears that almost all States would allow post-conviction litigation based on new evidence of innocence even if the evidence arises long after the conviction. States with a short post-conviction statute of limitations generally provide an equitable catch-all exception to the statute of limitations or a discovery-rule exception for claims based on new evidence that could not have been uncovered at the time of trial.[2] Some States treat belated post-

[1] http://www.innocencecommission-nc.gov/Forms/pdf/Grimes/2012.04.13%20Filed-Stamped%20Commission%20Opinion.pdf (Dec. 13, 2012).

[2] States with discovery-rule exceptions include Alabama, Ala. R. Crim. P. 32.1(e); *id.* 32.2(c), Alaska, Alaska Stat. § 12.72.010(4); *id.* § 12.72.020(b)(2), Arizona, Ariz. R. Crim. P. 32.1(e) & 32.4(a), Florida, Fla. R. Crim. P. 3.850 & 3.851, Georgia, Ga. Code Ann. § 9-14-42(c)(4), Iowa, Iowa Code § 822.2, Kentucky, Ky. R. Crim. P. 11.42(10)(a), Louisiana, La. Code Crim. Proc. Ann. art. 930.8(A)(1), Maine, Me. Rev. Stat. Ann. tit. 15, § 2128(b), Minnesota, Minn. Stat. § 590.01(4)(b) & (c), Mississippi, Miss. Code Ann. § 99-39-5(2)(a)(1), Montana, Mont. Code Ann. § 46-21-102(2), Ohio, Ohio Rev. Code Ann. §§ 2953.21(A) & 2953.23, Oregon, Or. Rev. Stat. § 138.510(3), Pennsylvania, 42 Pa. Cons. Stat. Ann. § 9545(b), South Carolina, S.C. Code Ann. § 17-27-45(c), Utah, Utah Code Ann. § 78B-9-107(2)(e), and Washington, Wash. Rev. Code Ann. § 10.73.090. States with catch-all exceptions include Colorado,

conviction petitions based on new scientific evidence more favorably than petitions based on other kinds of new evidence. *See* Ark. Code Ann. § 16-112-201(a); Idaho Code Ann. § 19-4902; Miss. Code Ann. § 99-39-5; Tenn. Code Ann. §§ 40-30-102 & 303; Wyo. Stat. Ann. § 7-12-303. Other States treat belated evidence or claims of actual innocence more favorably than evidence or claims about constitutional violations. *See, e.g.*, Utah Code Ann. § 78B-9-107(4)(b); 725 Ill. Comp. Stat. 5/122-1(c). Finally, some States impose no hard-and-fast statute of limitations on post-conviction petitions.[3]

The upshot is that, although a claim may be barred in federal court, the claim will not necessarily be foreclosed in state court. For example, in this case, it seems likely that Respondent could file a successive motion for relief from his criminal sentence in Michigan state court. *See* Mich. Ct. R. 6.502(G)(2). Michigan has no statute of limitations. And, if Respondent's claim is truly based on "new evidence that was not discovered before the first such

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Colo. Rev. Stat. Ann. § 16-5-402(2)(d), Delaware, Del. Super. Ct. Crim. R. 61(i)(5), Kansas, Kan. Stat. Ann. § 60-1507(f)(2) ("manifest injustice"), Maryland, Md. Code Ann. Crim. Proc. § 7-103 (ten-year limit waived for "extraordinary cause"), New Jersey, N.J. Ct. R. 3.22-12(a)(1) (five-year limit waived for "fundamental injustice"), Texas (with respect to capital cases), Tex. Code Crim. Proc. Ann. art. 11.071(4A), and Arkansas, *Echols v. State*, 201 S.W.3d 890, 894 (Ark. 2005) (although limit on statutory procedure, no time limit on petition for coram nobis).

[3] *See, e.g.*, N.D. Cent. Code § 29-32.1-03 ("An application may be filed at any time."); R.I. Gen. Laws § 10-9.1-3 (same); Wis. Stat. Ann. § 974.02 (same); s*ee also In re Reno*, 283 P.3d 1181, 1207 (Cal. 2012) (must file without "substantial delay").

motion," *id.*, he could file a successive motion. This federal case—and the exception to the statute of limitations that the lower court created—is unnecessary.

B. State executive remedies for prisoners who are actually innocent.

In addition to these judicial avenues, the States make use of executive clemency to achieve justice in situations where there is doubt as to a prisoner's guilt. Executive "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 412. Indeed, "[i]t is precisely because society remains uneasy with the judicial process of criminal law enforcement that it has placed outside the courts the power to review and adjust sentences." Note, *A Matter of Life and Death: Due Process Protection in Capital Sentencing Proceedings*, 90 YALE L.J. 889, 898 (1981). All 50 States currently have constitutional or statutory provisions for executive clemency, which may be exercised on the basis of actual innocence.[4]

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[4] Ala. Const. amend. XXXVIII, Ala. Code § 15-18-100; Alaska Const. art. III, § 21, Alaska Stat. § 33.20.070; Ariz. Const. art. V, § 5, Ariz. Rev. Stat. Ann. §§ 31-443, 31-445; Ark. Const. art. VI, § 18, Ark. Code Ann. §§ 5-4-607, 16-93-204; Cal. Const. art. V, § 8; Colo. Const. art. IV, § 7, Colo. Rev. Stat. Ann. §§ 16-17-101, 16-17-102; Conn. Const. art. IV, § 13, Conn. Gen. Stat. § 54-130a; Del. Const. art. VII, § 1, Del. Code Ann. tit. 29, § 2103; Fla. Const. art. IV, § 8, Fla. Stat. § 940.01; Ga. Const. art. IV, § 2, Ga. Code Ann. §§ 42-9-20, 42-9-42; Haw. Const. art. V, § 5, Haw. Rev. Stat. § 353-72; Idaho Const. art. IV, § 7, Idaho

Executive clemency is no hollow promise. Instead, our "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial

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Code Ann. §§ 20-240, 67-804; Ill. Const. art. V, § 12, 730 Ill. Comp. Stat. 5/3-3-13; Ind. Const. art. V, § 17, Ind. Code §§ 11-9-2-1 to 11-9-2-4; Iowa Const. art. IV, § 16, Iowa Code § 914.2; Kan. Const. art. I, § 7, Kan. Stat. Ann. § 22-3701; Ky. Const. § 77; La. Const. art. IV, § 5(E), La. Rev. Stat. Ann. § 15:572; Me. Const. art. V, pt. 1, § 11, Me. Rev. Stat. Ann. tit. 34-A, § 5210; Md. Const. art. II, § 20, Md. Code Ann. Corr. Servs. § 7-601; Mass. Const. pt. 2, ch. II, sec. I, art. VIII (amended by Article LXXIII of Amendments); Mich. Const. art. V, § 14; Minn. Const. art. V, § 7, Minn. Stat. § 638.01 et seq.; Miss. Const. art. V, § 124, Miss. Code Ann. § 47-5-115; Mo. Const. art. IV, § 7, Mo. Rev. Stat. §§ 217.220, 552.070; Mont. Const. art. VI, § 12, Mont. Code Ann. §§ 46-23-301 to 46-23-316; Neb. Const. art. IV, § 13, Neb. Rev. Stat. §§ 83-1,127 to 83-1,132; N.Y. Const. art. IV, § 4, N.Y. Exec. Law § 15; Nev. Const. art. V, § 13, Nev. Rev. Stat. § 213.080; N.H. Const. pt. 2, art. 52, N.H. Rev. Stat. Ann. § 4:23; N.J. Const. art. V, § 2, ¶ 1, N.J. Stat. Ann. §§ 2A:167-4, 2A:167-12; N.M. Const. art. V, § 6, N.M. Stat. Ann. § 31-21-17; N.C. Const. art. III, § 5(6), N.C. Gen. Stat. §§ 147-23 to 147-25; N.D. Const. art. V, § 7, N.D. Cent. Code § 12-55.1-02; Ohio Const. art. III, § 11, Ohio Rev. Code Ann. §§ 2967.01 to 2967.12; Okla. Const. art. VI, § 10; Or. Const. art. V, § 14, Or. Rev. Stat. §§ 144.649 to 144.670; Pa. Const. art. IV, § 9; R.I. Const. art. IX, § 13; S.C. Const. art. IV, § 14, S.C. Code Ann. §§ 24-21-910 to 24-21-1000; S.D. Const. art. IV, § 3, S.D. Codified Laws §§ 23A-27A-20 to 23A-27A-21, 24-14-1; Tenn. Const. art. III, § 6, Tenn. Code Ann. §§ 40-27-101 to 40-27-109; Tex. Const. art. IV, § 11, Tex. Crim. Proc. Code Ann. art. 48.01; Utah Const. art. VII, § 12, Utah Code Ann. § 77-27-5.5; Vt. Const. ch. II, § 20, Vt. Stat. Ann. tit. 28, § 453; Va. Const. art. V, § 12, Va. Code Ann. § 53.1-230; Wash. Const. art. III, § 9, Wash. Rev. Code Ann. § 10.01.120; W. Va. Const. art. VII, § 11, W. Va. Code § 5-1-16; Wis. Const. art. V, § 6; Wyo. Const. art. IV, § 5, Wyo. Stat. Ann. § 7-13-801.

motion, has been executive clemency." *Herrera*, 506 U.S. at 415. "[O]ver the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Id.* In fact, less than a month before this brief was filed, the Governor of Virginia pardoned an inmate because of doubts about his conviction. *See Johnathan Montgomery, Va. man in prison for false rape claim, being freed* (Nov. 20, 2012).[5] The Governor acted on the prisoner's application for a pardon "in under 20 hours." Press Release, *Governor McDonnell Issues Conditional Pardon Effective Immediately for Johnathan Montgomery* (Nov. 20, 2012).[6] This and other recent examples of executive clemency underscore that it is a very real possibility for an inmate with a *legitimate* claim of actual innocence.[7]

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[5] http://www.wjla.com/articles/2012/11/johnathan-montgomery-va-man-in-prison-for-false-rape-claim-being-freed-82298.html#ixzz2ErzHo6DW.

[6] http://www.governor.virginia.gov/news/viewRelease.cfm?id=1516.

[7] *See, e.g.*, Steve McVicker & Roma Khannaa, *After 9 years, inmate granted Perry pardon*, HOUSTON CHRON. (Aug. 17, 2007), http://www.chron.com/news/houston-texas/article/After-9-years-inmate-granted-Perry-pardon-1616305.php ("Since 2001, Perry has granted 14 pardons based on innocence, according to parole board records."); Steve Mills & Maurice Possley, *Ryan To Pardon 4 on Death Row*, CHI. TRIB., Jan. 10, 2003.

II. The exception to the one-year statute of limitations will impose substantial costs on the criminal justice system.

The Sixth Circuit's rule opens the federal courts to more belated petitions than Congress wanted and undermines the States' interest in seeing habeas litigation end as efficiently as possible. There are procedures for federal courts to review belated claims of constitutional violations. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(D). But, as Petitioner explains, the lower court's unbounded equitable-tolling exception "upset[s] the delicate balance Congress crafted" between the costs and benefits of untimely habeas litigation. Pet. Br. 5. Because of the difficulties of litigating guilt and innocence many years after a crime, each new and belated actual-innocence claim that the lower court's rule allows will increase the risk that someone who is *not* innocent will escape rightful punishment. Moreover, each of these claims effectively libels the criminal justice system and undermines the public's confidence in it. Finally, these claims increase the cost of criminal justice, requiring the States and federal government to spend resources litigating about the validity of old convictions instead of securing new ones.

A. Congress enacted AEDPA because of substantial delay and cost in federal habeas.

Congress was well aware of the costs of *ad infinitum* federal habeas litigation when it enacted the one-year statute of limitations. In 1989, a

Judicial Committee chaired by Justice Lewis Powell found "serious problems with the present system of collateral review . . . broadly characterized under the heading of unnecessary delay and repetition." *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, printed in 135 Cong. Rec. S13471-04, S13482 (Oct. 16, 1989) (hereinafter "Powell Committee Report"). To fix these problems, the Powell Committee proposed, and Congress enacted, a statute of limitations for federal habeas claims. *See* Statement of Senator Joseph Biden, 135 Cong. Rec. S13471-04, S13473 (Oct. 16, 1989) ("[T]he Powell committee recommended that the time period . . . should be limited to 6 months. . . . [M]y bill would require the [federal] habeas corpus petition to be filed within 1 year."). The Sixth Circuit's exception for claims of actual innocence—particularly when it is unbounded by any requirement of diligence by the petitioner—threatens to revive the "unnecessary delay and repetition" that the States experienced before this innovation. *See* Powell Committee Report, 135 Cong. Rec. at S13482.

1. The statute of limitations serves important goals. In adopting the one-year limit, Congress recognized that parties cannot effectively litigate habeas petitions years after a conviction because "the passage of time may make reliable determinations of asserted claims . . . difficult or practically impossible." *E.g.*, Statement of Senator Charles Grassley, 136 Cong. Rec. S6789-03, S6828 (May 23, 1990). This Court has similarly explained that "factual determinations are often dispositive of" constitutional claims like ineffective assistance of counsel, "coerced confession, lack of competency to

stand trial, and denial of a fair trial." *Peyton v. Rowe*, 391 U.S. 54, 62 (1968) (citations omitted). Those factual issues are, by their nature, difficult to assess years after the facts actually arose. Delaying "the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id*.

The Sixth Circuit's innocence-tolling rule is likely to lead to delays and piecemeal litigation. Especially since the tolling rule is not constrained by a requirement that the petitioner use reasonable diligence in exercising his claims, it gives inmates the freedom to wait to file habeas petitions until the State's evidence has become stale and the only remaining evidence shifts to their maximum advantage. This is a special problem in capital cases. As the Powell Committee explained, "[t]he inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out." 135 Cong. Rec. at S13482.

2. The "innocence" tolling rule also has special costs above and beyond those normally associated with habeas review. Although it is difficult to litigate anything years after the event has occurred, it is especially difficult to litigate *guilt and innocence* years after the crime was committed. But that is precisely what the Sixth Circuit's rule requires. For every habeas petitioner that asserts his innocence, the State will have to refute his claim with an evidentiary presentation from his trial.

The practical impediments to that kind of mini-retrial are substantial. "Witnesses die or move away;

physical evidence is lost; memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). "Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case." *Id.* (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970)). The prosecutors, police officers, witnesses, and victims involved in the case will have moved on. The upshot is that a State starts from a disadvantaged position in refuting an innocence claim when it is brought years after the inmate was prosecuted and convicted.

B. Unfounded claims of actual innocence consume State resources and undermine the criminal justice system.

Any rule to address claims of actual innocence must account for the unfortunate but undeniable fact that unscrupulous prisoners falsely claim that they are innocent all the time. The paradigm is the petitioner's actual-innocence claim in *Herrera*. There the petitioner argued that he should be able to seek habeas relief on the grounds that he was "actually innocent," even though the State did not violate any of his constitutional rights. Justices O'Connor and Kennedy were sympathetic to the petitioner's constitutional theory, but dismissed his particular case as "neither difficult nor troubling" because "[p]etitioner is not innocent, in any sense of the word." 506 U.S. at 419, 421 (O'Connor, J., concurring). In *Herrera*, "[t]he record

overwhelmingly demonstrate[d] that petitioner" was guilty despite his innocence claim. *Id.* at 421.

These unfounded actual-innocence claims impose substantial costs on the system. Especially when publicized, these claims undermine society's faith in the criminal justice system and the finality of long-established convictions. They also require a large amount of resources to litigate and resolve. These costs arise even in cases like *Herrera* where the habeas petitioner is 100% guilty. Here are three examples.

1. *Roger Keith Coleman.* Coleman's case gave rise to one of this Court's most significant decisions on the law of procedural default. In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court overruled *Fay v. Noia*, 372 U.S. 391 (1963), and held that an attorney's error in failing to file an appeal could bar the petitioner from pursuing his claims in federal court. That ruling was necessary, in part, because Coleman did not argue, before this Court, that he was actually innocent. But after this Court affirmed the dismissal of his petition, he turned around and very publicly—and very fraudulently—proclaimed his innocence.

Coleman was convicted of raping and murdering his sister-in-law in Virginia in 1982. *Coleman v. Commonwealth*, 307 S.E.2d 864 (1983). Coleman had previously been convicted of attempted rape, and blood on Coleman's clothes matched his victim's. *Id.* at 870, 876. Coleman was sentenced to death. *Id*. at 876.

Coleman's case first came to this Court's attention because it presented a difficult question

about procedural default. Coleman's post-conviction attorney had missed an appellate deadline in state court, and the lower courts held that this procedural failure blocked Coleman from pursuing, on federal habeas review, his federal claims of ineffective assistance of counsel. Coleman sought to circumvent that default, but made no claim that he could do so because he was actually innocent. He instead asserted that because the default resulted from his attorneys' errors he could show justifiable "cause" for his default. This Court held that Coleman's habeas petition was procedurally barred. "This is a case about federalism," the Court explained. "It concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

Following this Court's decision, Coleman turned to the avenue many prisoners choose when they are out of options—a fraudulent claim of actual innocence. Although he had not maintained that he could get around the procedural default through an actual-innocence exception before this Court, he filed yet another habeas petition in federal court, arguing this time that he was "actually innocent" and could surmount the procedural default. *See Coleman v. Thompson*, 798 F. Supp. 1209 (W.D. Va. 1992). All the relevant courts denied that petition. *See id.* at 1218; *see also Coleman v. Thompson*, 504 U.S. 188 (1992) (denying application for stay of execution).

Coleman's case then became a *cause célèbre*. *See Kansas v. Marsh*, 548 U.S. 163, 189 (2006) (Scalia, J., concurring) (discussing Coleman's case). Coleman appeared on several TV programs, and *Time*

magazine put him on its cover. "Roger Keith Coleman says he didn't kill anybody, but the courts are tired of listening," *Time* magazine intoned. "That could be a tragic mistake." Jill Smolowe, *Roger Keith Coleman: Must This Man Die?*, TIME (May 18, 1992). After Virginia's Governor received roughly 9,000 calls and letters in favor of clemency, he arranged for a lie-detector test, which Coleman failed. *See* Bonnie V. Winston & Greg Schneider, *Coleman put to death: High-profile defendant failed lie detector test*, ROANOKE NEWS, May 21, 1992, at A1, *available at* 1992 WLNR 1019950. Coleman was executed in 1992, and his last words were: "An innocent man is going to be murdered tonight." *Id.*

Public concern over Coleman's case only grew with his execution, and his supporters unabashedly used Coleman's claim of actual innocence to cast doubt on the legitimacy of the justice system. In 1998, for example, a book was published to make the case for Coleman's innocence, which "challeng[ed] the assumptions of anyone who believes that the American justice system is concerned primarily with justice." *See* Lisa Higgins, *Amazon.com Review of* May God Have Mercy *by John C. Tucker*, http://www.amazon.com/May-God-Have-Mercy-Punishment/dp/0385332947 (last visited Dec. 18, 2012).

But Coleman's innocence claim was a sham. Ten years after his execution, his legal team and a media consortium petitioned Virginia's Governor to allow new DNA testing of semen samples taken from Coleman's victim. The Governor agreed, and the DNA test confirmed what a jury had known more than twenty years earlier—that Coleman was guilty,

beyond a reasonable doubt. There was only a 1-in-19 million chance that the DNA belonged to someone else. *See* Michael D. Shear & Maria Glod, *Tests Show Dead Man's Guilt,* WASH. POST, Jan. 13, 2006, at B1, *available at* 2006 WLNR 26032589.

2. *Sirhan Sirhan*. Tragically, Sirhan Sirhan became a household name four decades ago. Many of those households' residents would be shocked to learn that his attorneys have recently filed a federal habeas petition claiming that he is "actually innocent."

Sirhan shot Senator Robert F. Kennedy in 1968, at close range in the pantry of a Los Angeles hotel. *See People v. Sirhan*, 497 P.2d 1121 (Cal. 1972). There has never been any doubt about his responsibility for this national tragedy. The assassination was witnessed by journalist George Plimpton, author Pete Hamill, and professional football player Rosey Grier. They were among the men who subdued and disarmed Sirhan after he fired his gun. *See* Pete Hamill, *Two Minutes to Midnight: The Very Last Hurrah*, VILLAGE VOICE (June 13, 1968).[8] Sirhan confessed to the murder, but the trial court refused to accept his guilty plea and required the prosecution to prove its case. *Sirhan*, 497 P.2d at 1127, 1133. Sirhan testified at trial that, although he admitted killing Kennedy, he could not specifically recall the shooting or confessing to the crime. *Id*. at 1127. Nonetheless, "it was undisputed that defendant fired the shot that killed Senator

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[8] http://blogs.villagevoice.com/runninscared/2010/05/pete_hamills_ey.php (last visited Aug. 20, 2012).

Kennedy." *Id.* at 1125. The prosecution established that Sirhan had killed Kennedy because of the Senator's support for Israel, and Sirhan was sentenced to life imprisonment. *Id.* at 1127-30.

Sirhan's attorneys have recently filed a federal habeas petition claiming that Sirhan is "actually innocent" of the crime. *See* Sur-Reply on the Issue of Actual Innocence, (Doc. 195), *Sirhan v. Galaza*, No. 2:00-CV-5686-CAS (C.D. Cal. Feb. 22, 2012). Sirhan's theory of "actual innocence" is that Sirhan was brainwashed or hypnotized into attacking Kennedy as a distraction while another, unidentified, shooter killed Kennedy as part of a conspiracy. *Id.* at 2-30. Because the habeas petition is pending in a district court within the Ninth Circuit, Sirhan's attorneys have invoked the Ninth Circuit's actual-innocence exception to the one-year statute of limitations. *Id.*

Sirhan's new allegations of actual innocence have been widely published. They have led to new conspiracy theories about Senator Kennedy's assassination 40 years after the fact. *See, e.g.*, Robert Vaughn, *I know who was behind Bobby Kennedy's murder, by his actor friend Robert Vaughn*, DAILY MAIL ONLINE (Jan. 12, 2009)[9] ("[O]ne of the greatest crimes of the 20th Century remains unresolved by the official verdict, even to this day."). And they have compelled state prosecutors to defend a conviction that was final some 40 years ago.

[9] http://www.dailymail.co.uk/news/article-1111444/I-know-Bobby-Kennedys-murder-actor-friend-Robert-Vaughn.html (last visited Dec. 18, 2012).

3. *Tommy Arthur*. The lead amicus on this brief has long dealt with a less famous, but no less false, claim of actual innocence. Thomas Douglas Arthur killed his girlfriend's husband in Alabama in 1982. The evidence of guilt has always been overwhelming. Arthur's girlfriend, who was also convicted of the murder, initially told the police that she had been raped and that the rapist killed her husband. *See Arthur v. Allen*, 452 F.3d 1234, 1238-39 (11th Cir. 2006). In fact, as she later testified, she and Arthur conspired to kill her husband and intended to split her husband's life-insurance proceeds. *Id.* This was Arthur's second murder; he was on work-release from his first sentence when he committed it. *Id.* at 1239-40.

Because of procedural errors, Arthur was tried and convicted for the murder three times. At the conclusion of his third trial in 1991, Arthur personally asked the jury to recommend that the judge sentence him to death. Arthur told the jury that he "wouldn't dare ask you for it if I thought for a minute that I would be executed." Trial Transcript at 1181, State v. Arthur, CC-89-577 (Jefferson Cnty. Cir. Ct. 1991). Instead, Arthur told the jury that he had already managed to overturn his capital-murder conviction on two previous occasions and that, if he was sentenced to death, he would be in a better position to challenge his latest conviction too. The jury, and then the judge, obliged his request.

Since then, Arthur has made good on his promise to the jury. After his normal avenues of post-conviction litigation ran out, Arthur filed both an untimely federal habeas action and a civil-rights action, in which he alleged his "actual innocence"

and requested a DNA test of the rape kit used to examine his girlfriend-accomplice. The federal courts eventually dismissed both actions. *See Arthur*, 452 F.3d at 1253-54; *Arthur v. King*, 500 F.3d 1335, 1342 (11th Cir. 2007). The Eleventh Circuit noted that Arthur's civil-rights action was very late:

> [It was] filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition.

Arthur, 500 F.3d at 1342.

Even though the courts universally concluded that "there was ample evidence linking Arthur to [the] murder," *id.*, Arthur's actual-innocence claims attracted public support. The *Birmingham News* has editorialized that "[i]t's inconceivable that the state of Alabama won't order DNA testing before executing a Death Row inmate who claims to be innocent." *DNA Testing for Arthur*, BIRM. NEWS (Nov. 29, 2007). The *Atlantic* has described Arthur's "excruciating case . . . an ugly case, tracking many of the failings of the human condition." *Another Death Row Debacle: The Case Against Thomas Arthur*, ATLANTIC (Feb. 27, 2012).

Then, three days before his execution date, Arthur filed a successive state post-conviction petition that again alleged his actual innocence. Arthur relied on newly discovered evidence—namely,

a signed and notarized confession from another convicted murderer, Bobby Gilbert, asserting that Gilbert had raped the girlfriend-accomplice and committed the murder. *See Arthur v. State*, 71 So. 3d 733, 750 (Ala. Crim. App. 2010). The Alabama Supreme Court issued a last-minute order staying Arthur's execution so that this successive petition could proceed. *Id.* at 738.

The trial court conducted an evidentiary hearing, at which the "State presented overwhelming evidence that Gilbert's affidavit is false and that Gilbert and Arthur conspired to fabricate the affidavit." *Id.* at 744. Nonetheless, the court "out of an abundance of caution" directed the State to "conduct D.N.A. testing on the available physical evidence in this case." *Id.* at 739. Unsurprisingly, the testing was not exculpatory—the only available DNA belonged to the victim, not Gilbert. *Id.* at 740. Arthur appealed all the way to this Court, which denied his cert petition last year. *See Arthur v. Alabama*, 132 S. Ct. 453 (2011).

For his part, Thomas Arthur is currently proceeding with yet another civil-rights action challenging Alabama's three-drug execution method. *See Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. 2012). There is little doubt that he has his next actual-innocence habeas petition prepared and ready to file when that civil-rights litigation ends. The tolling rule at issue here can only assist his decades-long effort to thwart the imposition of his sentence.

* * *

The proposed "actual innocence" exception to AEDPA's one-year statute of limitations comes with substantial costs. The lower court's tolling rule

undermines the States' interests, gives convicted criminals a new avenue to abuse the system, and threatens a return to the days before Congress enacted the one-year statute of limitations. Congress weighed these costs against the benefits of unchecked federal habeas litigation when it enacted AEDPA, and struck the right balance. Although Congress decided to let state prisoners file successive and untimely federal habeas petitions based on new evidence that materializes after trial, Congress was clear that such claims must be filed within a year of the discovery of that new evidence.

Especially in light of the judicial and executive remedies available on the state level, the lower court's open-ended equitable-tolling exception to the federal statute of limitations is unjustified. The lower court's rule gives convicted criminals like Coleman, Sirhan, and Arthur a new avenue to abuse the system, but it does not meaningfully improve on the systems that States already provide to vindicate *legitimate* claims of actual innocence. The States' interests in finality and efficiency outweigh the interest of prisoners in raising untimely claims in federal habeas, not only upon the discovery of new evidence, but more than one year after the new evidence is discovered.

CONCLUSION

The Court should reverse the Sixth Circuit.

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