American Bar Association
www.supremecourtpreview.org

No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN,

Petitioner,

v.

FLOYD PERKINS,

Respondent.

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

BRIEF FOR THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

MaryBeth W. Shreiner
COOLEY LLP
11951 Freedom Drive
Reston, VA 20190
(703) 456-8000
mshreiner@cooley.com

Kyle P. Reynolds
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
(202) 842-7800
kreynolds@cooley.com

Lori R. Mason
Counsel of Record
Maureen P. Alger
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

Counsel for Amicus Curiae The Innocence Network

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Protecting the Actually Innocent from Unjust Incarceration or Execution Is a Paramount Goal of the Criminal Justice System. 4

A. This Court Has Long Relied on Equitable Principles in Habeas Proceedings To Prevent Unjust Incarceration. 5

B. This Court Continued This Equitable Tradition in *House*, Holding That the Actual-Innocence Gateway Survived the Passage of AEDPA. 6

C. Actually Innocent People Would Have Languished in Prison Without an Actual-Innocence Gateway to AEDPA's Statute of Limitations. 8

1. José Garcia 8

2. Bruce Lisker 12

3. Larry Pat Souter 15

II. Investigating Claims of Actual Innocence Is a Slow, Uncertain, and Sometimes Haphazard Process. 17

TABLE OF CONTENTS
(continued)

Page

A. Exonerating Evidence Is Often Discovered Serendipitously, Regardless of Whether the Petitioner Has Been Diligent. 19

1. Clarence Elkins 19

2. Jonathan Moore..... 21

3. Gary Gauger 23

B. Many Petitioners Have Limited Access to Legal Resources and Individuals To Assist in an Investigation Outside of Prison. 24

C. Many Petitioners Suffer from Mental Disabilities, Lack of Education, and Low Intelligence, All of Which Hinder or Preclude an Investigation. 27

III. Recognizing the Continued Vitality of the Actual-Innocence Gateway Would Not Impose Additional Burdens on Federal Courts. 30

A. Petitioners Rarely Claim Actual Innocence. 30

B. Actual Innocence Is Difficult To Demonstrate. 32

C. Actually Innocent Petitioners Have No Incentive To Delay Filing Their Habeas Petitions. 33

TABLE OF CONTENTS
(continued)

Page

D. A Holding That the Miscarriage-of-Justice Doctrine Does Not Create an Equitable Exception to § 2244(d), or That Such an Exception Requires Diligence, Would Impose Additional Burdens on Courts. 35

IV. Clemency Is No Answer..... 36

CONCLUSION 38

TABLE OF AUTHORITIES

Pages

CASES

Engle v. Isaac,
456 U.S. 107 (1982) 5

Ex parte Yerger,
75 U.S. (8 Wall.) 85 (1868) 5

Garcia v. Portuondo,
334 F. Supp. 2d 446 (S.D.N.Y. 2004) 9, 10, 11

Garcia v. Portuondo,
459 F. Supp. 2d 267 (S.D.N.Y. 2006) 10, 11

Herrera v. Collins,
506 U.S. 390 (1993) .....passim

Holland v. Florida,
130 S. Ct. 2549 (2010) 7

House v. Bell,
547 U.S. 518 (2006) .....passim

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 4, 5

Lewis v. Casey,
518 U.S. 343 (1996) 25, 27

Lisker v. Knowles,
463 F. Supp. 2d 1008 (C.D. Cal. 2006) 12, 13, 14

Lisker v. Knowles,
651 F. Supp. 2d 1097 (C.D. Cal. 2009) 14, 15

Lonchar v. Thomas,
517 U.S. 314 (1996) 8

McCleskey v. Zant,
499 U.S. 467 (1991) 6

Murray v. Carrier,
477 U.S. 478 (1986) 6

Panetti v. Quarterman,
551 U.S. 930 (2007) 36

Preiser v. Rodriguez,
411 U.S. 475 (1973) 5

Schlup v. Delo,
513 U.S. 298 (1995) .....passim

Souter v. Jones,
395 F.3d 577 (6th Cir. 2005) 15, 16

Vasquez v. Hillery,
474 U.S. 254 (1986) 34

In re Winship,
397 U.S. 358 (1970) 2, 4, 5

STATUTES

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") .....passim

28 U.S.C. § 2244.....passim

OTHER AUTHORITIES

Am. Bar Ass'n Justice Kennedy Comm'n, *Report with Recommendations to the ABA House of Delegates* (2004)..... 37, 38

Charles Armbrust, National Registry of Exonerations, *Bruce Lisker*..... 15

Jordan M. Barry, *Prosecuting The Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 Stan. L. Rev. 535 (2012)..... 17

Edwin M. Borchard, *Convicting the Innocent: Errors of the Criminal Justice System* (1932)..... 19

Matthew Bosher, *The 'Exceptionally Troubling' Murder Conviction of Jose Garcia*, 2 Am. U. Crim. L. Brief 16 (2007)..... 10, 11

Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 Geo. J. on Poverty L. & Pol'y 247 (2011)..... 29

Dave Daley, *Biker Is Convicted of '93 Killings of Richmond Couple; Another Outlaw Found Guilty in Murder of Hell's Angel on Northwest Side in '95*, Chi. Trib., June 16, 2000 24

Chris Dettro, *UIS Group Helps Free Aurora Man*, The State Journal-Register, March 8, 2012 23

Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. Rev. 1825 (2002) 37

Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. Pa. J. Const. L. 819 (2008) 25

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 4, 30

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) 32

Scott Glover & Matt Lait, *A Case of Doubt: New Light on a Distant Verdict*, Los Angeles Times, May 22, 2005 15

Scott Glover & Matt Lait, *A Sentence, and Hopes, are Lifted in '83 Killing*, Los Angeles Times, Aug. 8, 2009 15

Scott Glover & Matt Lait, *Lisker Files Suit Alleging He Was Framed: Man Wrongly Imprisoned for 26 Years in the Death of His Mother Says LAPD Violated his Rights*, Los Angeles Times, Dec. 23, 2009 15

Caroline Wolf Harlow, U.S. Dep't of Justice, *Education and Correctional Populations* (2003) 28

Harry Hitzeman, *Man Exonerated 12 Years After Shooting*, Chicago Daily Herald, Mar. 7, 2012 23

Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* (2006) 28

Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts—An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996* (2007) 31

Daniel T. Kobil, *The Role of Clemency in Providing Mid-Course Corrections of Sentence* before the ABA Justice Kennedy Commission (Nov. 12, 2003)..... 38

Matt Lait, *After 26 Years, Bail for Lisker*, Los Angeles Times, Aug. 12, 2009..... 15

James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)..... 18, 27

Shelley Johnson Listwan et al., *How To Prevent Prisoner Re-Entry Programs From Failing: Insights From Evidence-Based Corrections*, 70-DEC Fed. Probation 19 (2006)..... 29

Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?,"* 86 Judicature 83 (2002) 18, 24

Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513 (1988) 28, 29

Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451 (1990/1991) 25, 27

Douglas Montero, *Cancer Victim Reveals Secret that Jailed Innocent Men*, New York Post, Nov. 21, 2011 11

Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Office of Educ. Research & Improvement, No. NCES 1994-102, *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* (1994) 29

Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* (2010)..... 21, 31

Maurice Possley, National Registry of Exonerations, *Jose Garcia* 11

Ray Quintanilla, *Gauger Set Free in Killing of Parents; McHenry County Man on Death Row 3 Years*, Chi. Trib., Oct. 5, 1996..... 24, 27

Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 Buff. Crim. L. Rev. 967 (2001) 38

Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 Law & Soc'y Rev. 183 (2008) 38

Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-To-The-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219 (2012) 26, 27

Clifford Ward, *Aurora Man is Freed After Conviction Vacated*, Chi. Trib., Mar. 7, 2012..... 23

Patrick Yeagle, *Incarcerated But Innocent: Illinois Innocence Project Expands Work to Free the Wrongfully Convicted*, Illinois Times, Apr. 26, 2012 23

Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101 (2002)..... 4, 26

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 66 current members of the Innocence Network have represented hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, the Netherlands, and New Zealand. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons learned from cases in which the system convicted innocent persons, the Innocence Network advocates reforms designed to enhance the truth-seeking functions of the criminal justice system and thereby prevent future wrongful convictions.

SUMMARY OF ARGUMENT

The actual-innocence gateway serves as a critical safety valve, protecting against the incarceration and execution of innocent persons. The gateway reflects "the fundamental value determination of our society that it is far worse to convict an innocent man than to

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. In compliance with Rule 37.3, the written consent of all parties accompanies this brief.

let a guilty man go free." *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). The Court should affirm the Sixth Circuit's judgment recognizing that the one-year limitations period of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") incorporates the actual-innocence gateway. Congress could have, but did not, preclude application of the actual-innocence gateway to time-related defaults when enacting AEDPA. Congress's failure to exclude the doctrine's application to AEDPA requires continued application of the crucial actual-innocence gateway. As the cases discussed below demonstrate, innocent people will remain incarcerated unless the Court recognizes the continued vitality of the gateway.

Further, no diligence requirement should be imposed on a petitioner seeking to invoke the innocence gateway. The Innocence Network's experience in numerous innocence investigations confirms that investigating a claim of innocence is a time-intensive process fraught with difficulties and often turns on fortuity rather than diligence alone. Imposing a diligence requirement would deprive some actually innocent petitioners of the opportunity to establish their innocence.

Petitioners frequently conduct investigations from within the confines of prison, often with little outside assistance from counsel or even an investigator, and with deficient or inaccessible prison law libraries. Many petitioners are also mentally disabled or lack education or literacy, making it all the more challenging to conduct a thorough and timely investigation. It is not practicable to require

diligence to satisfy the innocence gateway: many petitioners face insurmountable obstacles to systematically unearthing critical exculpatory facts. When there are facts demonstrating innocence, the federal courts' doors should be open.

Affirming the continued availability of the actual-innocence gateway would not inundate the courts with habeas petitions. Contrary to popular belief, studies show that prisoners do not commonly assert their actual innocence. The stringent standards required to meet the actual-innocence threshold will continue to deter frivolous innocence claims or permit them to be dealt with quickly and efficiently by the district courts. Further, habeas petitioners have no incentive to delay in asserting actual innocence, but instead, have every incentive to seek habeas relief as expeditiously as possible. Allowing habeas petitions beyond AEDPA's statute of limitations where the petitioner makes a showing of actual innocence will not change that. Any delay in presenting evidence of innocence can be taken into account in evaluating the weight of that evidence when determining whether the *Schlup* standard has been met. If, however, habeas petitioners claiming actual innocence are held to AEDPA's statute of limitations, then courts will undoubtedly see prematurely filed petitions that are not yet fully investigated, filed to avoid missing the one-year deadline.

Finally, clemency is not the solution. Clemency is largely within the discretion of elected officials, and thus often dictated by the political climate, and its exercise has declined precipitously in recent decades. Clemency does not provide a fail-safe if an actually innocent petitioner's federal habeas claim is barred.

ARGUMENT

I. Protecting the Actually Innocent from Unjust Incarceration or Execution Is a Paramount Goal of the Criminal Justice System.

The questions presented in this case must be evaluated in light of the crucial and fundamental importance of protecting actually innocent people from unjust incarceration or execution. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[2] *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). As this Court has recognized, an innocent person has a "powerful and legitimate interest" in obtaining release from incarceration. *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986); *Schlup*, 513 U.S. at 324 ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence."). This individual interest is reflected in our society's "fundamental value determination . . . that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup*, 513 U.S. at 324 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

---

[2] *See* Limin Zheng, Comment, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2138 (2002) ("[E]ven those gravely concerned about conservation of judicial resources have acknowledged that the 'policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.'") (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)).

The actual-innocence gateway ensures that a miscarriage of justice does not occur in the "extremely rare" but crucial cases in which a prisoner demonstrates actual innocence. *Id.*

Cases decided after the passage of the AEDPA, including *House v. Bell*, have reaffirmed that the *Schlup* gateway applies to procedural defaults not expressly addressed by Congress. *See* 547 U.S. 518, 536 (2006). This is because procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)).

A. This Court Has Long Relied on Equitable Principles in Habeas Proceedings To Prevent Unjust Incarceration.

Considerations of fundamental fairness have long governed the writ's vital role in preventing unjust incarceration. *See, e.g.*, *Kuhlmann*, 477 U.S. at 447 ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.") (internal quotation omitted). The use of habeas corpus to secure relief from wrongful confinement was "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Likewise, in early decisions, this Court embraced the common-law principle that habeas preserves individual liberty against unjust restraints. *See, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

Modern decisions of this Court have preserved "the 'equitable discretion' of habeas courts to see that

federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citation omitted). In *Murray v. Carrier*, for example, the Court held that to avoid a "miscarriage of justice," "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [state-law] procedural default." 477 U.S. 478, 495-96 (1986). Similarly, in *McCleskey v. Zant*, the Court provided an innocence safety valve for the cause-and-prejudice standard, explaining: "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty . . . ." 499 U.S. 467, 495 (1991) (citation omitted).

In *Schlup v. Delo*, decided shortly before the passage of AEDPA, the Court held that actual innocence may excuse procedural errors where equity so demands, describing an actual-innocence showing as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404).

B. This Court Continued This Equitable Tradition in *House*, Holding That the Actual-Innocence Gateway Survived the Passage of AEDPA.

Although aware of *Schlup* when enacting AEDPA, Congress did not preclude the application of the

actual-innocence gateway to time-related defaults, and its silence should not be construed as rejecting the equitable principles traditionally governing the writ. *See Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (improper to "construe a statute to displace courts' traditional equitable authority absent the 'clearest command'"). Nor did Congress prohibit use of the courts' equitable authority to excuse a procedural default when faced with a strong actual-innocence showing.

House, issued after AEDPA's enactment, emphasizes the actual-innocence gateway's continuing vitality. House's habeas petitions were denied, in part, because he had waived his arguments under state law. 547 U.S. at 534-35. This Court held that although federal habeas relief is generally not available for "claims forfeited under state law," "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration" in extraordinary circumstances. *Id.* at 536 (internal quotation omitted).

Most importantly here, *House* considered and rejected the argument that AEDPA superseded the *Schlup* actual-innocence gateway. Congress expressed no intent to overturn the *Schlup* standard for a procedural default for first habeas petitions. Indeed, *House*'s reasoning applies with even greater force here because the procedural default at issue—failure to comply with AEDPA's statute of limitations—is solely a federal procedural requirement.

As the Court has recognized, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the

protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). The cases discussed in section I.C below demonstrate the critical importance of the actual-innocence gateway in providing relief to actually innocent prisoners.

C. Actually Innocent People Would Have Languished in Prison Without an Actual-Innocence Gateway to AEDPA's Statute of Limitations.

Real-world cases demonstrate the importance of the miscarriage-of-justice exception in protecting actually innocent people from unjust incarceration.[3] In the following cases in which the petitioner was actually innocent, AEDPA's statute of limitations—without the actual-innocence gateway—would have barred petitioners' federal habeas claims.

1. José Garcia

On July 16, 1991, Cesar Vasquez was shot to death in the Bronx. José Garcia was tried for the murder. The only testifying eyewitness claimed that she had seen Garcia at the scene of the murder from her fourth-floor window. A jury convicted Garcia of second-degree murder, and he was sentenced to 25 years to life in prison.

---

[3] Although these are not capital cases, the concern is even more grave when the petitioner may be executed.

Garcia maintained his innocence throughout the proceedings: he was in jail in the Dominican Republic until the afternoon of July 16, and he had remained there for several weeks before returning to the United States. Garcia's lawyer had put on virtually no evidence of this alibi at trial, other than the testimony of the victim's sister who admitted on cross-examination that she had no personal knowledge of where Garcia was at the time of her brother's murder. The prosecution was likewise aware of Garcia's alibi, but made little attempt to investigate it.

Garcia's repeated efforts to pursue relief in state court failed: New York courts denied his direct appeal, his attempts to seek a writ of error *coram nobis*, and his motion to vacate his conviction. Many of his efforts were undertaken pro se. Garcia also had a limited command of English. He filed a federal habeas corpus petition in 2002, which the prosecution moved to dismiss as barred by AEDPA's one-year statute of limitations. The magistrate judge issued a Report and Recommendation recommending that Garcia's petition be dismissed because it was not filed within the limitations period.

The district court found that Garcia's petition was, in fact, filed after the one-year statute of limitations had expired. *Garcia v. Portuondo*, 334 F. Supp. 2d 446, 450 (S.D.N.Y. 2004). Nevertheless, the court held that Garcia's credible claim of actual innocence provided an exception to the limitations period, and Garcia's otherwise-barred petition could

proceed.[4] *Id*. at 462 ("[T]his Court holds that the running of the AEDPA statute of limitations is equitably tolled in the exceedingly rare case in which the petitioner makes out a credible claim of actual innocence. This is such a case.").

Garcia received an evidentiary hearing on his petition. At this hearing, Garcia's trial counsel testified that he believed that Garcia was in the Dominican Republic at the time of the killing, but he had not prepared or investigated this defense because he believed the prosecution's case was weak, he had limited time and money to investigate, he thought any witnesses might not be credible, and he had doubts about the admissibility of documents from the Dominican Republic. Garcia's habeas counsel, on the other hand, conducted a thorough investigation—including investigating in the Dominican Republic—and located a number of documents establishing that Garcia was in the Dominican Republic until shortly before Vasquez's murder. All of these documents existed at the time of trial, but Garcia's trial counsel had not attempted to find them. Garcia's habeas counsel also put on the testimony of numerous witnesses who testified that Garcia was in the Dominican Republic on the night of Vasquez's murder, as well as witness affidavits confirming that Garcia was still in the Dominican Republic a few days after the murder. *See generally Garcia v. Portuondo*, 459 F. Supp. 2d 267, 271-78, 287-89 (S.D.N.Y. 2006); Matthew Bosher, *The 'Exceptionally*

---

[4] The district court found that Garcia had been diligent in pursuing his actual-innocence claim. 334 F. Supp. 2d at 452.

Troubling' Murder Conviction of Jose Garcia, 2 Am. U. Crim. L. Brief 16, 16-18 (2007).

Based on this evidence, the district court granted Garcia's habeas petition and ordered the state to release or re-try him. 459 F. Supp. 2d at 295. The prosecution dismissed the charges against Garcia, and he was released from prison in February 2007, nearly 16 years after he was arrested for a murder that took place while he was roughly 1,500 miles from the scene of the crime. After Garcia's exoneration, the prosecution's star witness confessed that she had lied under oath when she identified Garcia at trial to protect her son, who had been threatened by police after he witnessed the murder but refused to cooperate with investigators.[5]

The evidence that ultimately exonerated José Garcia came to light through a patchwork of fortunate events: Garcia's trial counsel agreed to testify at his evidentiary hearing, the district court appointed habeas counsel with the resources to conduct an investigation in the Dominican Republic, and documents created more than a decade earlier in

---

[5] For background on Garcia's case, see generally Douglas Montero, *Cancer Victim Reveals Secret that Jailed Innocent Men*, New York Post, Nov. 21, 2011, *available at* http://www.nypost.com/p/news/local/bronx/dying_to_tell_truth_ZLw3NZNFjv8V4yn9jCeLuL; Matthew Bosher, *The 'Exceptionally Troubling' Murder Conviction of Jose Garcia,* 2 Am. U. Crim. L. Br. 16 (2007); Maurice Possley, National Registry of Exonerations, *Jose Garcia*, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3835; *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006); *Garcia v. Portuondo*, 334 F. Supp. 2d 446 (S.D.N.Y. 2004).

a foreign county still existed at the time of his hearing. But perhaps the most significant event in Garcia's story took place when the district court held that Garcia's otherwise-barred habeas petition could be filed outside AEDPA's one-year limitations period because of the actual-innocence gateway. Had Garcia's petition been barred by limitations, he might very well still be in prison today for a murder he did not commit.

2. Bruce Lisker

In March 1983, Dorka Lisker was beaten and stabbed to death in her Los Angeles home. Her 17-year-old son, Bruce Lisker ("Lisker"), found the body and called paramedics. Lisker was tried for the murder in California court. He was convicted of second-degree murder in 1985 and was sentenced to 16 years to life in prison.

The California appellate courts upheld Lisker's conviction, and the California Supreme Court denied habeas relief in 1989. Fourteen years later he unsuccessfully sought collateral review again in California state court. He filed a habeas corpus petition in federal court in 2004. The district court, adopting the magistrate judge's Report and Recommendation, found that the AEDPA statute of limitations expired in 1997—nearly seven years before Lisker filed his federal habeas petition. *Lisker v. Knowles*, 463 F. Supp. 2d 1008, 1009, 1011-12 (C.D. Cal. 2006). Nevertheless, the court permitted Lisker's petition to go forward, holding that the *Schlup* gateway tolls the limitations period upon a

credible showing of actual innocence, and that Lisker had made the required showing. *Id.* at 1038-42.

In so finding, the court reviewed evidence uncovered after Lisker's conviction. This evidence was presented at an evidentiary hearing at which "the case the prosecution presented at trial" was "effectively dismantled." *Id.* at 1018. For example, the prosecution contended that Lisker had lied to police about being able to see his mother's body from outside the house, despite photographic evidence that supposedly demonstrated that Lisker could not have seen through the windows on account of glare. But evidence at the hearing showed that Lisker indeed could have seen his mother's body through the windows of her house, and the photographic evidence presented at trial did not accurately depict the glare on the windows at the relevant time. Indeed, the prosecutor at trial had not visited the murder scene before the trial, but when he visited the scene in 2005 he was shocked to find that from outside the house he could see the location where Lisker's mother was found. *Id.* at 1019-22.

Numerous other aspects of the prosecution's case against Lisker unraveled at the hearing. The prosecution had contended that shoeprints at the scene demonstrated that Lisker was the only other person in the house around the time of the killing. But at the hearing Lisker presented the 2004 analysis of an experienced LAPD criminalist who concluded that certain footprints at the scene—including at least one bloody shoeprint found inside the house—could not have been made by Lisker's shoes. In fact, the evidence presented suggested that

an impression on the victim's head may have matched this other shoeprint. *Id.* at 1022-24.

Moreover, the prosecution had argued at trial that a motive for Lisker to kill his mother was to steal money from her purse, but much of the money that Lisker had supposedly stolen was later discovered by a court clerk to have remained in her purse all along. *See id.* at 1018, 1025. The prosecution's closing argument drew attention to the absence of evidence suggesting another legitimate suspect, but in fact there was another likely suspect with a violent criminal past who had lied to police about where he was on the day of the killing, admitted to being at Lisker's mother's home the day before the murder, and may have made a phone call from the home on the day of the murder. *Id.* at 1018, 1027-28. Additional examples of evidence presented at trial were significantly undermined at the hearing. Some of this evidence had been uncovered by a private investigator hired by Lisker; some was found through an intensive investigation into the case by the *Los Angeles Times*.

Based on this evidence, the court permitted Lisker to pass through the *Schlup* gateway and present his petition, which otherwise would have been barred by the AEDPA statute of limitations. In August 2009, the court granted his habeas petition and ordered the state to re-try or release him. *See Lisker v. Knowles*, 651 F. Supp. 2d 1097, 1101, 1141 (C.D. Cal. 2009). The next month, prosecutors dropped the charges against Lisker for lack of evidence. Bruce Lisker,

who had been imprisoned when he was 17 years old, left prison as a 44-year-old man.[6]

3. Larry Pat Souter

In August 1979, Kristy Ringler was found lying unconscious on a highway in Michigan, with a small pool of blood beneath her head. *Souter v. Jones*, 395 F.3d 577, 581 (6th Cir. 2005). The autopsy revealed that Ringler died of brain injury caused by two head lacerations. *Id.* A forensic pathologist believed that Ringler's injuries were consistent with being struck by a car.

Ringler had recently left a party, where she was last seen by Larry Pat Souter. Souter had been heavily drinking whiskey the night of Ringler's death. Souter discarded the whiskey bottle when he and other partygoers got word of Ringler's accident

---

[6] For background on Lisker's case, see generally Scott Glover & Matt Lait, *A Case of Doubt: New Light on a Distant Verdict*, Los Angeles Times, May 22, 2005, *available at* http://www.latimes.com/news/local/la-me-lisker22may22,0,5660396,full.story; Scott Glover & Matt Lait, *Lisker Files Suit Alleging He Was Framed: Man Wrongly Imprisoned for 26 Years in the Death of His Mother Says LAPD Violated his Rights*, Los Angeles Times, Dec. 23, 2009, at A8; Matt Lait, *After 26 Years, Bail for Lisker*, Los Angeles Times, Aug. 12, 2009, at A8; Scott Glover & Matt Lait, *A Sentence, and Hopes, are Lifted in '83 Killing*, Los Angeles Times, Aug. 8, 2009, at A1; Charles Armbrust, National Registry of Exonerations, *Bruce Lisker*, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3386; *Lisker v. Knowles*, 463 F. Supp. 2d 1008 (C.D. Cal. 2006); *Lisker v. Knowles*, 651 F. Supp. 2d 1097 (C.D. Cal. 2009).

and walked to the scene. *Id.* The police subsequently recovered the discarded liquor bottle.

Police investigated Souter, but Souter denied any involvement in Ringler's death. *Id.* Police did not find any blood on Souter, with the exception of a trace of blood on the label of the liquor bottle, which matched both Souter's and Ringler's blood type. Souter explained that he had cut his finger on a door handle at the party. *Id.* at 582. The prosecutor declined to press charges. *Id.*

In 1983, a detective and the medical examiner reconsidered the case and hypothesized that the liquor bottle might have been used to kill Ringler. *Id.* The prosecutor again declined to bring charges against Souter. *Id.*

In 1991—more than a decade after Ringler's death—a new sheriff reviewed the evidence and issued an arrest warrant for Souter. *Id.* at 582-83. A jury convicted Souter of second-degree murder in 1992. *Id.* at 583. After filing an unsuccessful motion for new trial, Souter filed a habeas petition in the United States District Court for the Western District of Michigan. *Id.* Souter based his petition on several pieces of new evidence, including testimony that the liquor bottle would not have had a sharp edge in 1979, new photographs of the victim that contradicted the prosecution's theory, and recantations from two of the prosecution's witnesses. *Id.* at 583-84. The district court found Souter's habeas petition untimely, and therefore barred. *Id.* at 584. In 2005, the Court of Appeals reversed, holding that Souter's new evidence established a credible claim of actual innocence. *Id.* at 590, 597.

While Souter's case is an example of the critical need for the actual-innocence gateway, it is also an example of how evidence can be discovered by fortuity. *See infra*, Section II.A. Evidence uncovered after the Court of Appeals granted Souter's habeas petition conclusively established that another person—not Souter—was responsible for Ringler's death.

At that time, Carla Dimkoff—a person with no involvement in the case—saw a news report about the case. She contacted Souter's attorney to disclose that she believed that her father, James Keller, was responsible for Ringler's death. Further investigation confirmed that Souter was not accountable; instead, Dimkoff's father, who had been drinking, killed Ringler by hitting her with the side-mirror of his motor home. Only after Souter's attorney pursued Dimkoff's story did state officials finally acknowledge that Souter was innocent.[7]

II. Investigating Claims of Actual Innocence Is a Slow, Uncertain, and Sometimes Haphazard Process.

Innocence investigations rarely follow a linear path and are often marked by false starts, dead ends, and serendipitous "breaks" in the case that lead to exonerating evidence, sometimes many years after conviction. The experience of the Innocence Network and its affiliate Innocence Projects belies the notion that requiring diligence would result in meritorious

[7] For a recounting of the exonerating evidence, see Jordan M. Barry, *Prosecuting The Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 Stan. L. Rev. 535, 558-59 (2012).

petitions being filed sooner. Innocence investigations are qualitatively different from the preparation that precedes the average habeas petition. Such investigations unfold in their own time, as they require an incarcerated individual to pursue evidence outside both the record and the prison walls. Squeezing these investigations into a tight limitations period does not serve the traditional role of habeas corpus in preventing unjust incarceration. Forcing innocence investigations to conclude prematurely, whether by rejecting the *Schlup* gateway or grafting onto existing equitable doctrines a new diligence requirement that does not reflect the realities of investigating from prison, not only creates incentives for petitioners to file premature petitions, but may also pretermit avenues of investigation that could result in conclusively exonerating evidence. And, most fundamentally, failure to recognize an exception or saddling the exception with a diligence requirement unquestionably could result in actually innocent prisoners being denied federal habeas relief, even if they would otherwise have been able to adduce compelling evidence of innocence.

It is a fallacy to believe that exonerating evidence can be discovered more quickly if the petitioner exercises diligence. Critical evidence needed by a petitioner is, not uncommonly, the product of fortuity. *See* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2051 n.84 (2000) (describing "the huge element of luck characterizing the discovery of many miscarriages of justice" and providing examples); Lawrence C. Marshall, *Do Exonerations Prove That "The System Works?,"* 86 Judicature 83, 84 (2002) (concluding that 10 of 13

exonerations studied resulted from "fortuities"); Edwin M. Borchard, *Convicting the Innocent: Errors of the Criminal Justice System* xix (1932) (collecting cases in which evidence of innocence discovered by "sheer luck").

Below is a small representative sampling of individuals who were convicted of crimes, with the stories of the investigations, and the fortuities, that ultimately proved their actual innocence.

A. Exonerating Evidence Is Often Discovered Serendipitously, Regardless of Whether the Petitioner Has Been Diligent.

1. Clarence Elkins

In June 1999, Clarence Elkins was convicted of murdering and raping his mother-in-law and of raping and attempting to murder his six-year-old niece. Elkins proclaimed his innocence immediately and consistently. It would take nearly eight years, however, before DNA evidence conclusively exonerated Elkins by establishing that another man had committed the heinous crimes for which Elkins was convicted.

Although no physical evidence connected Elkins to the crime, an Ohio jury convicted him based largely on the testimony of his six-year-old niece who had identified him as the perpetrator. After the attacks in which his niece was rendered unconscious and her grandmother was murdered, his niece fled her grandmother's home and went to the nearby home of three neighborhood playmates. The girls' mother

testified that when she answered the door, the girl said: "My Uncle Clarence killed my grandma."

Although Elkins's niece recanted her testimony in May 2002, the state court dismissed Elkins's motion for new trial or evidentiary hearing, concluding that the child's recantation was not credible.

Elkins's wife, convinced he was innocent of killing her mother and raping her niece, continued to pursue a long and difficult investigation. The investigation was marked by false starts and dead-ends as well as serendipitous events that led to the discovery of the evidence that ultimately exonerated Elkins. For example, Mrs. Elkins knew that her mother had repeatedly rebuffed the advances of an emotionally disturbed man 30 years her junior and suspected this young man might have committed the crimes. In 2002, while still pursuing evidence to link this younger man to the crimes, she was shocked to read in the *Akron Daily Journal* that Earl Mann—the common-law husband of her mother's neighbor (the very woman to whom her niece had gone after the attacks)—had been convicted of raping the three young girls who had been her nieces' playmates. Although this news report raised grave questions, Mrs. Elkins continued to attempt to determine whether the younger man was involved. The younger man agreed to have his DNA compared to DNA from the crime scene, but the necessary DNA tests, more sophisticated than the DNA evidence presented at trial, would cost between $30,000 and $50,000, a sum Mrs. Elkins did not have.

The Ohio Innocence Project/Rosenthal Institute for Justice at the University of Cincinnati became involved in the case in 2004. Mark Godsey, cofounder

of the Ohio Innocence Project, negotiated a steep discount on the DNA testing. That testing excluded Elkins but also excluded the younger suspect. An Ohio state court denied Elkins's motion for new trial based on this evidence, concluding that the jury would have convicted Elkins even if it had had the new DNA evidence. At that time, Elkins's team did not have DNA from Earl Mann.

Then, in 2005, in "an amazing coincidence," Mann was transferred to the prison in which Elkins was serving his term, and indeed to his very cell block. Ultimately, Elkins was able to collect one of Mann's cigarette butts and get it to his wife so a DNA sample could be taken. Sophisticated DNA testing proved that Mann's DNA matched that of hair and fluid collected from the crime scene. The county prosecutor, however, dismissed this DNA testing as not conclusive because it could have resulted from DNA "skin-cell transfer." Only after Ohio Attorney General Jim Petro became involved in the case in September 2005 did Elkins finally obtain the relief he had sought—in December 2005, the County Prosecutor filed a motion to dismiss all charges against Elkins.[8]

2. Jonathan Moore

In 2002, an Illinois jury convicted Jonathan Moore of first-degree murder, along with counts of

---

[8] For background on Elkins's case, see generally Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* 9-61 (2010).

attempted murder, for his supposed role in a 2000 shooting in Aurora, Illinois in which one man was killed and another paralyzed. His conviction was upheld on appeal, and he was ultimately sentenced to 70 years in prison. His projected parole date was 2057.

In 2011—in connection with another case, and completely unbeknownst to Moore—a confidential informant who had been present at the 2000 shooting approached the Aurora police with information that Moore was not the shooter. This witness provided the police with other information that led to the reopening of the investigation into Moore's case. In the course of this investigation, the Aurora police conducted interviews—including interviews that the original investigators never conducted—that corroborated the informant's statements and severely undermined the original case against Moore that was presented to the jury.

The new evidence so strongly cast doubt on Moore's guilt that prosecutors agreed that he should be released. With the assistance of the Downstate Illinois Innocence Project (now the Illinois Innocence Project), Moore was released from prison in March 2012. At the time he was released, the Aurora police's investigation into the murder and attempted murder of which Moore was convicted remained ongoing.

The evidence that exonerated Jonathan Moore and ultimately led to his release arose by complete serendipity. Not only would Moore likely have remained in prison if the confidential informant had not approached the police, he also would likely have remained incarcerated if the Aurora police had not

gone to such efforts to investigate the matter and ensure that an innocent person had not been imprisoned.[9]

3. Gary Gauger

In 1993, Morris and Ruth Gauger, an elderly couple, were brutally killed on their farm in Richmond, Illinois. Each was beaten and stabbed. The Gaugers' son Gary became the immediate suspect because he was alleged to have acted strangely when the bodies were discovered. Police questioned Gauger for 21 hours, during which he allegedly made incriminating statements. A jury convicted Gauger of his parents' homicide six months later.

In 1996, a federal district court overturned Gauger's conviction. A fortuitous wiretap—completely unrelated to Gauger's case—eventually cleared Gauger's name and identified the real perpetrators. By chance, the Bureau of Alcohol, Tobacco and Firearms used a wiretap in its investigation of a violent relationship between the "Outlaws" (a motorcycle gang) and the "Hells Angels." The wiretap unexpectedly picked up two of

---

[9] For background on Moore's case, see generally Patrick Yeagle, *Incarcerated But Innocent: Illinois Innocence Project Expands Work to Free the Wrongfully Convicted*, Illinois Times, Apr. 26, 2012; Chris Dettro, *UIS Group Helps Free Aurora Man*, The State Journal-Register, Mar. 8, 2012, at 13; Clifford Ward, *Aurora Man is Freed After Conviction Vacated*, Chi. Trib., Mar. 7, 2012, at C9; Harry Hitzeman, *Man Exonerated 12 Years After Shooting*, Chicago Daily Herald, Mar. 7, 2012, at 1.

the Outlaws bragging about having murdered the Gaugers without consequence, because the Gaugers' son had been convicted.

Regardless of Gauger's diligence, he was actually innocent. But it took a serendipitous turn to prove it.[10]

These cases highlight the unique and difficult nature of an innocence investigation and that conclusively exonerating evidence may be discovered irrespective of diligence. This is so even when a prisoner has the support of the Network and one of the Innocence Projects or other dedicated outside resources.

B. Many Petitioners Have Limited Access to Legal Resources and Individuals To Assist in an Investigation Outside of Prison.

Even petitioners who are fortunate enough to have the resources of a dedicated family member, counsel, or an organization like an Innocence Project face a daunting task in gathering the evidence necessary to prove actual innocence. Most petitioners not only lack these resources, but also labor under a variety of disadvantages that would make failure to

---

[10] For background on Gauger's case, see generally Ray Quintanilla, *Gauger Set Free in Killing of Parents; McHenry County Man on Death Row 3 Years*, Chi. Trib., Oct. 5, 1996, News, at 1; Dave Daley, *Biker Is Convicted of '93 Killings of Richmond Couple; Another Outlaw Found Guilty in Murder of Hell's Angel on Northwest Side in '95*, Chi. Trib., June 16, 2000, Metro Chicago, at 3; Marshall, *supra*, at 86.

recognize the innocence gateway, or imposing a diligence requirement on that gateway, unjust. A lack of resources has a substantial impact on a petitioner's ability to conduct a thorough investigation to support his claim of innocence.

Without assistance from counsel, it is undoubtedly challenging for petitioners to submit compelling habeas petitions. Michael A. Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. L. & Soc. Change 451, 481 (1990/1991) ("Anyone who has represented condemned inmates, or who has read their pro se papers, must recognize the absurdity of such people preparing meaningful habeas petitions and supporting memoranda."). Their task is made even harder by well known deficiencies in and lack of access to prison law libraries. *See, e.g.*, Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. Pa. J. Const. L. 819, 829-30 (2008) (describing States' dismantling of prison law libraries in the wake of *Lewis v. Casey*, 518 U.S. 343 (1996)). Perkins lacked access to a law library for five years. Resp. Br. at 9.

Petitioners navigating the habeas process on their own will frequently have great difficulty in gathering exculpatory evidence in a timely fashion. A diligence requirement, moreover, is unlikely to account for the great practical challenges petitioners face in conducting investigations. A recent article acknowledges this conundrum: Petitioners are not equipped to conduct a factual investigation as an attorney would, but courts often fail to appreciate

this impediment fully when assessing whether the petitioner should have discovered evidence earlier:

> But the petitioner must make the case for why he failed to discover the claim or claims earlier. Without more, his pro se status, which encompasses the fact that he is incarcerated without outside legal and investigative assistance to uncover facts that might support a claim for habeas relief, will not suffice. Once again, federal courts engage in mythical thinking in assuming that the average incarcerated inmate is as able to litigate and conduct factual investigations as the professional attorney.

Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-To-The-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. Pa. J. Const. L. 1219, 1234-35 (2012) (citation omitted); *accord* Zheng, *supra*, at 2135 ("It is convenient to blame prisoners for inactivity, but prisoners generally lack the resources necessary to conduct a thorough investigation of the new evidence by themselves. If they hastily file a habeas corpus petition whenever some new clue emerges, they will most likely be found to be abusing the system.").

In addition to the lack of adequate legal representation, many petitioners likewise lack assistance from non-attorneys on the outside. Without such non-attorney sleuths investigating the facts, it is exceedingly difficult to prove one's actual innocence. One example is Gary Gauger. See *supra*,

Section II.A.3. Although Gauger was innocent, he did not have means to prove it—nor did he have assistance from anyone on the outside who could investigate on his behalf. After being released from prison, Gauger lamented the inability to investigate while he was imprisoned: "While I was in prison, no one was investigating to find out who killed my parents." Quintanilla, *supra*, at 1. Having a resource outside of the confines of prison to conduct an investigation is undoubtedly a key advantage. *See supra*, Section II.A.1 (explaining how Elkins's wife was ultimately able to disprove that Elkins had committed the crime); *accord* Liebman, *supra*, at 2051 n.84 (attributing many prisoners' eventual exonerations to "luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release").

C. Many Petitioners Suffer from Mental Disabilities, Lack of Education, and Low Intelligence, All of Which Hinder or Preclude an Investigation.

Another significant impediment faced by many petitioners is their mental-health conditions and/or low intelligence. Although not all petitioners suffer from mental illness or low intelligence, the statistics are dismal. *See* Uhrig, *supra*, at 1253 (describing the relative mental health of the inmate population as "bleak"); Mello & Duffy, *supra*, at 481 ("[M]any condemned inmates are illiterate, uneducated, mentally impaired, or any combination of the three."); *Lewis*, 518 U.S. at 354 (describing the prison

population as "mostly uneducated and indeed largely illiterate").

According to a 2006 Department of Justice study, mental illness is far more prevalent among prisoners than among the general public. As of the middle of 2005, more than half of all prison and jail inmates had a mental-health problem. *See* Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 1 (2006), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf. The study further found that approximately 4 in 10 local jail inmates and 3 in 10 State and Federal prisoners had symptoms of a mental-health disorder, without a recent history. *Id.* at 3. To give perspective, the study also reported that approximately 1 in 10 persons age 18 or older in the general population met the DSM-IV criteria for the symptoms of a mental-health disorder. *Id.* at 5 (relying on data in the National Epidemiologic Survey on Alcohol and Related Conditions, 2001-2002). Thus, prisoners demonstrate significantly higher levels of mental illness than non-incarcerated individuals.

Similarly, prisoners have significantly less education and lower intelligence than the average non-incarcerated individual. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513, 549 (1988) ("Intelligence and educational levels among prisoners as a group are very low."). Prisoners are statistically far less educated than the general public. Caroline Wolf Harlow, U.S. Dep't of Justice, *Education and Correctional Populations* 1-2 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/

ecp.pdf (approximately 41% of prisoners in State and Federal prisons and local jails had not completed high school or the equivalent); *accord* Shelley Johnson Listwan et al., *How To Prevent Prisoner Re-Entry Programs From Failing: Insights From Evidence-Based Corrections*, 70-DEC Fed. Probation 19, 21 (2006) (only 40% of adult inmates finished their high-school education); Mello, *supra*, at 549 (in most states, the average prisoner only had eight years of education).

In addition, prisoners demonstrate significantly lower literacy levels than non-incarcerated individuals. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Office of Educ. Research & Improvement, No. NCES 1994-102, *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* 17, 20 (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf.

Prisoners also are more likely to have learning disabilities. *See id.* at xxiii (11% of prisoners reported having learning disabilities, compared to 3% of the general population).

These mental-health and educational deficiencies create a further impediment to prisoners' ability to conduct investigations and timely file petitions sufficient to obtain post-conviction relief: "Given that many inmates do not have a high level of education and that many suffer from mental illness, navigating the post-conviction appeals process poses, at the very least, a daunting challenge." Amy Breglio, Note, *Let Him Be Heard: The Right to Effective Assistance of Counsel on Post-Conviction Appeal in Capital Cases*, 18 Geo. J. on Poverty L. & Pol'y 247, 259 (2011).

The unquestionable investigational challenges faced by many habeas petitioners support an actual-innocence gateway that is applied without a diligence requirement, especially in light of the central importance of protecting those who are innocent.

III. Recognizing the Continued Vitality of the Actual-Innocence Gateway Would Not Impose Additional Burdens on Federal Courts.

Recognizing that the *Schlup* gateway permits actually innocent petitioners to bring first-time habeas petitions outside the one-year limitations period with no diligence requirement will not needlessly burden the courts or litigants. *Contra* Pet. Br. at 24-25; States' *Amici* Br. at 11-15. The substantive and procedural hurdles faced by a petitioner asserting actual innocence in a habeas proceeding, along with the fact that innocence claims are rare, ensure that judicial resources will not be taxed by a traditional application of *Schlup*.

A. Petitioners Rarely Claim Actual Innocence.

As Judge Friendly remarked more than 40 years ago: "the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970). This Court acknowledged in *Schlup* that Judge Friendly's insight "remains largely true today." 513 U.S. at 322.

Nevertheless, it is a common misconception that all prisoners—even those who are undeniably guilty—maintain their innocence, and that their claims of innocence risk burdening busy courts. *See, e.g.*, States' *Amici* Br. at 14. Research, however, suggests otherwise.

A study of federal habeas petitions, which examined more than 1,500 non-capital habeas cases filed by state prisoners, concluded that fewer than 4% of petitioners raised "new evidence of innocence of the offence of conviction—either DNA or non-DNA." Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S. District Courts* 15-18, 30 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Among capital cases, in which the stakes are undeniably higher, that number rises to a still-small 10.8%. *Id.* at 29. These numbers cohere with anecdotal evidence that the number of prisoners who insist on their innocence is small. *See, e.g.*, Petro and Petro, *supra*, at ix, 217-19 (presenting anecdotal evidence from Lauren McGarity, mediator and prison educator, that of the "nearly one thousand" convicted felons that she has known, only two have said they are innocent).

The number of prisoners who claim to be actually innocent may indeed be smaller than the number of prisoners who are actually innocent. Another study analyzed a sample of individuals who had been proven to be actually innocent by post-conviction DNA testing. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 64-65 (2008). Of 133 exonerated individuals who received a written ruling on their claims, only 16 at any point raised a state-law claim seeking a new trial on the basis of

newly discovered evidence of innocence. *Id.* at 110-11. None of these 16 prisoners received relief on these claims. *Id.* Moreover, none of this group raised *Schlup* to invoke the "actual innocence" exception to procedural default, and only five raised a freestanding actual-innocence claim under *Herrera*. *Id.* at 110-12.

Because prisoners do not routinely claim their actual innocence, the States' concern that recognizing an equitable exception to § 2244(d) would result in a deluge of actual-innocence claims is unfounded.

B. Actual Innocence Is Difficult To Demonstrate.

There is a reason why not every prisoner—not even every actually innocent prisoner—raises actual-innocence claims in post-conviction proceedings: actual innocence is difficult to demonstrate, and victories on such claims are rare.

The *Schlup* standard is a demanding one. Satisfying that standard, which permits a petitioner to overcome procedural default and proceed with his habeas petition, requires evidence that must be both new (*i.e.*, not presented at trial) and credible. *Schlup*. 513 U.S. at 324. Sufficient evidence might consist, for example, of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* In weighing whether the petitioner has made the appropriate showing, a court must consider the new evidence as part of "all the evidence" (including the evidence at trial, which a jury has necessarily found sufficient to convict) and including the "timing of the submission" (which will

be long after the petitioner's conviction and incarceration). *Id.* at 328, 332.

Moreover, a petitioner must have all the necessary evidence before filing his petition: a habeas petition is not a matter of notice pleading followed by an opportunity to take discovery. It is thus no surprise that both this Court and the Courts of Appeals have remarked upon the considerable hurdles that a petitioner must surmount to pass through the *Schlup* gateway. *See, e.g.*, *House*, 547 U.S. at 538 ("[I]t bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case.").

As this Court has noted, "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare," and "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence is thus significantly less than that posed by claims relating only to sentencing." *Schlup*, 513 U.S. at 324. The high standard for demonstrating actual innocence mitigates any burdens that might be placed on courts and litigants by recognizing an equitable exception to § 2244(d).

C. Actually Innocent Petitioners Have No Incentive To Delay Filing Their Habeas Petitions.

Actually innocent petitioners have no reason to wait to file a habeas petition any longer than necessary to gather the evidence needed to support the petition. *Contra* Pet. Br. at 18; States' *Amici* Br. at 13.

First, an inmate who is actually innocent has no interest in languishing in prison any longer than absolutely necessary. And only an actually innocent petitioner can successfully invoke *Schlup* as a gateway to permit a filing after the limitation period expires. Non-capital prisoners who are guilty of the underlying crime—and thus have no hope of passing through the *Schlup* gateway—also have little incentive to delay their habeas petitions.

Second, *amici* point out that when habeas petitioners delay in filing their petitions, "[w]itnesses die or move away; physical evidence is lost; memories fade." States' *Amici* Br. at 13-14 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting)). Accordingly, *amici* argue, a State's ability to defend its original verdict degrades with time. But a petitioner's ability to build his case for actual innocence deteriorates to the same extent as a State's ability to defend its original verdict. Witnesses for the State do not die or move away any faster than witnesses whose testimony can help prove innocence. Moreover, because the petitioner bears the burden of proof in a habeas proceeding, *see, e.g.*, *Herrera*, 506 U.S. at 399-400, the passage of time and degradation of evidence ultimately benefit the State more than they do the habeas petitioner.

Third, under *Schlup*, a court may take into account "how the timing of the submission . . . bear[s] on the probable reliability of [the new] evidence." 513 U.S. at 332. An actually innocent petitioner—or even a guilty one acting in bad faith—is thus aware that convenient or unexplainable delays could very well serve to render his already steep burden an insurmountable one.

D. A Holding That the Miscarriage-of-Justice Doctrine Does Not Create an Equitable Exception to § 2244(d), or That Such an Exception Requires Diligence, Would Impose Additional Burdens on Courts.

The Warden advocates for a rule that the miscarriage-of-justice doctrine does not create an equitable exception to AEDPA's statute of limitations, or that such an exception requires reasonable diligence by the habeas petitioner. *See, e.g.*, Pet. Br. at 6. Either rule, however, would impose additional burdens on busy district courts. This is true for two reasons.

First, it would encourage actually innocent petitioners to file a premature first habeas petition before filing their complete and fully investigated petition. Such a situation burdens both actually innocent petitioners as well as courts. Like Perkins, some actually innocent petitioners must slowly build a case that demonstrates their innocence based upon multiple pieces of evidence that are not, standing alone, dispositive of actual innocence. As discussed above, this process can be haphazard, aggregative, and time-consuming.

Absent an equitable exception to § 2244(d), actually innocent petitioners would likely be forced to file a not-yet-final first petition just before the limitations period expires to avoid having their petition barred as untimely. 28 U.S.C. § 2244(d)(1). Perhaps that premature, not-fully-investigated petition will suffice to persuade the district court of

the petitioner's innocence, but more likely not. Indeed, the formality of filing an incomplete, partially investigated claim—which is unlikely to be as meritorious as one presenting the full fruits of an investigation—is more likely to be a needless drain on the resources of the courts, the petitioner, and the State. That would benefit no one. *Cf. Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (requiring petitioners to file premature claims for purely procedural reasons amounts to "[a]n empty formality" that does not "respect[] the limited legal resources available to the States"). Attorneys representing petitioners under these circumstances will be put in an untenable position: they will be forced to choose between filing a weak, incompletely investigated petition—likely to the detriment of their client's interests—and completing their investigation but risking that the petition will be barred as untimely or the product of undue delay. The Warden's proposed rule thus encourages needless, piecemeal litigation.

Second, requiring district courts to assess an actually innocent petitioner's diligence necessarily requires district courts to expend more of their scarce resources. A rule that requires district courts to review and rule upon a petitioner's diligence is inevitably a rule that taxes the resources of busy district courts.

IV. Clemency Is No Answer.

That a State *may* grant clemency to a person who is actually innocent provides no solution for the injustices that could result if the Court were to hold that there is no innocence gateway or that diligence is required. Grave problems with how clemency is

structured and currently administered by the various States are well documented. As a result, clemency is no longer the fail-safe posited by the Court in *Herrera*, if it ever was.

In many States, who is granted clemency is a matter of politics and influence. In some states, the governor, an elected official, has sole and unfettered discretion in whether to grant clemency. As a result, whether to grant clemency may turn largely on the State's political climate. As explained in the Kennedy Commission Report, "The political reality is that there are few criticisms of officials who say 'no' to a clemency request, and there is considerable risk of political backlash if an offender released by action of the executive commits another crime." Am. Bar Ass'n Justice Kennedy Comm'n, *Report with Recommendations to the ABA House of Delegates* 69 (2004), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf ("Kennedy Commission Report"); *see also* Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. Rev. 1825, 1827 (2002) (describing California clemency procedure as "standardless in procedure, discretionary in exercise, and unreviewable in result"). "Governors and presidents often seem to treat clemency as a quasi-illegitimate power that they are reluctant to exercise." [11] Testimony of

[11] Even in States in which a Board may review the evidence submitted with a clemency petition, there is no guarantee the evidence will be reviewed, much less that relief will be provided.

Professor Daniel T. Kobil, *The Role of Clemency in Providing Mid-Course Corrections of Sentence* before the ABA Justice Kennedy Commission 8 (Nov. 12, 2003).

Moreover, use of clemency has atrophied in recent decades. *See, e.g.*, Kennedy Commission Report, *supra*, at 70 ("[I]n almost every jurisdiction the instance of pardoning decreased markedly after 1990."); Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 Law & Soc'y Rev. 183, 186 n.8 (2008) (currently low clemency rates "represent[] a radical shift from several decades ago, when governors granted clemency in 20 to 25 percent of the death penalty cases they reviewed"); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 Buff. Crim. L. Rev. 967-1006 (2001).

In sum, clemency cannot be relied upon as the fail-safe for the actually innocent envisioned by the *Herrera* Court and urged by *amici*.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Network respectfully urges the Court to affirm the Sixth Circuit's judgment.

Respectfully submitted,

LORI R. MASON
MAUREEN P. ALGER
Counsel of Record
COOLEY LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 843-5000
lmason@cooley.com

MARYBETH W. SHREINER
COOLEY LLP
11951 Freedom Drive
Reston, VA 20190
(703) 456-8000
mshreiner@cooley.com

KYLE P. REYNOLDS
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
(202) 842-7800
kreynolds@cooley.com

Counsel for *Amicus Curiae*
The Innocence Network

January 25, 2013