

No. 04-8990

In the Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit**

**BRIEF FOR FORMER PROSECUTORS AND
PROFESSORS OF CRIMINAL JUSTICE AS *AMICI
CURIAE* SUPPORTING PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
ARGUMENT.....	2
I. PUBLIC CONFIDENCE IN THE INTEGRITY OF THE DEATH PENALTY DEPENDS UPON THE ABILITY TO HALT THE EXECUTION OF IN- MATES WHO PRESENT PERSUASIVE EVI- DENCE OF ACTUAL INNOCENCE.....	2
A. The Integrity Of The Criminal Justice System Is Judged By Its Fairness To The Innocent	3
B. Imposition Of The Death Penalty Merits A Higher Standard Of Reliability Than Other Pun- ishments.....	4
C. Public Confidence In The Reliability Of The Justice System Has Been Shaken In The Decade Since <i>Herrera</i> and <i>Schlup</i> , In The Wake Of Revelations That Innocent Defendants Have Been Condemned To Death.....	5
II. ANY BURDEN IMPOSED BY ADJUDICATION OF CLAIMS OF ACTUAL INNOCENCE IS FAR OUTWEIGHED BY THE BENEFIT OF MAIN- TAINING THE CREDIBILITY OF OUR SYSTEM OF JUSTICE.....	9
CONCLUSION	11
APPENDIX A.....	1a
APPENDIX B.....	5a

TABLE OF AUTHORITIES
(continued)

	Page(s)
 CASES	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	8
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	3
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	9
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977)	5
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	3, 5
<i>Kaufman v. United States</i> , 394 U.S. 217 (1969)	11
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995)	<i>passim</i>
<i>Solem v. Helm</i> , 463 U.S. 277 (1983)	4
<i>Strickler v. Green</i> , 527 U.S. 263 (1999)	3
<i>United States v. Bagley</i> , 4783 U.S. 667 (1985)	3
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	4
 STATUTES, RULES AND REGULATIONS	
Sup. Ct. R. 37.3(a)	1
American Bar Association, <i>Standards for Criminal Justice: Prosecution Function and Defense Function</i> § 3-1.2(c) (3d ed. 1993)	3
National District Attorneys Association, <i>National Prosecution Standards</i> 9 (2d ed. 1991)	3

TABLE OF AUTHORITIES
(continued)

	Page(s)
 MISCELLANEOUS	
Assoc. Press, <i>O'Connor Questions Death Penalty</i> , N.Y. Times, July 4, 2001, at A9.....	8
John Carpenter, <i>Hard Work Helps Bring Justice to 4 Innocent Men</i> , Chi. Sun-Times, June 23, 1996, at 26.....	6
Death Penalty Information Center, <i>Innocence and Death</i> , available at http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-yr-rc	6
Larry Fish, <i>Cleared Death-Row Inmate to Be Freed</i> , Phila. Inquirer, Jan. 14, 2004, at B1	2
John W. Gonzalez, <i>Death Row Inmate Cleared In '86 Fire</i> , Houston Chronicle, Oct. 6, 2004, at B1	2
Samuel R. Gross et al., <i>Exonerations in the United States 1989 Through 2003</i> , 95 J. Crim. L. & Criminology 523 (2005)	5
Harris Interactive Poll, Feb. 12, 2003.....	8
John Jeter, <i>Students' Probe Ends 16 Years on Death for Illinois Man</i> , Wash. Post, Feb. 6, 1999, at A3	6
Dirk Johnson, <i>Illinois, Citing Faulty Verdicts, Bars Executions</i> , N.Y. Times, Feb. 1, 2000, at A1	2
J.M. Lawrence, <i>Free At Last; 30-Year Journey from Death Row to Home</i> , Boston Herald, May 21, 2004, at 3.....	2

TABLE OF AUTHORITIES
(continued)

	Page(s)
Edward Lazarus, <i>The Limits of DNA Justice</i> , Wash. Post, June 16, 2000, at A-29	9
James Liebman, Jeffrey Fagan & Valerie West, <i>A Broken System; Error Rates In Capital Cases, 1973-1995</i> (2000)	6
James Liebman, <i>Overproduction Of Death</i> , 100 Colum. L. Rev. 2030 (2000)	6
Joseph Neff, <i>Gell Found Not Guilty</i> , News & Observer, Feb. 19, 2004, at A1	2
Kimball Perry, <i>'85 Murder Conviction Dismissed</i> , Cincinnati Post, Mar. 1, 2005, at A8	2
Tom Ragan, <i>Years After Death Row Travesty, Killer Gets Due</i> , Chi. Trib., Sept. 8, 1999, at 1	10
William S. Sessions, <i>DNA Tests Can Free the Innocent. How Can We Ignore That?</i> , Wash. Post, Sept. 21, 2003, at B2	5
John Shiffman, <i>1 in 4 Blacks Condemned by All-White Juries</i> , Tennessean, July 27, 2001, at 1A	7
John Shiffman, <i>Troubled Lawyers Still Allowed to Work Death Cases</i> , Tennessean, July 25, 2001, at 1A	7
U.S. Dep't of Justice, Bureau of Justice Statistics, <i>Capital Punishment, 2003</i> (2004)	7
U.S. Dep't of Justice, Bureau of Justice Statis- tics, <i>Capital Punishment, 1996</i> (1997)	7

TABLE OF AUTHORITIES
(continued)

	Page(s)
U.S. Dep't of Justice Bureau of Justice Statistics, <i>Federal Habeas Corpus Review: Challenging State Court Criminal Convictions</i> (1995).....	11
James D. Unnever & Francis T. Cullen, <i>Executing the Innocent and Support for Capital Punishment: Implications for Public Policy</i> , 4 <i>Criminology & Pub. Pol'y</i> 3 (2005).....	8
Scott Vollum et al., <i>Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes</i> , 21 <i>Just. Q.</i> 521 (2004).....	8
Henry Weinstein, <i>DNA Tests Finally Clear Louisiana Man Of Murder</i> , <i>L.A. Times</i> , Aug. 10, 2004, at A12	2
Henry Weinstein, <i>Death Sentences on Decline as Public's Skepticism Grows</i> , <i>L.A. Times</i> , Dec. 14, 2004, at A28.....	7

INTEREST OF *AMICI CURIAE*^{*}

Amici curiae are former prosecutors and professors of criminal justice who have a continuing interest in maintaining the legitimacy of the criminal justice system as a fair and effective means of punishing the guilty and freeing the innocent.¹ Fair administration of the death penalty is a critical test of any system of justice. Under the intense public scrutiny capital cases receive, the failure to produce a just result resounds far beyond the confines of a particular case. The role of prosecutors is weakened, and their credibility before juries, judges, and the public is diminished, if a just outcome is not evident where the public most demands it.

This is one such case. Petitioner has a powerful claim of actual innocence, supported by unusually convincing evidence, but has been unable to escape the sentence of death. Adoption of the Sixth Circuit's approach would have the inevitable result of undermining public confidence in our system of justice, by increasing the possibility of wrongful executions and wrongful incarceration. *Amici* accordingly submit this brief from the perspective of individuals with a strong interest in ensuring the reliability of the criminal justice system and who share a concern that the task of prosecutors will become more difficult if the public cannot be confident that the innocent can be exonerated. The *en banc* majority in this case, having applied an unduly restrictive approach to this Court's reasoned precedents regarding habeas

* Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

¹ A list of *amici* is found in Appendix A.

corpus claims of actual innocence, threatens those important interests. The judgment should therefore be reversed.

ARGUMENT

I. Public Confidence In The Integrity Of The Death Penalty Depends Upon The Ability To Halt The Execution Of Inmates Who Present Persuasive Evidence of Actual Innocence

In recent years, DNA and other evidence has shown that a significant number of inmates sentenced to death were actually innocent. Those exonerations quite naturally have garnered significant publicity.² Prosecutors' credibility before juries and the public depends upon the existence of a full range of safety valves to free the innocent when errors have occurred. Accessible judicial remedies for colorable claims of actual innocence serve this vital purpose.

² See, e.g., Larry Fish, *Cleared Death-Row Inmate to Be Freed*, Phila. Inquirer, Jan. 14, 2004, at B1 (Nicholas James Yarri cleared after spending more than half his life on Pennsylvania's death row); John W. Gonzalez, *Death Row Inmate Cleared In '86 Fire*, Houston Chronicle, Oct. 6, 2004, at B1 (Ernest Ray Willis cleared after spending 17 years on Texas death row); J.M. Lawrence, *Free At Last; 30-Year Journey from Death Row to Home*, Boston Herald, May 21, 2004, at 3 (Laurence Adams freed after 1974 Massachusetts death sentence); Henry Weinstein, *DNA Tests Finally Clear Louisiana Man Of Murder*, L.A. Times, Aug. 10, 2004, at A12 (Ryan Matthews freed after spending more than five years on Louisiana death row); Joseph Neff, *Gell Found Not Guilty*, News & Observer, Feb. 19, 2004, at A1 (Alan Gell freed after 1998 North Carolina death sentence); Kimball Perry, *'85 Murder Conviction Dismissed*, Cincinnati Post, Mar. 1, 2005, at A8 (Derrick Jamison wins dismissal of charges for which he spent 17 years on Ohio's death row); cf. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1.

A. The Integrity Of The Criminal Justice System Is Judged By Its Fairness To The Innocent

“[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.” *Schlup v. Delo*, 513 U.S. 298, 325 (1995). That is because “the central purpose of any system of criminal justice” is not just “to convict the guilty,” but to “free the innocent.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Accordingly, the government’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

Within this scheme, prosecutors are entrusted with a “special role * * * in the search for truth in criminal trials.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor’s role “transcends that of an adversary: [the prosecutor] ‘is the representative not of an ordinary party to a controversy, but of a sovereignty.’” *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). See also National District Attorneys Association, *National Prosecution Standards* 9 (2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); *id.* § 3-1.2 cmt. (“it is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty”).

Where, however, prosecutors fail for whatever reason to acquiesce in the face of a strong showing of ‘actual innocence,’ the courts can and must step in. As this Court has found, “a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional” and warrant habeas relief. *Herrera*, 506 U.S. at 417. Concern for execution of the innocent, com-

pounded by additional constitutional concern for the conduct of the trial, requires that the burden of proof for “gateway” claims be a reasonable one. There, “a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have” in the verdict. *Schlup*, 513 U.S. at 325 (internal citation omitted), and reflects “the relative importance attached to the ultimate decision.” *Ibid.* Accordingly, the legal framework governing claims of actual innocence must recognize “[t]he paramount importance of avoiding the injustice of executing one who is actually innocent.” *Ibid.*

B. Imposition Of The Death Penalty Merits A Higher Standard Of Reliability Than Other Punishments

The American people and their Constitution hold the death penalty to a higher standard of reliability than other punishment. As the Court has recognized,

the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted); see also *Solem v. Helm*, 463 U.S. 277, 294 (1983) (“the death penalty is different from other punishments in kind rather than degree”).

In light of the public’s justified scrutiny of the application of the death penalty, “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather

than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977).

C. Public Confidence In The Reliability Of The Justice System Has Been Shaken In The Decade Since *Herrera* and *Schlup*, In The Wake Of Revelations That Innocent Defendants Have Been Condemned To Death

Recent DNA evidence and other evidence raise the specter of “[t]he quintessential miscarriage of justice” in “the execution of a person who is entirely innocent.” *Schlup*, 513 U.S. at 324-326 & n. 42. When *Herrera* and *Schlup* were decided, there was not widespread concern over the possibility of executing the innocent. The public and the courts maintained confidence in the application of the death penalty “in no small part because the Constitution offers unparalleled protections against convicting the innocent.” *Herrera*, 506 U.S. at 420 (O’Connor, J., concurring).

Many believed that the advent of DNA testing would merely confirm the accuracy with which our system of justice catches and punishes the guilty. See William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, Wash. Post, Sept. 21, 2003, at B2 (former head of FBI describing the creation of the FBI’s DNA testing lab, and calling on fellow prosecutors and legislators to assure meaningful access to DNA evidence that can prove innocence). The results proved otherwise. They demonstrated that DNA gathered at a crime often did not match the individuals identified for prosecution. See, e.g., *id.* (finding approximately 25% of DNA tests excluded the prime suspect in the investigation as the perpetrator). As DNA testing spread, so did exonerations. See *id.* (noting 137 post-conviction DNA exonerations for all crimes as of 2003).³ The number

³ See also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523

of individuals who were at one time sentenced to death but later exonerated of the crimes charged has climbed to 121 since 1973. Death Penalty Information Center, *Innocence and Death*, available at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-yr-rc>.⁴ And the total number of post-conviction DNA exonerations (both capital and non-capital) in the United States has now reached 162. See <http://www.innocenceproject.org/case/index.php> (summarizing and indexing each post-conviction DNA exoneration).

In one celebrated case, journalism students helped to discover evidence that eventually helped to free four men in Illinois, two of whom had been sentenced to death. John Carpenter, *Hard Work Helps Bring Justice to 4 Innocent Men*, Chi. Sun-Times, June 23, 1996, at 26. Through the seemingly obvious technique of interviewing available witnesses, the students spurred an investigation that led to DNA tests and eventual exoneration of the four men. *Id.* Remarkably, students from the same class played a pivotal role a few years later in the release of a man who had spent sixteen years on death row. John Jeter, *Students' Probe Ends 16*

(2005) (locating 340 individual exonerations from 1989 through 2003, almost all of which “are clustered in two crimes: rape and murder”).

⁴ Research on death penalty verdicts has further eroded confidence in their reliability. See, e.g., James Liebman, Jeffrey Fagan & Valerie West, *A Broken System; Error Rates In Capital Cases, 1973-1995* (2000) (finding 65% overall error rate in capital punishment system, and 82% of all capital judgments reversed on appeal were replaced on retrial with a sentence less than death or no sentence at all, and, among reversals, 7% resulted in acquittals); see also James Liebman, *Overproduction Of Death*, 100 Colum. L. Rev. 2030 (2000) (arguing that strong incentives exist at trial to impose the death penalty on those who do not deserve it under applicable state substantive law).

Years on Death for Illinois Man, Wash. Post, Feb. 6, 1999, at A3. The credibility of the criminal justice system takes a well-deserved hit when such cases are publicized.

As exonerations have mounted, the number of death sentences has decreased dramatically across America. In the 1990s, death sentences numbered over 300 per year. See, e.g., U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 1996* (1997) (320 sentences of death in 1996). In 2003, by contrast, 144 inmates received death sentences, the lowest in 25 years. U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment, 2003* 8, 14 (2004). As one observer noted, “[j]uries are more reluctant to impose the death sentence for a variety of reasons, prime among them a parade of wrongfully convicted people leaving death row.” Henry Weinstein, *Death Sentences on Decline as Public’s Skepticism Grows*, L.A. Times, Dec. 14, 2004, at A 28 (quoting Robin M. Maher, director of ABA death penalty representation project).⁵

At the same time, the public has registered increasing concern over the administration of the death penalty. Of those surveyed in a recent poll, 62% were “very concerned” that innocent people may be put to death. An additional 26%

⁵ In Tennessee, other problems touching upon the legitimacy of death sentences have been reported. See, e.g., John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, Tennessean, July 25, 2001, at 1A (“In the past quarter century, at least 39 Tennessee lawyers who have been disciplined by the state have represented defendants in capital cases * * * include[ing] lawyers who seriously neglected client’s cases — missed key filing deadlines, failed to interview important witnesses, or lied to or stole from clients.”); John Shiffman, *1 in 4 Blacks Condemned by All-White Juries*, Tennessean, July 27, 2001, at 1A (“All-white juries have sent 15 black men to Tennessee’s death row since 1977 * * * [; t]hat accounts for one of every four blacks sentenced to death statewide — and one in two blacks outside Shelby County.”).

were “somewhat concerned.” Together, a combined total of 88% of respondents were concerned that innocent people may be put to death. Harris Interactive Poll, Feb. 12, 2003.

Support for the death penalty is diminished among respondents who believed that innocent people have been executed. James D. Unnever & Francis T. Cullen, *Executing the Innocent and Support for Capital Punishment: Implications for Public Policy*, 4 *Criminology & Pub. Pol’y* 3, 15 (2005) (finding a difference in support for the death penalty between the groups of nearly 20%). Even among supporters of capital punishment, grave concerns exist over its application. A study of public opinion in Texas, where a large majority supports capital punishment, found that a majority of respondents also supported a moratorium on executions. Scott Vollum et al., *Confidence in the Death Penalty and Support for Its Use: Exploring the Value-Expressive Dimension of Death Penalty Attitudes*, 21 *Just. Q.* 521, 533 (2004) (registering 82 percent support for capital punishment and 64 percent support for a moratorium on executions). The surprising match of support for capital punishment with the desire for a moratorium on executions was most closely correlated with concern about the “protect[ion of] innocent people from being executed.” *Id.* at 531, 536.

Concern over the number of exonerations has also found voice in this Court. See *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) (noting the “disturbing” number of inmates on death row who have been exonerated); see also Assoc. Press, *O’Connor Questions Death Penalty*, *N.Y. Times*, July 4, 2001, at A9 (quoting Justice O’Connor’s statement that “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed”).

Amici urge this Court to vindicate our shared interest in ensuring that the public’s confidence in the accuracy and fairness of our justice system is restored. That goal is frustrated if the courts are perceived to be placing undue hurdles

in front of defendants who discover strong evidence of innocence (particularly, but not limited to, DNA evidence) after conviction. If we are to ask citizens, as jurors, to deprive a person of liberty or to impose the ultimate sanction of death — or, through their elected representatives, to provide us with the necessary resources to investigate and prosecute crime — then our system of justice must, no less aggressively, seek to exonerate the wrongfully convicted.

II. Any Burden Imposed By Adjudication Of Claims Of Actual Innocence Is Far Outweighed By The Benefit Of Maintaining The Credibility Of Our System Of Justice

The cost to the credibility of our system of justice from the potential execution of the innocent far outweighs any disruption in proceedings that adjudication of actual innocence claims may bring. Although finality is important, *Calderon v. Thompson*, 523 U.S. 538, 555-556 (1998) (finality essential to retributive and deterrent functions of criminal law), its value is premised upon the assumption that those who are prosecuted and punished are in fact responsible for their crimes.

The number of credible actual innocence claims will always remain quite small. See *Schlup*, 513 U.S. at 325 n. 42 (observing that in a majority of federal habeas cases, claims would be rebutted by a strong presumption of guilt); see also Edward Lazarus, *The Limits of DNA Justice*, Wash. Post, June 16, 2000, at A-29 (“the universe of cases where DNA testing can provide such magic-bullet results is very small: basically, only rape or rape-murder cases, in which the exchange of genetic material necessarily occurs”). Even among all federal habeas claims, only a very small percentage are granted or remanded. See U.S. Dep’t of Justice Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995) (finding only

1% of petitions granted and another 1% remanded to state courts).

Indeed, a review of the adjudication of *Schlup* claims in the lower federal courts in the decade since this “gateway” became available provides additional indications that it is serving its intended purpose as a final safeguard against wrongful execution and imprisonment, without unduly burdening the courts with frivolous claims. *Amici* conducted a review of all judicial opinions available on Westlaw and Lexis (whether published or unpublished) since 1995 in which petitioners sought to avail themselves of the *Schlup* “gateway” by presenting what they claimed was new evidence of actual innocence. This research revealed that such decisions were issued by only 338 federal habeas courts (143 circuit courts, and 195 district courts). In 31 of those cases — 9.2% of the total — the courts found that the petitioners had presented sufficiently powerful claims of actual innocence to warrant consideration of their otherwise procedurally-barred constitutional claims. See Appendix B (listing all such cases). And in the vast majority of those cases, the underlying claims (whether of actual innocence, or of independent constitutional violations) were sufficiently meritorious as to result in immediate or eventual relief from the petitioner’s conviction or sentence.

This “big picture” data certainly appears to suggest that the *Schlup* gateway, and the governing standard of relief, are functioning appropriately. *Schlup* has proven itself to be the extraordinary remedy and necessary safeguard that is applied only to petitioners in the small fraction of cases involving truly compelling evidence of actual innocence. Nor are the meritorious cases so entirely rare as to suggest that *Schlup* has not made and will not continue to make a meaningful contribution to our justice system. Indeed, to the 20 individual petitioners who have obtained such relief, it may well have made the difference between execution or a lifetime in prison and one at liberty. Surely, any “raising of

the bar” under *Schlup* that would deprive many such individuals of relief should be undertaken only on a compelling showing of need — a need that does not appear to exist given the lower courts’ reasonable application of the current rule over the last decade.

Moreover, for the few credible claims of actual innocence that arise in federal habeas review, the values of efficiency and finality must be weighed against a basic principle of fairness that permits execution only if the defendant actually committed the crime of which he or she is accused. In that regard, “[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.” *Kaufman v. United States*, 394 U.S. 217, 228 (1969). And of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime.⁶ That is the essence of justice.

CONCLUSION

For the reasons set forth above and in petitioner’s brief, the judgment of the Sixth Circuit should be reversed.

⁶ See Tom Ragan, *Years After Death Row Travesty, Killer Gets Due*, Chi. Trib., Sept. 8, 1999, at 1 (subsequent conviction of a different defendant for double murder that had wrongfully put Anthony Porter on Illinois’ death row for fourteen years).

Respectfully submitted.

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APPENDIX A

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James S. Brady	United States Attorney, W.D. Mich. 1971-1981
Robert C. Bundy	United States Attorney, D. Alaska 1994-2001
Kenneth Bynum	Assistant United States Attorney, D.D.C. 1984-1988
Paul B. Carroll	Consultant and trainer on police practices at National Institute of Justice, U.S. Dep't of Justice; 30 year veteran, Chicago Police Department
Barry Coburn	Assistant United States Attorney, D.D.C. 1985-1990

Gary Cordner, Ph.D.	Professor of Criminal Justice & Police Studies; Director, Regional Community Policing Institute; Director, International Justice & Safety Institute, Eastern Kentucky University; former Dean of the College of Justice & Safety, Eastern Kentucky University; Chief of Police, St. Michaels, Md. 1984-1987; former president, Academy of Criminal Justice Sciences; former-editor, American Journal of Police; former editor, Police Quarterly
Katherine B. Darmer	Associate Professor, Chapman University School of Law; Assistant United States Attorney, S.D.N.Y. 1995-1999
W. Thomas Dillard	United States Attorney, E.D. Tenn. 1981; N.D. Fla. 1983-1986
Steven Gilbert, Ph.D.	Director of Criminal Investigations Program, Assistant Professor, State University of New York, Canton
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Eric J. Miller	Assistant Professor, St. Louis University Law School

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James G. Richmond	United States Attorney, N.D. Ind. 1985-1991
William W. Robertson	Captain, United States Army Judge Advocate General Corps 1968-1972; Assistant United States Attorney, D.N.J. 1972- 1976; Chief of the U.S. Dep't Justice Organized Crime Strike Force, D.N.J. 1976-1978; First Assistant United States Attorney, D.N.J. 1978-1980; United States Attorney, D.N.J. 1980-1981

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APPENDIX B

This Appendix lists all 338 cases available electronically on Westlaw or Lexis, whether published or unpublished, in which a federal habeas petitioner sought to use *Schlup* v. *Delo* to overcome a procedural default, by asserting a claim of actual innocence and presenting evidence that he or she characterized as “new.” In determining which cases fit this criteria, we did not prejudge the merits of the proffered evidence or scrutinize whether it was in fact “newly discovered.” If a court analyzed evidence that the petitioner characterized as new for *Schlup* purposes, the case is included on the list below, even if the Court held that the evidence at issue was available at the time of trial or could have been previously discovered with due diligence. On the other hand, if a petitioner did not identify any new evidence of any sort, but only made a bare claim of actual innocence (*i.e.*, based on the trial record), the case was excluded from this review. In some cases, *pro se* petitioners did not explicitly make a *Schlup* claim, but the courts nonetheless analyzed the petition under *Schlup*, and these cases are included below as well.

Because we sought to assess how courts have adjudicated *Schlup* claims under the current “no reasonable juror” standard, the following types of cases were necessarily excluded from our inquiry: 1) habeas claims in which a court stated in dicta that a petitioner had not asserted a claim under *Schlup* or presented any new evidence of innocence, after concluding that some or all of the petitioner’s claims were procedurally barred; 2) direct federal appeals in which a defendant made a motion to a trial court to vacate a verdict or for a new trial; 3) “legal innocence” claims in which a petitioner claimed that he was actually innocent based solely on a change in the law; and 4) cases citing *Schlup* solely for unrelated propositions.

**Evidence Held Sufficient to Pass Through *Schlup*
“Gateway”**

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