

IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

10 KP 1163

No. 2010-KP-0085

JOHN FLOYD

v.

BURL CAIN, WARDEN

On writ to review the ruling of the Criminal District Court,
Orleans Parish, No. 280-729, Section "C"
The Honorable Benedict Willard, Judge Presiding

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

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LOUISIANA

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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. EXPLICITLY RECOGNIZING CLAIMS OF ACTUAL INNOCENCE BASED ON NEWLY-DISCOVERED EVIDENCE OF ANY TYPE WILL PREVENT FUNDAMENTAL MISCARRIAGES OF JUSTICE FROM CONTINUING TO OCCUR.....	3
A. The Same Principle That Mandates Review Where There Is Newly-Available DNA Evidence Applies With Equal Force Where The Newly-Available Evidence Is Not Limited To DNA Evidence But Is Nonetheless Compelling	3
1. <i>Louisiana Presently Allows for Post-Conviction Review Only of Newly- Available DNA Evidence Of Actual Innocence</i>	3
2. <i>Cases That Do Not Hinge On DNA Evidence Represent The Vast Majority Of Wrongful Conviction Cases</i>	4
3. <i>The Causes Of Wrongful Convictions Are The Same In Cases That Solely Hinge On DNA Evidence And Those That Do Not</i>	6
II. RECOGNIZING CLAIMS OF ACTUAL INNOCENCE FOR NEWLY-DISCOVERED EVIDENCE OF ALL TYPES IS IN ACCORDANCE WITH LOUISIANA LAW	7
A. This Court Should Clearly Establish What It Considered In <i>Conway</i> And Hold That Claims Of Actual Innocence That Do Not Only Involve DNA Evidence Are Cognizable Under Louisiana Law	7
B. The Recognition Of Claims Of Actual Innocence For Newly-Discovered Evidence Of Any Type Comports With The Guarantees Recognized In The Louisiana Constitution	10
III. THIS COURT SHOULD ADOPT A STANDARD FOR POST-CONVICTION RELIEF THAT FAIRLY AND JUSTLY BALANCES THE STATE'S INTEREST IN FINALITY WITH ENSURING THAT PETITIONERS WHO ARE ACTUALLY INNOCENT CAN MEANINGFULLY CHALLENGE THEIR CONVICTION AND CONTINUED INCARCERATION	13
IV. THE COURT SHOULD GRANT MR. FLOYD'S PETITION AND IN SO DOING ESTABLISH AN ACTUAL INNOCENCE CLAIM BASED ON NEWLY-DISCOVERED EVIDENCE OF ANY TYPE.....	14
CONCLUSION.....	15
VERIFICATION AND CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page(s)</u>
<i>Babineaux v. Judiciary Comm'n</i> , 341 So. 2d 396 (La. 1976)	11
<i>City of Alexandria v. Alexandria Civil Service Comm'n</i> , 23 So. 2d 407 (La. Ct. App. 2009).....	11
<i>City of Kenner Fire Dep't v. Municipal Fire and Police Civil Service Bd.</i> , 685 So. 2d 325 (La. Ct. App. 1996).....	11
<i>Downes v. State</i> , 771 A.2d 289 (Del. 2001)	10
<i>Ex parte Elizondo</i> , 947 S.W.2d 202 (Tex. Crim. App. 1996)	9, 13, 14
<i>Gregory v. Clause</i> , 584 N.W.2d 873 (S.D. 1998).....	10
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	<i>passim</i>
<i>House v. Bell</i> , 547 U.S. 518 (2006)	8
<i>In re B.J.</i> , 672 So. 2d 342 (La. Ct. App. 1996).....	13
<i>In re C.B.</i> , 708 So. 2d 391 (La. 1998)	12
<i>In re Clark</i> , 855 P.2d 729 (Cal. 1993).....	10, 12
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	8
<i>Johnson v. State</i> , 900 S.W.2d 940 (Ark. 1995)	10
<i>Jones v. State</i> , 591 So. 2d 911 (Fla. 1991)	10, 14
<i>Montoya v. Ulibarri</i> , 142 N.M. 89 (N.M. 2007).....	9
<i>People v. Cole</i> , 1 Misc. 3d 531 (N.Y. Sup. Ct. 2003).....	10, 13
<i>People v. Washington</i> , 171 Ill. 2d 475 (1996).....	8, 9, 14
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995)	2
<i>State ex rel Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003).....	9, 10, 13
<i>State ex rel Holmes v. Court of Appeals</i> , 885 S.W.2d 389 (Tex. Crim. App. 1994)	9, 12

TABLE OF AUTHORITIES (cont.)

	<u>Page(s)</u>
<i>State v. Boutte</i> , 27 So. 3d 1111 (La. Ct. App. 2010).....	11
<i>State v. Conway</i> , 816 So.2d 290 (La. 2002).....	<i>passim</i>
<i>State v. Graham</i> , 311 Mont. 500 (Mont. 2002).....	10
<i>State v. Graham</i> , 422 So. 2d 123 (La. 1982).....	8
<i>State v. Hayes</i> , No. 97-3780 (La. 24th JDC Dec. 19, 2006).....	5, 8
<i>State v. Juluke</i> , 725 So. 2d 1291 (La 1999).....	15
<i>State v. Matthis</i> , 970 So. 2d 505 (La. 2007).....	8
<i>State v. Watson</i> , 126 Ohio App.3d 316 (Ohio Ct. App. 1998).....	10
<i>State v. Weaver</i> , 805 So.2d 166 (La. 2002).....	11
<i>Summerville v. Warden</i> , 229 Conn. 397 (Conn. 1994).....	9

STATUTES AND RULES

ALM R. Crim. P. Rule 30(b) (2010).....	10
COLO. REV. STAT. § 18-1-410(e) (2009).....	10
IDAHO CODE ANN. § 19-4910(4) (2009).....	10
IOWA CODE § 822.2(d) (2008).....	10
La. C. Cr. P. Article 926.1 (2010).....	2, 4
La. C. Cr. P. Article 930.3 (2010).....	<i>passim</i>
La. C. Cr. P. Article 362.2 (2010).....	11
LA. CONST. Article 1, § 2.....	10, 11
LA. CONST. Article 1, § 20.....	11
LA. CONST. Article 1, § 22.....	11
La. R.S. 15:572.8.....	4, 14
N.D. CENT. CODE § 29-32.1-01(e) (2007).....	10
N.J. Court Rules, R. 3:20-1.....	10
OKLA. STAT. tit. 22 § 1080(d) (2009).....	10
VA. CODE ANN. 19.2-327.11 (2010).....	10

TABLE OF AUTHORITIES (cont.)

	<u>Page(s)</u>
<u>OTHER AUTHORITIES</u>	
<i>A Revolution at 50: Barry C. Scheck</i> , N.Y. TIMES, Feb. 25, 2008.....	7
Adam Liptak, <i>Study of Wrongful Convictions Raises Questions Beyond DNA</i> , N.Y. TIMES, July 23, 2007.....	6, 7
Amy Klobuchar & Hilary Caligiuri, <i>Protecting the Innocent/Convicting the Guilty</i> , 32 WM. MITCHELL L. REV. 1 (2005-06).....	4, 5
Arleen Anderson, <i>Responding to the Challenge of Actual Innocence After Herrera v. Collins</i> , 71 TEMP. L. REV. 489 (1998).....	12, 13
Barry Scheck, <i>et al.</i> , ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001)	7
Brandon Garrett, <i>Judging Innocence</i> , 108 COLUM. L. REV. 55 (2008).....	2, 4
Chris Conway, <i>The DNA 200</i> , N.Y. TIMES, May 20, 2007.....	3
Daniel Medwed, <i>Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts</i> , 47 ARIZ. L. REV. 655 (2005).....	5, 6
David Michael Risinger, <i>Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate</i> , J. CRIM. & CRIMINOLOGY 761 (2006-07).....	7
George C. Thomas III, <i>et al.</i> , <i>Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence</i> , 64 U. PITT. L. REV. 263 (2002-03).....	5
John Eligon, <i>New Efforts Focus on Exonerating Prisoners in Cases Without DNA Evidence</i> , N.Y. TIMES, Feb. 8, 2009	5
Michael Muskat, Note, <i>Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies</i> , 75 TEX. L. REV. 131 (1996).....	11
N.Y. State Bar Association, Final Report on N.Y. State Bar Association’s Task Force on Wrongful Convictions (April 24, 2009)	6
Recording of Meeting of Senate Committee on Judiciary, § C (Apr. 24, 2001).....	4
Rhonda Bell, <i>Time Limit Frustrates Requests for DNA Test</i> , TIMES-PICAYUNE, Dec. 28, 1999	4
Samuel R. Gross <i>et al.</i> , <i>Exonerations in the United States 1989 Through 2003</i> , J. CRIM. LAW & CRIMINOLOGY 523 (2005).....	5, 6
The Innocence Project website, http://www.innocenceproject.org/about/Mission-Statement.php	4
The Innocence Project website, http://www.innocenceproject.org/understand/	1, 7
Vivian Berger, <i>Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere</i> , 35 WM. & MARY L. REV. 943 (1993-94)	13

INTEREST OF AMICUS CURIAE

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The fifty-eight current members of the Innocence Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.¹ To date, the Innocence Network's member organizations have helped to exonerate over 250 individuals nationwide. As perhaps the nation's leading authority on wrongful convictions, the Innocence Network is regularly consulted by officials at the state, local, and federal levels. Drawing on the lessons from cases in which innocent persons have been wrongfully convicted, the Innocence Network advocates study and reform to enhance the truth-seeking functions of the criminal justice system and to prevent future wrongful convictions. In that regard, the Innocence Network and its members work to rectify the key causes of wrongful convictions, some of which are at issue in Petitioner John Floyd's case. These key causes include: (i) eyewitness misidentification, which contributed to 75% of wrongful convictions eventually overturned by DNA evidence; (ii) invalidated or improper forensic science (50%); (iii) false confessions (25%); and (iv) false testimony of informants (15%). Additionally, two other pervasive problems in our judicial system, namely government misconduct and ineffective assistance of counsel, have been identified as root causes of wrongful convictions. See The Innocence Project website, <http://www.innocenceproject.org/understand/> (providing data on the key causes of wrongful convictions) (last visited May 14, 2010).

Currently, in Louisiana, a petitioner who has identified DNA evidence that proves by clear and convincing evidence that he is innocent of the crime for which he was convicted is eligible for statutory post-conviction relief at any time. In contrast, no such parallel avenue has been explicitly recognized for petitioners whose cases involve equally compelling evidence of actual innocence that is not DNA evidence, or whose cases

¹ The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project (Schuster Institute for Investigative Journalism at Brandeis University), Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

include some DNA evidence that supports (but does not conclusively prove) their case in addition to other non-DNA evidence that does. Contrary to popular perception, however, cases that do not solely hinge upon or even involve DNA evidence represent the majority of exonerations in both Louisiana and nationally. It is crucial to recognize that the underlying causes of wrongful convictions, the most common of which are noted above, are at play both in those in cases where exculpatory DNA evidence comes to light and in those where it does not, necessitating a meaningful avenue of relief for petitioners who can present evidence – be it DNA or otherwise – that demonstrates their innocence. The Innocence Network thus strongly encourages this Court to establish unequivocally that it is unconstitutional to deny post-conviction relief to someone, such as Petitioner John Floyd, who can demonstrate through newly-discovered evidence that he is actually innocent of the crime for which he was convicted, regardless of whether that evidence is DNA evidence.

In doing so, Louisiana will join the majority of states that already recognize independent claims of actual innocence based on all types of newly-discovered evidence and help rectify what has been described as “a fundamental miscarriage of justice”: the continued incarceration of innocent individuals. *Schlup v. Delo*, 513 U.S. 298, 315 (1995).

SUMMARY OF ARGUMENT

“The central purpose of any system of criminal justice is to convict the guilty and free the innocent.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Yet, despite this fundamental principle, people who are factually innocent are convicted. See Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56 (2008) (“With the benefit of DNA testing, we now know our courts have convicted innocent people and have even sentenced some to death”). There can be no dispute that a grave miscarriage of justice occurs whenever an innocent person is wrongfully convicted and put into prison. Providing a meaningful opportunity for such individuals to obtain substantive review of their claims of actual innocence is essential to the proper functioning of any criminal justice system. Yet, currently, this State’s post-conviction statutory scheme only explicitly allows for the adjudication of claims of actual innocence when the newly-discovered evidence is of the type that is suitable for DNA testing. See La. C. Cr. P. Art. 926.1 (2010). While providing relief to those who can establish their innocence based on DNA is laudable, the reality, borne out by empirical studies, is that the vast majority of post-conviction exonerations do not solely hinge on or even involve DNA evidence. Thus, a post-conviction scheme that fails to provide relief to the wrongfully convicted where DNA evidence is not at issue, or comprises only part of the new evidence that supports an actual innocence claim, contravenes the most basic notions of fairness embedded in this State’s Constitution and underlying our nation’s criminal justice system as a whole.

In 2002, this Court assumed that “a claim of ‘actual innocence’ not based on DNA evidence . . . is cognizable on collateral review” under this State’s post-conviction statutory scheme, but was not compelled to extend its analysis any further, as it found that the petitioner in that case failed to make a *bona fide* claim of actual

innocence. *State v. Conway*, 816 So.2d 290, 291 (La. 2002). In stark contrast, the compelling facts of Mr. Floyd's case provide the ideal opportunity for this Court to firmly establish the contours of the right contemplated by the Court in *Conway*, by definitively holding that a claim of actual innocence is cognizable under the Louisiana Constitution and setting forth the standard pursuant to which such a claim will be reviewed.² Mr. Floyd's claim is supported by significant new evidence – both DNA and non-DNA – that demonstrates that he is actually innocent of the crime for which he was convicted, the murder of William Hines, and also of the related crime of which he was acquitted, the murder of Rodney Robinson. This new evidence, as laid out in detail in the Petitioner's brief, bolsters Mr. Floyd's trial testimony that his confessions to both crimes were false and completely undermines the prosecution's theory at trial: that one perpetrator with the same *modus operandi*, namely Mr. Floyd, committed both murders.

The striking fact here is that if the new evidence that Mr. Floyd is trying to adduce was susceptible to DNA testing, he would have a clear right to post-conviction relief. However, even though his claim is only based in part on new DNA evidence, Mr. Floyd has conclusively established a claim of innocence and that he was wrongfully convicted. Failing to recognize claims of actual innocence based on *any type* of newly-discovered evidence, including a combination of DNA and non-DNA evidence, violates the protections enshrined in the Louisiana Constitution, including the guarantee of due process and the prohibition against cruel and unusual punishment. Furthermore, it distinguishes Louisiana from nearly two-thirds of other states that have expressly provided a remedy to post-conviction petitioners who can establish that they are actually innocent based on newly-discovered evidence of any type, not solely DNA evidence. Given the fundamental nature of the rights involved, the Innocence Network respectfully requests not only that this Court grant relief in this case to Mr. Floyd, who has presented new evidence – including both DNA and non-DNA evidence – that overwhelmingly demonstrates that he is actually innocent of the murders of William Hines and Rodney Robinson, but also that the Court explicitly establish a clear, bright-line rule that post-conviction petitioners, who can establish their actual innocence through newly-discovered evidence of any type, are entitled to seek relief.

ARGUMENT

I. EXPLICITLY RECOGNIZING CLAIMS OF ACTUAL INNOCENCE BASED ON NEWLY-DISCOVERED EVIDENCE OF ANY TYPE WILL PREVENT FUNDAMENTAL MISCARRIAGES OF JUSTICE FROM CONTINUING TO OCCUR

A. The Same Principle That Mandates Review Where There Is Newly-Available DNA Evidence Applies With Equal Force Where The Newly-Available Evidence Is Not Limited To DNA Evidence But Is Nonetheless Compelling

1. Louisiana Presently Allows for Post-Conviction Review Only of Newly-Available DNA Evidence Of Actual Innocence

DNA has been used as a tool for exonerating the innocent for more than twenty years in this country, beginning in 1989. See Chris Conway, *The DNA 200*, N.Y. TIMES, May 20, 2007, at D14. The Innocence

² Throughout this brief, the Innocence Network relies on the facts as presented in Mr. Floyd's writ application.

Project, one of the founding members of the Innocence Network, was established in 1992 “to assist prisoners who could be proven innocent through DNA testing” and its work, along with other member organizations and individuals, has fundamentally altered the way in which participants in our justice system and the public at large view guilt and innocence. The Innocence Project website, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited May 14, 2010). One commentator describes the far-reaching effect of DNA exoneration cases as follows:

Exoneration cases have altered the ways judges, lawyers, legislators, the public, and scholars perceive the criminal system’s accuracy. Courts now debate the legal significance of these exonerations. . . . Popular television shows, books, movies, and plays have dramatized the stories of exonerations. States have declared moratoria on executions, citing examples of wrongful convictions. Moreover, forty-three states and the District of Columbia have passed legislation providing access to post-conviction DNA testing. Six states have created innocence commissions designed to investigate possible innocence cases, and others have enacted reforms aimed at improving the accuracy of criminal investigations and trials. . . . Social scientists have begun to study the causes of wrongful convictions and legal scholars are beginning to reassess our constitutional criminal procedure’s efficacy in light of exonerations.

Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57-58 (2008).

As part of this reform movement, Louisiana enacted its own DNA statute in 2001, which allows for post-conviction testing of DNA samples that can demonstrate an individual’s innocence. *See* La. C. Cr. P. Art. 926.1 (2010) (“Prior to August 31, 2014, a person convicted of a felony may file an application under the provisions of the Article for post-conviction relief requesting DNA testing of an unknown sample secured in relation to the offense for which he was convicted.”); *see also* La. C. Cr. P. Art. 930.3 (7) (allowing for relief to be granted if the results of such DNA testing prove “by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.”).³ Thus, for nearly a decade, certain prisoners, whose cases include biological evidence that can be tested for DNA, have been eligible to apply for post-conviction relief in Louisiana. The enactment of the DNA statute was largely motivated by the 1999 case in Terrebonne Parish where Clyde Charles was exonerated, through DNA evidence, of a rape he did not commit. *See* Rhonda Bell, *Time Limit Frustrates Requests for DNA Test*, TIMES-PICAYUNE, Dec. 28, 1999, at A1.⁴ Louisiana has also passed a statute providing monetary compensation and other relief to those whose convictions have been reversed or vacated. *See* La. R.S. 15:572.8 (entitling an exoneree to \$15,000 for each year imprisoned up to a maximum of \$150,000 and to money for job skills training, medical and counseling services, tuition, and other aid).

2. *Cases That Do Not Hinge On DNA Evidence Represent The Vast Majority Of Wrongful Conviction Cases*

The laudable reforms mentioned above do not, however, go far enough in addressing the problem of wrongful convictions. “While the DNA exoneration cases have grabbed the attention of the public, DNA

³ Louisiana has even created a special fund to pay for DNA testing for indigent defendants. *See* La. C. Cr. P. Art. 926.1(2)(K).

⁴ When testifying in support of this legislation, John Sinquefield of the East Baton Rouge District Attorney’s Office, and a member of the Governor of Louisiana’s DNA Task Force, observed: “We do not want to have any person who is truly factually innocent of a crime spend another day in prison if possible.” Recording of Meeting of Senate Committee on Judiciary, Section C (Apr. 24, 2001).

evidence is not always available, or material, in establishing innocence or guilt. . . . *In the majority of crimes committed, there is no biological evidence left behind.*” Amy Klobuchar & Hilary Caligiuri, *Protecting the Innocent/Convicting the Guilty*, 32 WM. MITCHELL L. REV. 1, 4-5 (2005-06) (emphasis added). Because DNA-based cases have “captured the attention of state legislators and the broader public,” the wrongful conviction of an individual in a case where DNA is not available “has largely escaped notice,” despite the fact that it is a “far more pervasive issue.” Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656-57 (2005). High-profile DNA exonerations have thus created a misconception that DNA evidence is the only conclusive way to reach a guilt or innocence determination, making it “harder for prisoners seeking to prove their innocence in the much larger number of cases that do not involve DNA evidence. . . .” John Eligon, *New Efforts Focus on Exonerating Prisoners in Cases Without DNA Evidence*, N.Y. TIMES, Feb. 8, 2009, at A26. Yet, non-biological evidence uncovered after conviction can be equally as compelling as evidence that can be tested for DNA. A persuasive hypothetical from one group of commentators illustrates this fact: “If a prisoner’s lawyer uncovered a videotape (verified by neutral experts) of someone else committing the crime, it seems bizarre to say that the prisoner cannot present that evidence because it is non-scientific.” George C. Thomas III, et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 281 (2002-03).⁵

Empirical studies provide further support for the notion that DNA evidence has been involved in only a minority of known exonerations. One commentator explains this phenomenon as follows:

Evidence suitable for DNA testing . . . exists only in a smattering of criminal cases: an estimated 80-90% of cases do not have any biological evidence. Even where biological evidence conducive to a DNA test is present at the outset of a particular case, the evidence is often lost, destroyed, or degraded over time. Post-conviction innocence claims based on DNA testing therefore represent a small proportion of innocence claims generally, and this percentage is bound to diminish in the future,” because testing of relevant samples before trial is now commonplace, and because those already incarcerated whose cases involved DNA evidence are likely to seek post-conviction relief.

Medwed, *supra* at 656-57. An exhaustive study of all documented exonerations in the United States from 1989 through 2003 concluded that “[o]nly 19% of murder exonerations included DNA evidence (and none of the other non-rape exonerations).” Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. LAW & CRIMINOLOGY 523, 531 (2005). The authors of the study commented that “[t]he false convictions

⁵ This Court need not rely on hypothetical scenarios to be convinced of the need for a standard that allows for post-conviction review of more than just DNA evidence. In *State v. Hayes*, a recent Louisiana exoneration case in Jefferson Parish, Travis Hayes had been convicted along with alleged co-conspirator Ryan Matthews of killing a convenience store owner during a robbery. According to the prosecution, Williams was the shooter and Hayes drove the getaway car. Evidence discovered after the conviction demonstrated that a ski-mask found at the scene and worn by the shooter contained a DNA sample that did not belong to Ryan Matthews, but in fact belonged to another individual, Rondell Love. See *State v. Hayes*, No. 97-3780, (La. 24th JDC Dec. 19, 2006) 12/19/06 Tr. at 7-10. At his post-conviction hearing, Mr. Hayes presented the DNA evidence excluding his alleged co-conspirator Mr. Matthews, and also presented additional non-DNA evidence, including the fact that Mr. Love had confessed to the crime in the interim. *Id.* at 7-10, 28. On an application for post-conviction relief, a trial judge concluded that this combination of DNA and non-DNA evidence demonstrated Mr. Hayes’s innocence. *Id.* at 126.

that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless.” *Id.*⁶ This trend is borne out in a review of exonerations in Louisiana as well: since 1990, 25 individuals have been exonerated post-conviction in this state,⁷ and DNA evidence decisively led to the exoneration in only eight of those 25 cases.⁸

Without a right to bring a claim of actual innocence based on newly-discovered evidence of any type, post-conviction relief in Louisiana based on a claim of actual innocence remains capriciously tied to those limited cases where biological evidence susceptible to DNA testing happens to be available. A more comprehensive approach is necessary to rectify past wrongs. As has been observed:

The hodge-podge of state newly-discovered evidence procedures must be critically examined in light of the realization, spawned by DNA testing, that innocent defendants are convicted with alarming frequency, and the reality that post-conviction innocence claims receive vastly different procedural treatment within most states depending on whether the claim involves DNA or non-DNA evidence. . . the structure of most state procedures means that a prisoner’s quest for justice may turn on the fortuity that a biological sample was left at the crime scene and preserved over time. . . .

Medwed, *supra* at 660.

3. *The Causes Of Wrongful Convictions Are The Same In Cases That Solely Hinge On DNA Evidence And Those That Do Not*

It is not only unfair, but also illogical, to distinguish between claims of actual innocence supported exclusively by DNA and those that do not rely exclusively on DNA where “the same causes of wrongful convictions exist in cases with DNA evidence as in those cases that don’t.” Adam Liptak, *Study of Wrongful*

⁶ In another study, prepared by a task force commissioned by the New York State Bar Association examining exonerations in New York, the authors found that: “Slightly less than half of the cases reviewed by the Task Force resulting in a wrongful conviction involved a DNA exoneration. This meant that while scientific advances have played an essential role in helping to prevent wrongful convictions, many other non-scientific factors have also been the cause of wrongful convictions and had to be carefully examined and considered.” Final Report of the N.Y. State Bar Association’s Task Force on Wrongful Convictions, dated April 4, 2009, at 6.

⁷ The names and case numbers of the Louisiana exonerees since 1990 are as follows: Allen Coco, Calcasieu Parish, 14th JDC, Case # 14,891-95; Daniel Bright, Orleans Parish, Case # 375-994; Gregory Bright, Orleans Parish, Case # 252-514; Dennis Brown, St. Tammany Parish, 22d JDC, Case # 128-634; Travis Hayes, Jefferson Parish, 24th JDC, Case # 97-3780; Dwight Labran, Orleans Parish, Case # 388-287; Earl Truvia, Orleans Parish, Case # 252-514; Gene Bibbins, East Baton Rouge Parish, 19th JDC, Case # 2-87-00979; Cheryl Beridon, Terrebonne Parish, 32d JDC, Case # 78,042; Gerald Burge, St. Tammany Parish, 22d JDC, Case # 147-175; Albert Burrell, Union Parish, 3d JDC, Case # 28,734; Clyde Charles, Terrebonne Parish, 32d JDC, Case # 106-980; Shareef Cousin, Orleans Parish, Case # 376-479; Douglas DiLosa, Jefferson Parish, 24th JDC, Case # 87-105; Roland Gibson, Orleans Parish, Case # 203-904; Michael Graham, Union Parish, 3d JDC, Case # 28,734; Willie Jackson, Jefferson Parish, 24th JDC, Case # 87-205; Rickie Johnson, Sabine Parish, 11th JDC, Case # 30,770; Isaac Knapper, Orleans Parish, Case # 270-437; Curtis Kyles, Orleans Parish, Case # 303-970; Ryan Matthews, Jefferson Parish, Case # 97-3780; John Thompson, Orleans Parish, Case # 305-826 and Case # 306-526 (exonerated of two separate crimes); Hayes Williams, Orleans Parish, Case # 199-523; Michael Anthony Williams, Jackson Parish, 2d JDC, Case # 20,387; and Calvin Willis, Caddo Parish, 1st JDC, Case # 118-517.

⁸ The Louisiana exonerees whose cases hinged on DNA evidence are as follows: Allen Coco, Calcasieu Parish, 14th JDC, Case # 14,891-95; Dennis Brown, St. Tammany Parish, 22d JDC, Case # 128-634; Gene Bibbins, East Baton Rouge Parish, 19th JDC, Case # 2-87-00979; Clyde Charles, Terrebonne Parish, 32d JDC, Case # 106-980; Willie Jackson, Jefferson Parish, 24th JDC, Case # 87-205; Rickie Johnson, Sabine Parish, 11th JDC, Case # 30,770; Hayes Williams, Orleans Parish, Case # 199-523; and Calvin Willis, Caddo Parish, 1st JDC, Case # 118-517. In two other cases, those of Travis Hayes and Ryan Matthews, DNA evidence came to light after conviction but was not the only evidence of innocence that led to exoneration. See Travis Hayes, Jefferson Parish, 24th JDC, Case # 97-3780 and Ryan Matthews, Jefferson Parish, Case # 97-3780.

Convictions Raises Questions Beyond DNA, N.Y. TIMES, July 23, 2007, at A1; see also *A Revolution at 50: Barry C. Scheck*, N.Y. TIMES, Feb. 25, 2008, at F5.⁹ The underlying factors that contribute to wrongful convictions, the most prevalent of which are eyewitness misidentification, invalidated or improper forensic science, false confessions, government misconduct, false testimony of informants, and ineffective assistance of counsel, are equally likely to play a role in a case where exculpatory DNA evidence happens to be available, as in a case where DNA evidence: (i) only demonstrates innocence in combination with non-DNA evidence; (ii) does not exist at all.¹⁰ See The Innocence Project website, <http://www.innocenceproject.org/understand/> (discussing underlying causes of wrongful convictions) (last visited May 14, 2010).

Moreover, DNA exonerations may well become more rare going forward. “In a few years, the era of DNA exonerations will come to an end. The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been used widely since the early 1990s, clearing thousands of innocent suspects before trial.” Barry Scheck, *et al.*, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, 323 (2001). Additionally, reform statutes such as Louisiana’s DNA testing statute have allowed many of those already incarcerated to seek post-conviction relief if DNA evidence becomes available in their case. See Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1. However, the underlying causes of wrongful convictions are likely to continue even as post-conviction DNA exonerations diminish. Providing a remedy to petitioners who can establish actual innocence without new DNA evidence or in cases which involve more than just new DNA evidence will ensure that all those who are wrongly convicted within this State are afforded the same, essential protection.

II. RECOGNIZING CLAIMS OF ACTUAL INNOCENCE FOR NEWLY-DISCOVERED EVIDENCE OF ALL TYPES IS IN ACCORDANCE WITH LOUISIANA LAW

A. This Court Should Clearly Establish What It Considered In *Conway* And Hold That Claims Of Actual Innocence That Do Not Only Involve DNA Evidence Are Cognizable Under Louisiana Law

In *State v. Conway*, this Court was confronted with, but did not decide, the very question presented here: whether a claim of actual innocence *not* based on DNA is cognizable under this State’s post-conviction procedural regime, Article 930.3 of the Louisiana Code of Criminal Procedure. 816 So. 2d at 291.¹¹ While in

⁹ See also David Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. & CRIMINOLOGY 761, 773 (2006-07) (“[I]t is extremely important to remember that the conditions that cause wrongful convictions in non-DNA cases – the vast majority of cases – remain unaffected by [the development of post-conviction DNA testing statutes]. We must [instead] use post-conviction DNA exonerations wisely to throw light on the more general problem.”).

¹⁰ When Mr. Floyd’s counsel began work on Mr. Floyd’s case, they hoped to demonstrate his innocence through DNA testing of hairs from the Robinson and Hines crime scenes. However, all evidence from the Hines scene, to which the Robinson scene hairs could have been compared, had been destroyed. The fact that this DNA-testable evidence was not available is arbitrary, but deprives Mr. Floyd of a meaningful opportunity to obtain review of his actual innocence claim, despite the fact that he can present other compelling evidence of his innocence. This development in Mr. Floyd’s case demonstrates why post-conviction relief for claims of innocence that is limited to only those cases where DNA evidence is available fails to address entirely the problem of wrongful convictions.

¹¹ Article 930.3 provides for the following grounds for post-conviction relief: “(1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana; (2) The court exceeded its

Conway this Court determined that it need not reach that issue because the petitioner there clearly failed to “make a *bona fide* claim of actual innocence,” the Court’s opinion has been interpreted as opening the door to the recognition of such claims. *See, e.g., State v. Matthis*, 970 So. 2d 505, 510 (La. 2007) (reaffirming that *Conway* did not foreclose the possibility that “claims of actual innocence not based on DNA evidence” could be cognizable in post-conviction proceedings); *State v. Hayes*, No. 97-3780 (La. 24th JDC Dec. 19, 2006) (relying on the language in *Conway* to grant the petitioner post-conviction relief for a claim of actual innocence that involved significant evidence in addition to DNA test results). The Innocence Network respectfully requests that this Court definitively establish here that claims of actual innocence based on newly-discovered evidence of any type are cognizable in post-conviction proceedings in Louisiana.¹²

In *Conway*, the petitioner sought to use newly-discovered, non-DNA evidence to establish that he was entitled to post-conviction relief. 816 So. 2d at 291. In adjudicating that claim, this Court assumed hypothetically that post-conviction relief could be granted in situations where the petitioner presents “new, material, noncumulative and conclusive” evidence not based in DNA that undermines the prosecution’s entire case and does not rely on an “alternative and inconsistent theory of defense to the one he offered at trial.” *Id.* The Court then cited cases from other states, including Texas, Connecticut, and Illinois, which held that post-conviction relief for such claims of actual innocence is constitutionally required. *Id.* For example, this Court cited *People v. Washington*, where the Illinois Supreme Court granted the petitioner’s request for post-conviction relief based on newly-discovered witness testimony that established that he was actually innocent of the crime, holding that such claims are “cognizable as a matter of due process” under Illinois constitutional jurisprudence. *Id.* (citing *People v. Washington*, 171 Ill. 2d 475, 489 (Ill. 1996)). In reaching that conclusion, the court explained that the continued

jurisdiction; (3) The conviction or sentence subjected him to double jeopardy; (4) The limitations on the institution of prosecution had expired; (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or (6) The conviction or sentence constitute the *ex post facto* application of law in violation of the constitution of the United States or the state of Louisiana. (7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.” La. C. Cr. P. Art. 930.3.

¹² To be clear, a post-conviction claim of actual innocence is distinct from a claim challenging the sufficiency of the evidence. The latter is based on the acknowledgement that “a properly instructed jury [or trial judge sitting as a jury] may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt” *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). Claims challenging the sufficiency of the evidence are thus designed to remedy that error by allowing the reviewing court to evaluate the evidence adduced at trial and determine whether “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 319 (emphasis in original); *State v. Graham*, 422 So. 2d 123, 129 (La. 1982) (“The Due Process Clause of the Fourteenth Amendment requires this court to review the evidence upon which a criminal conviction is based to determine whether it is minimally sufficient.”). Defendants raising sufficiency of the evidence claims are not necessarily asserting that they are factually innocent; rather as the United States Supreme Court recognized in *Jackson*: “[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.” *Jackson*, 443 U.S. at 323-24; *see also Herrera*, 506 U.S. at 402 (“the *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a *rational* decision to convict or acquit”) (emphasis in original). On the other hand, petitioners requesting post-conviction relief based on a claim of actual innocence seek to present new evidence which was not available to the trial court and which establishes that they are factually innocent of the crime for which they were convicted. *See House v. Bell*, 547 U.S. 518, 538 (2006) (explaining that a claim of actual innocence “involves evidence the trial jury did not have before it, [and requires the court] to assess how reasonable jurors would react to the overall, newly supplemented record.”).

incarceration of a person who is actually innocent was not only so fundamentally unfair that it violated the guarantees of procedural due process recognized by Illinois's constitution, but was also "so conscience shocking as to trigger operation of substantive due process." *Id.* at 487-88.

As noted by the Court in *Conway*, the Texas Court of Criminal Appeals, that state's highest court for criminal cases, has also recognized actual innocence claims based on newly-discovered evidence in both capital and non-capital cases, explaining that a failure to do so would "raise issues of federal constitutional magnitude." *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). In a 1994 case, the Court of Criminal Appeals had concluded that a habeas petitioner "may appropriately couch his claims of factual innocence in the context of a violation of the Due Process Clause of the Fourteenth Amendment." *State ex rel Holmes v. Court of Appeals*, 885 S.W.2d 389, 399 (Tex. Crim. App. 1994). Two years later, in *Elizondo*, the same court was compelled to further elucidate the right to a claim of actual innocence and the standard of review of such a claim, as we ask the Court to do here. In the earlier case, no habeas petition had been actually pending, and as such, the court stated that "a more complete explanation of this Court's role of the criteria we use to assess the merits of an actual innocence claim" was warranted. *Ex parte Elizondo*, 947 S.W.2d at 205. The court then granted post-conviction relief in light of the fact that the sexual assault victim in that case recanted his trial testimony, thus affirmatively establishing the petitioner's innocence. *Id.* at 210. Likewise, the Connecticut Supreme Court, observing that "[t]he continued imprisonment of one who is actually innocent would constitute a miscarriage of justice," held under Connecticut law that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the results of his criminal trial." *Summerville v. Warden*, 229 Conn. 397, 422 (Conn. 1994).

Illinois, Texas, and Connecticut are not alone in recognizing this right. Courts in other states, including New Mexico, Missouri, and New York, have recognized that their state constitutions require claims of actual innocence based on newly-discovered evidence of any type to be heard in post-conviction proceedings. For example, the New Mexico Supreme Court decided that the "incarceration of an innocent person" contravened the protections and guarantees within the New Mexico Constitution. *Montoya v. Ulibarri*, 142 N.M. 89, 97 (N.M. 2007). The court held that "the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision of our state constitution," noting that "[t]o ensure that the principles of fairness within the New Mexico Constitution are protected, we hold that a habeas petitioner must be permitted to assert a claim of actual innocence in his habeas petition." *Id.* (citations omitted).¹³

The Missouri Supreme Court has also recognized claims of actual innocence based on any type of new evidence:

¹³ The court also found additional constitutional support for its holding in the prohibition against the infliction of cruel and unusual punishment, highlighting that the incarceration of the innocent not only fails to further any of the goals of punishment, but also inflicts upon those individuals a punishment that is "grossly out of proportion to the severity of the crime." *Montoya*, 142 N.M. at 97.

The [Missouri state] constitutional guarantee of due process protects the individual from the arbitrary exercise of governmental power. Even were there no federal constitutional violation in the execution of an innocent person, this Court could find as a matter of state law, that, as the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent.

State ex rel Amrine v. Roper, 102 S.W.3d 541, 547 n.3 (Mo. 2003).¹⁴ The California and Florida Supreme Courts have also held similarly. Under California law, a claim of “factual innocence based on newly discovered evidence” should be considered pursuant to a writ of habeas corpus “regardless of delay or failure to include the claim in a prior petition and irrespective of whether constitutional error contributed to the verdict.” *In re Clark*, 855 P.2d 729, 760 (Cal. 1993). Likewise, the Florida Supreme Court observed that post-conviction petitioners in Florida can seek relief on the grounds of newly-discovered evidence pursuant to a writ of error *coram nobis*. *See Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991). *See also State v. Graham*, 311 Mont. 500, 504 (Mont. 2002) (under Montana law, a petitioner seeking post-conviction relief can bring a claim on the grounds of newly-discovered evidence that establishes he is actually innocent); *Downes v. State*, 771 A.2d 289, 290 (Del. 2001) (the Delaware post-conviction scheme permits a petitioner to seek relief on the basis of newly-discovered evidence); *Gregory v. Clause*, 584 N.W.2d 873, 877-78 (S.D. 1998) (under South Dakota law, the writ of *quae coram nobis* is an avenue by which claims of actual innocence based on new evidence can be considered).¹⁵

B. The Recognition Of Claims Of Actual Innocence For Newly-Discovered Evidence Of Any Type Comports With The Guarantees Recognized In The Louisiana Constitution

The continued imprisonment of someone who is actually innocent of the crime for which he was convicted cannot be reconciled with the expansive protections afforded by the Louisiana Constitution. First, such a conviction and punishment violates the Louisiana Constitution’s guarantee of both procedural and substantive due process. *See* LA. CONST. Art. 1, § 2 (“No person shall be deprived of life, liberty, or property, except by due

¹⁴ A New York court, in recognizing claims of actual innocence based on any type of newly-discovered evidence, also concluded that the continued incarceration of the innocent violates New York’s constitution. *See People v. Cole*, 1 Misc. 3d 531, 541-42 (N.Y. Sup. Ct. 2003). The Court explained that not only does such a sanction contravene the due process clause because it “violates elemental fairness [and] deprives that person of freedom of movement and freedom from punishment,” but also it “violates the cruel and inhuman treatment clause.” *Id.*

¹⁵ While this Court in *Conway* cited to two state court cases to question whether claims of actual innocence based on newly-discovered, non-DNA evidence could be considered on collateral review, those cases are undeniably in the minority. *See Conway*, 816 So. 2d at 291 (citing *Johnson v. State*, 900 S.W.2d 940 (Ark. 1995) and *State v. Watson*, 126 Ohio App.3d 316 (Ohio Ct. App. 1998)). The majority of states have clearly provided, either through judicial opinions or legislative acts, grounds for relief based on new evidence of actual innocence. In fact, and as noted in Petitioner’s brief, over two-thirds of the states recognize claims of actual innocence in post-conviction proceedings based on newly-discovered, non-DNA evidence. In some states that have done so, such as Massachusetts, these claims are cognizable within general post-conviction relief language that posits that a new trial can be granted by the trial court “at any time if it appears that justice may not have been done.” ALM R. Crim. P. Rule 30(b) (2010); *see also, e.g.*, N.J. Court Rules, R. 3:20-1 (“The trial judge on defendant’s [post-conviction] motion may grant the defendant a new trial if required in the interest of justice.”). Many others specify that newly-discovered evidence, no matter the origin or source, can be raised to support an application for relief. *See* N.D. CENT. CODE § 29-32.1-01(e) (2007) (providing that post-conviction relief can be granted on the basis that “[e]vidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice”); *see also e.g.*, COLO. REV. STAT. § 18-1-410(e) (2009) (same); IDAHO CODE ANN. § 19-4910(4) (2009) (same); IOWA CODE § 822.2(d) (2008) (same); OKL. STAT. tit. 22 § 1080(d) (2009) (same); VA. CODE ANN. 19.2-327.11 (2010) (setting out procedures for bringing an actual innocence claim based on new evidence).

process of law.”). “Fundamental fairness” is central to any due process analysis under Louisiana law. *See, e.g., State v. Boutte*, 27 So. 3d 1111, 1113 (La. Ct. App. 2010) (“[T]he availability of post-conviction relief turns on whether the proceedings as a whole accorded the petitioner fundamental fairness and due process of law.”). As one court in this State has observed: “The essential guarantee of the Due Process Clause is fundamentally fair procedure for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property.” *City of Alexandria v. Alexandria Civil Service Comm’n*, 23 So. 2d 407, 413 (La. Ct. App. 2009). Refusing to provide any process to someone who can establish his actual innocence of the crime for which he was convicted cannot comport with that essential component.¹⁶

Second, the imprisonment of the innocent is inconsistent with the Louisiana Constitution’s guarantee of the right “to humane treatment,” which provides that “[n]o law shall subject any person to . . . cruel, excessive, or unusual punishment.” *See* LA. CONST. Art. 1, § 20. As this Court has written:

A punishment is constitutionally excessive if it makes no measureable contribution to acceptable goals of punishment and is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice.

State v. Weaver, 805 So.2d 166, 174 (La. 2002) (citations omitted). It is undeniable that the continued imprisonment of an individual who is innocent of the crime for which he was convicted violates all those standards and is nothing short of “cruel, excessive, [and] unusual.” LA. CONST. Art. 1, § 20.

Third, failing to provide judicial relief to someone who is actually innocent also raises concerns under the provision of the Louisiana Constitution that states that “[a]ll courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.” LA. CONST. Art. 1, § 22. The lack of a robust and meaningful remedy through post-conviction proceedings for a petitioner who can demonstrate actual innocence strikes at the heart of the concerns this provision was designed to address. *See City of Kenner Fire Dep’t v. Municipal Fire and Police Civil Service Bd.*, 685 So. 2d 325, 328-29 (La. Ct. App. 1996) (the “access to courts” provision of the Constitution especially guarantees access to the courts in cases involving “fundamental interests” that raise issues of constitutional importance).¹⁷

In *Herrera v. Collins*, 506 U.S. 390 (1993), the United States Supreme Court wrestled with the issue of

¹⁶ Similarly, under the Louisiana Constitution, this Court has acknowledged that an individual’s substantive due process rights are violated when he is arbitrarily or unreasonably “deprived of his life, liberty or property.” *Babineaux v. Judiciary Comm’n*, 341 So. 2d 396, 400 (La. 1976). The continued imprisonment of an individual, despite evidence of actual innocence, certainly represents an arbitrary and unreasonable deprivation of liberty.

¹⁷ A holding that the Louisiana Constitution forbids the continued imprisonment of the actually innocent would also be consistent with this State’s habeas corpus statute, which provides relief if “the original custody was lawful, but by some act, omission, or event which has since occurred, the custody has become unlawful.” La. C. Crim. P. Art. 362.2. Statutes with such language, “though not absolutely clear, seem to allow for bare innocence claims.” *See* Michael Muskat, Note, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 159 n.21 (1996).

whether federal habeas relief should be available to a petitioner who alleged that newly-discovered evidence would prove that he was innocent. At least six justices agreed that “a truly persuasive demonstration of ‘actual innocence’ made after trial . . . [would] warrant federal habeas relief if there were no state avenue open to process such a claim.” *Id.* at 417. This language has been interpreted as permitting such claims under the federal constitution in narrow circumstances. *See, e.g., State ex rel Holmes*, 885 S.W.2d at 397 (“From our reading of *Herrera*, we understand six members of the Supreme Court to have recognized the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”); *Clark*, 855 P.2d at 796-97 (acknowledging that in *Herrera* a majority of the United States Supreme Court stated that the Eighth and Fourteenth Amendments require federal courts to consider a claim of actual innocence “regardless of when it is raised or if constitutional error affected the verdict”). While it is true that in *Herrera*, the majority of the Court rejected the petitioner’s request for relief, observing that a claim of actual innocence is generally not cognizable in federal habeas proceedings absent an independent constitutional violation in the underlying state criminal proceeding, Justice O’Connor, in a concurring opinion, emphasized that the petitioner could not obtain relief in any event because the “newly-discovered” evidence that he had presented was entirely unconvincing. *See Herrera*, 506 U.S. at 393, 421 (O’Connor, J. concurring) (“[N]ot even the dissent expresses a belief that petitioner might possibly be actually innocent”).¹⁸ The debate about the true meaning of *Herrera*, however, need not preclude this Court from making clear that the right to an actual innocence claim based on newly-discovered evidence exists under the Louisiana Constitution. This Court has previously acknowledged that the Louisiana Constitution “*embodies and often amplifies* the protection of certain individual rights afforded by the United States Supreme Court interpretations of the Fourteenth Amendment and the Bill of Rights.” *See In re C.B.*, 708 So. 2d 391, 397 (La. 1998) (emphasis added). Furthermore, as a policy matter, adjudicating claims of actual innocence in the state criminal justice system furthers the goals of state sovereignty and finality in criminal proceedings. As one scholar has written:

The concept of state sovereignty is affirmed by the states themselves adjudicating claims of actual innocence. Each state has a significant interest in preserving the accuracy of its own trial process and in ensuring correct guilt and innocence determinations in accordance with state law The question then becomes how the states can provide review of actual innocence claims without obliterating their interest in finality. The answer lies in the States being able to maintain control over their criminal judgments by furnishing their own procedures for the review of such claims. . . . To be sure, it is in the states’ best interests to provide their own post-conviction procedures to review colorable claims of actual innocence.

Arleen Anderson, *Responding to the Challenge of Actual Innocence After Herrera v. Collins*, 71 TEMP. L. REV.

¹⁸ The acknowledgment that federal habeas relief would be available in a case where there was better factual support for the claim of actual innocence (and no avenue of relief in the state) makes *Herrera* a murky case to say the least. That acknowledgement by the majority, however, makes the entire *Herrera* Court unanimous on one proposition: at some point along the continuum, the evidence of actual innocence becomes strong enough that the federal constitution *requires* post-conviction relief. The fact that the Court was not required to draw the line in that case does not diminish the importance of that acknowledgment.

489, 499-500 (1998).¹⁹

The Innocence Network respectfully requests that this Court clearly and explicitly hold what it assumed without deciding in *Comway*: that claims of actual innocence not solely based on new DNA evidence are cognizable under the Louisiana Constitution in post-conviction proceedings. Such a holding would be in full accordance with the guarantees of this State's Constitution, and would allow Louisiana to join a plethora of other states in providing an avenue of relief for those petitioners who, despite their convictions, are actually innocent.

III. THIS COURT SHOULD ADOPT A STANDARD FOR POST-CONVICTION RELIEF THAT FAIRLY AND JUSTLY BALANCES THE STATE'S INTEREST IN FINALITY WITH ENSURING THAT PETITIONERS WHO ARE ACTUALLY INNOCENT CAN MEANINGFULLY CHALLENGE THEIR CONVICTION AND CONTINUED INCARCERATION

In *Comway*, this Court explained that the newly-discovered evidence required to prevail on a claim of actual innocence in post-conviction proceedings must be "new, material, noncumulative and conclusive evidence" and "undermine the prosecution's entire case." 816 So. 2d at 291. However, the Court did not specify the standard that petitioners would have to meet to prevail on such a claim. Instead, the Court merely stated that the evidence would have to meet "an extraordinarily high standard." *Id.* In addition to recognizing a constitutionally-based actual innocence claim based on newly-discovered evidence of any type, the Innocence Network respectfully requests that this Court adopt a standard for the review of such a claim that strikes a balance between Louisiana's interest in the finality of convictions and its interest in freeing the wrongfully convicted.

In this regard, a number of courts in other jurisdictions have imposed a "clear and convincing" burden on petitioners seeking to prove claims of actual innocence.²⁰ For example, in a case involving eyewitness misidentification, a New York court stated that a petitioner "must establish by clear and convincing evidence . . . that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." *Cole*, 1 Misc. 3d at 543. The court balanced the government's interest in the finality of a constitutionally-obtained conviction against the fact that "society does not have any interest in the conviction or punishment of an innocent person." *Id.* The Missouri Supreme Court similarly established that, under Missouri law, petitioners must "make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." *State ex rel Amrine*, 102 S.W.3d at 548. The court examined an array of standards and concluded that the clear and convincing standard would "strike a balance" between what it considered to be an impossibly high standard, namely, that no rational juror could convict the petitioner after introduction of new evidence, and the confidence that a court should have in an otherwise constitutionally valid conviction. *Id.*; see also *Ex parte Elizondo*, 947 S.W.2d at 209 (requiring that "the petitioner must show by clear and convincing evidence that no

¹⁹ See also Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1010 (1993-94) ("For a number of reasons, allocating *Herrera* claims to state post-conviction courts is a far superior solution to processing them in the district courts . . . fact finding on guilt and innocence comprises 'the central focus and purpose' of local criminal prosecutions.").

²⁰ Under Louisiana law, to prove something by "clear and convincing" evidence "means to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence." *In re B.J.*, 672 So. 2d 342, 348 (La. Ct. App. 1996).

reasonable juror would have convicted him in light of the new evidence”). The “clear and convincing” standards used by New York, Missouri, and Texas would comport with related provisions of Louisiana law. For example, Louisiana’s Innocence Compensation Law provides that an exonerated petitioner is entitled to compensation if “he has served in whole or in part a sentence of imprisonment” and “has proven by clear and convincing scientific or non-scientific evidence that he is factually innocent of the crime for which he was convicted.” La. R.S. 15:572.8; *see also* La. C. Cr. P. Art. 930.3(7) (providing that petitioners can be granted post-conviction relief if “[t]he results of DNA testing . . . proves by clear and convincing evidence” that they are factually innocent).

In the interest of ensuring that the wrongfully convicted face a standard for relief that provides a sufficient mechanism for contesting their continued confinement, some other state courts have adopted standards akin to the one articulated by Justice Blackmun in *Herrera*: that petitioners with claims of actual innocence must present evidence that they are “probably” innocent. *Herrera*, 506 U.S. at 443 (Blackmun, J., dissenting). This standard recognizes that “[t]he actual-innocence proceeding [] may constitute the final word on whether the defendant may be punished,” and as such, establishes a high enough standard to prevent “an otherwise constitutionally valid conviction or sentence . . . [to] be set aside lightly.” *Id.* at 443. At the same time, it also accounts for the often significant passage of time between the original trial and post-conviction proceedings, and its impact on the quality and availability of the evidence available to a petitioner. The Illinois Supreme Court has adopted a similar standard, namely, that the evidence be “new, material, noncumulative and, most importantly, of such conclusive character as would *probably* change the result on retrial.” *Washington*, 171 Ill. at 489 (emphasis added). The Florida Supreme Court, in a pre-*Herrera* opinion, likewise held that “in order to provide relief, the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial,” observing that imposing too demanding a burden of proof “runs the risk of thwarting justice.” *Jones*, 591 So. 2d at 915 (emphasis in original).

The Innocence Network respectfully requests that this Court adopt a “clear and convincing” standard for post-conviction relief. Regardless, under any of the standards set forth above, the new evidence of actual innocence presented by Mr. Floyd here demonstrates that he should be entitled to post-conviction relief.

IV. THE COURT SHOULD GRANT MR. FLOYD’S PETITION AND IN SO DOING ESTABLISH AN ACTUAL INNOCENCE CLAIM BASED ON NEWLY-DISCOVERED EVIDENCE OF ANY TYPE

Mr. Floyd’s case presents an ideal opportunity for this Court generally to recognize a constitutional claim of actual innocence based on newly-discovered evidence of any type, even if not DNA evidence, and specifically to grant relief to an individual who has been wrongfully incarcerated for nearly 30 years. As set forth in detail in the Petitioner’s brief, the prosecution’s theory of the case at trial was that the *same* perpetrator (Mr. Floyd) murdered both victims (Hines and Robinson) in the same brutal manner after having been invited into their residences to drink whiskey and engage in sexual intercourse. The newly-uncovered evidence relating to both

murders, which consists of both DNA and non-DNA evidence, when viewed in conjunction with the evidence presented at trial, conclusively demonstrates that Mr. Floyd is actually innocent of both murders.

The new, exculpatory evidence presented by Mr. Floyd is of the nature and quality that this Court in *Conway* wrote was necessary for a petitioner seeking relief on the grounds of actual innocence to present, namely, that it be new, material, noncumulative, and conclusive. Moreover, the new evidence presented here is not based on an alternative or inconsistent theory of defense. *See Conway*, 816 So. 2d at 291. Unlike in *State v. Juluke*, where this Court rejected a defendant's attempt on appeal to present an alibi "rest[ing] on a factual premise which conflicted with *all* of the evidence in the case presented not only by the state but also by the defense," in his original trial in 1981, the focus of the Mr. Floyd's defense has always been that he was unlawfully coerced into confessing and that he is innocent of both murders. 725 So. 2d 1291, 1293-94 (La. 1999) (emphasis in original). The newly-discovered DNA and non-DNA evidence here, taken together and in conjunction with the prior admitted evidence, fundamentally rebuts any assertion that Mr. Floyd was present at either crime scene and significantly undermines the limited inculpatory evidence that the prosecution marshaled to obtain Mr. Floyd's conviction for the Hines murder. The new evidence thereby discredits the prosecution's entire case. While the newly-discovered evidence does not disprove the prosecution's theory that the same person committed both crimes, it completely undermines the theory that that person was Mr. Floyd. When the entire record is viewed together with the new DNA and non-DNA evidence presented by Mr. Floyd, as it must be, it demonstrates that Mr. Floyd is actually innocent of both the Hines and Robinson murders.


CONCLUSION

Mr. Floyd should not have to remain in prison for a crime he did not commit merely because some of the evidence that establishes his innocence is not susceptible to DNA testing or because the DNA evidence alone does not conclusively establish his actual innocence. The Innocence Network respectfully urges this Court to recognize a post-conviction claim of actual innocence based on newly-discovered evidence of any type, both DNA and non-DNA evidence. In so doing, this Court will ensure that Mr. Floyd, and similarly situated petitioners, can seek the justice they so desperately deserve.

May 20, 2010

On Behalf of *Amicus Curiae*
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VERIFICATION AND CERTIFICATE OF SERVICE

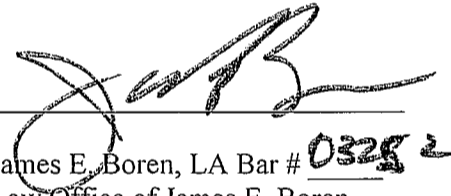
BEFORE ME, the undersigned authority, personally came and appeared James E. Boren who, being duly sworn, deposed and said that he is acting as counsel for the Innocence Network, that the statements contained in the forgoing Brief of the Innocence Network as *Amicus Curiae* in Support of Petitioner John Floyd are true and correct to the best of his information, knowledge and belief, and that a copy of the forgoing Brief of the Innocence Network as *Amicus Curiae* in Support of Petitioner John Floyd and Motion for Leave to File A Brief as *Amicus Curiae* in Support of Petitioner John Floyd have been forwarded to the following by U.S. Mail:

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On the 20th day of May, 2010.

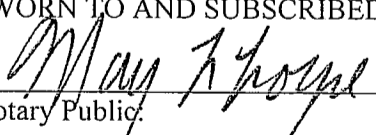


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SWORN TO AND SUBSCRIBED before me, this 20th day of May, 2010.



Notary Public

Mary L. Loupe
Notary I. D. #66218