

No. 04-8990

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warder,
Respondent,

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

BRIEF FOR THE INNOCENCE PROJECT, INC.,
AS *AMICUS CURIAE*
SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE**

The Innocence Project, Inc. (“the Project”), is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated over 160 innocent persons, and served as counsel or provided critical assistance in the majority of these cases. Currently, the Project represents over 140 individuals seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. The Project has also served as counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to exculpatory DNA evidence. These include, *inter alia*, *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002), and *Godschalk v. Montgomery County Dist. Atty.’s Ofc.*, 177 F.Supp.2d 366 (E.D. Pa. 2001).

As perhaps the nation’s leading authority on DNA evidence and wrongful convictions, the Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State’s Commission on Forensic Science, charged with regulating all state and local crime laboratories) are regularly consulted by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner’s constitutional claims in a number of respects.

* *Amicus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were “extremely rare.” *Schlup v. Delo*, 513 U.S. 298, 321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as “nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent”¹ – has since freed dozens of citizens from our nation’s prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials’ acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less “rare” than anyone – including advocates for the innocent – ever imagined.

Yet the DNA “revolution” has done more than reveal that our nation has, with troubling frequency, sent innocent citizens to prison and death row. It has also exposed grievous flaws and shortcomings of various “old” methods of forensic science, ones that directly caused many of these wrongful convictions.² This fact – and the lower courts’

¹ Naftali Bendavid, *U.S. targets DNA backlog; Agency to spend \$30 million to aid state crime labs*, CHICAGO TRIBUNE, Aug. 2, 2001, at N10.

² See Michael J. Saks and Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 5 SCIENCE 892, 893-95 (2005) (describing how post-conviction DNA exonerations have exposed widespread error in other, more rudimentary forensic sciences, and surveying “worrisome data” on high error rates in those other disciplines). For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved convictions obtained in reliance on

need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis -- makes it critical that this Court reverse the dangerous precedent set by the Sixth Circuit majority in the instant case.

Specifically, DNA has revealed a finite but troubling class of convictions tainted by what is best described as “false facts”: forensic evidence that likely carried great weight with the original jury, but which is now known, to a scientific certainty, to have been erroneous. Most commonly – as in Petitioner’s case – such “false facts” are revealed by DNA tests proving that the defendant was not, in fact, the source of critical biological evidence recovered from the crime scene, despite trial evidence to the contrary. In the instant case, the jury was told by an expert witness for the prosecution that the defendant was “definitely” a potential donor of semen on the victim’s clothing, because he shared the perpetrator’s distinct blood type and “secretor status”– yet DNA has now definitively excluded him as the source. Because these “false fact” discoveries involve unassailable science that would be, with good reason, enormously persuasive to a jury on retrial, they cast the *Schlup* inquiry (into whether “reasonable jurors” would likely find a reasonable doubt about guilt) in an entirely new light. Indeed, because of the public’s widespread acceptance of DNA evidence, and its inherent objectivity and precision, the very considerations that usually counsel against permitting

microscopic hair “matches.” See Barry Scheck, Peter Neufeld, and Jim Dwyer., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 365 (New American Library ed., Dec. 2003). Nor is the problem limited to shoddy work by ill-trained criminalists. Indeed, studies comparing the findings of the world’s leading microscopic hair examiners to DNA test results have had equally disturbing results. See, e.g., Max Houck & Bruce Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. FORENSIC SCI. 5, at 964-967 (Sept. 2002) (in 11% of cases studied, mitochondrial DNA testing proved that hairs which FBI examiners had found to be microscopically consistent with one another did not, in fact, come from the same source).

habeas petitioners to raise post-conviction challenges to their convictions – such as accuracy over time, and the need for public confidence in the outcomes of criminal cases – strongly work in favor of relief in this context.

The *en banc* majority in *House* failed to perceive this critical distinction and its legal significance under this Court’s precedents. In denying relief, it crafted a new rule which – if allowed to stand – could jeopardize the legitimate claims of a significant number of innocent persons in prison and on death row. That error requires this Court’s sure and swift correction -- particularly because, in this case, some of the scientific “facts” presented to the jury were not just false, but fraudulent (*see* Point III, *infra*).

Fortunately, most State officials have come to grasp the probative value of DNA evidence and other advances in forensic science, and will simply consent to grant relief when presented with a compelling case such as this one. As such, they take seriously the maxim that “the law must serve the cause of justice,” and their own “duty to vindicate [the] interest” of a citizen whom they have reason to believe was wrongfully convicted. *Dretke v. Haley*, 541 U.S. 386, 399-400 (2004) (Kennedy, J., dissenting). But in the tiny fraction of such cases in which a federal court must vindicate that interest, the continued viability of *Schlup* is absolutely critical. So, too, is an unequivocal holding by this court that a “truly persuasive showing” of actual innocence would, on its own, constitute a viable constitutional claim. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993).

ARGUMENT

I. Post-Conviction Cases in Which Objective Scientific Evidence Proves the Falsity of Critical “Facts” Relied Upon By the Jury at Trial Should be Accorded Great Weight in the *Schlup* Analysis, a Principle the *En Banc* Majority Failed to Grasp

In denying relief to Mr. House, the Sixth Circuit concluded that a convicted person cannot pass through the *Schlup* “gateway” unless he effectively negates each and every item of evidence offered against him at the original trial -- no matter how persuasive his new evidence of actual innocence. As persuasively demonstrated in Petitioner’s brief to this Court, that holding runs counter to the plain language (and any logical reading) of *Schlup*. Furthermore, when courts impose such an unduly high burden, they create a substantial risk that an innocent person may be executed or remain imprisoned. That error – combined with the truly impressive evidentiary showing of actual innocence by this Petitioner – is reason enough to reverse the decision below.

But this case crystallizes another recurring issue that has divided courts facing *Schlup* claims: Is there something about the nature of new scientific evidence of innocence – evidence that definitively disproves material facts offered by the State at trial – that is of distinct importance in the *Schlup* inquiry? Put another way, should objective, scientific proof that a conviction was obtained by reliance on “false facts” be entitled to heightened significance in deciding whether “it is more likely than not that no reasonable juror would have convicted” had the truth been known?

The answer is a resounding “yes.” The reasons go to the heart of *Schlup*’s equitable doctrine, as well as the administration-of-justice concerns shared by both the majority and dissenters in that landmark case. And since DNA testing and other advances in forensic science are increasingly becoming the basis for meritorious claims of actual innocence – to an extent scarcely imagined when *Schlup* itself was decided – the time has come for this Court to squarely address its significance.

A. Public Confidence in the Outcome

Schlup’s “gateway” is rooted in the equitable nature of the habeas writ. *See id.* at 319. In providing a limited forum for a habeas petitioner with strong evidence of actual

innocence to adjudicate otherwise-untimely claims of constitutional error, the *Schlup* Court balanced the constitutional imperative against execution of the innocent (the “fundamental miscarriage of justice exception” to procedural default) against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. This Court and the Circuits have since applied *Schlup*’s “gateway” in non-capital cases as well. *See, e.g., Bousley v. United States*, 523 U.S. 614, 624 (1998).

Two years earlier, those same concerns led to the denial of relief in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993), in which the Court rejected the merits of the petitioner’s “freestanding” actual innocence claim, while assuming that “a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional” and warrant habeas relief. *Id.* at 417. Six Justices in *Herrera* went further, asserting the position that truly persuasive “freestanding” innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 419-20 (O’Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

What tipped the equitable scales in *Schlup* – and renders it consistent with *Herrera* – was the principle that constitutional error at trial, coupled with a strong showing of innocence, so undermined “confidence in the outcome” as to merit less deference on habeas review. *Id.* at 315, 317. That principle also guided the Court in its selection of the standard to govern “gateway” claims. *Id.* at 325 (“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) (internal citation omitted). To that end, the *Schlup* test imposes “less of a burden” on petitioners than would be required for a *Herrera* claim of innocence arising from an “error-free” trial. *Id.* at 315-16.

Scientifically proven “false facts” should be governed by

the same principles. For while the error here is factual, rather than “legal,” the potentially devastating impact on public confidence in the system if the error goes uncorrected is arguably greater — particularly when the same new evidence that exposes the falsity supports a viable claim of innocence. Jurors are known to give less weight than lawyers to perceived legal “technicalities,” but are highly troubled when false scientific evidence may have tainted a conviction.³ It is thus hard to imagine that a hypothetical reasonable juror would not find scientific “false fact” cases to fall within that “narrow class . . . implicating a fundamental miscarriage of justice.” *Schlup*, 513 U.S. at 315 (internal citation omitted).

The high value conferred on truth and accuracy in the outcome of a criminal trial is by no means confined to laypersons, of course; it has long been one of the central tenets of this Court’s criminal procedure jurisprudence. *See, e.g., Tehan v. United States ex rel. Shott*, 382 U.S. 406, 417 (1966) (“The basic purpose of a trial is the determination of truth”); *Williams v. United States*, 401 U.S. 646,653 (1971)

³ *See, e.g.,* Phoebe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors*, WINSTON-SALEM JOURNAL, Aug. 29, 2005, at A1 (reviewing series of North Carolina cases in post-DNA era in which new forensics disproved trial evidence, and discussing strong impact of forensic evidence on jurors generally); Tammy Fonce-Olivas, *Juror says scientist influenced Moon case rape verdict*, EL PASO TIMES, Dec. 23, 2004, at 1A (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that subsequently-discredited serology evidence was “the majority” of what led jury to convict, as it was “what placed [Moon] at the scene more than anything else.”); Roma Khanna, *Jurors Say Lab Data Was Crucial; flawed evidence a large role in their decision in Rodriguez case*, HOUSTON CHRONICLE, Oct. 21, 2004, at B1 (quoting jury foreman from 1998 rape trial of George Rodriguez, later exonerated by DNA evidence and proof that serology testimony at trial was erroneous; foreman opined that original serology testimony had been “necessary” to jury’s decision to convict Rodriguez, and that “we probably would have acquitted him” without it).

