

No. 04-8990

IN THE
Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, Warden,
Respondent,

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

**BRIEF OF THE INNOCENCE PROJECT, INC.,
AS AMICUS CURIAE
IN SUPPORT OF THE 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 by Prof. Barry Scheck and Peter J. Neufeld 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 litigation model that has to date exonerated over 155 innocent persons by post-conviction DNA testing and served as counsel in the majority of these cases. Currently, we represent over 100 clients seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. As perhaps the nation’s leading authority on DNA evidence and wrongful convictions, the Project’s founders (both of whom are members of New York State’s Commission on Forensic Science, charged with regulating all state and local crime laboratories) and its staff are regularly consulted on such issues 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 critical respects.

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,

* *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.

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 individuals 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’ need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis – makes Petitioner’s case a critical one for this Court’s review.

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

¹ “U.S. Targets DNA Backlog,” CHICAGO TRIBUNE., Aug. 2, 2001.

² For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved erroneous microscopic hair “matches” at the original trials. 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).

source of critical biological evidence recovered from the crime scene, despite trial testimony 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 habeas petitioners to raise post-conviction challenges to their convictions – such as finality, 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 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*). And fortunately, because most State officials grasp the probative value of DNA evidence (and grant relief accordingly), this Court can do so without unduly burdening the federal habeas courts.

REASONS FOR GRANTING THE PETITION

- I. A Newly Emerging Class of Post-Conviction Cases – in Which DNA Objectively Proves the Falsity of Critical “Facts” Relied Upon By the Jury at Trial**

– Merit Heightened Significance in the *Schlup v. Delo* Analysis, and the *En Banc* Majority Failed to Recognize this Distinction

As persuasively demonstrated in Petitioner’s *certiorari* petition, the Circuits are markedly divided on whether a convicted person can pass through the *Schlup* “gateway” if he does not negate each and every item of evidence offered against him at the original trial, no matter how persuasive his new evidence of actual innocence. When courts impose such a burden, they create a substantial risk that an innocent person may be executed, and that error – combined with the impressive evidentiary showing of actual innocence by this particular Petitioner – is reason enough to grant the Writ.

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 – which 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 over non-scientific evidence (*i.e.*, recantations by lay witnesses) 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. Since DNA testing is 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”) against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. 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 417.³

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 principle. For while the error here is evidentiary, rather than “legal,” the potentially devastating impact on public confidence in the system if the error goes uncorrected

³ Six Justices in *Herrera* went further, holding that truly persuasive “freestanding” innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 870 (O’Connor and Kennedy, J.J.); *id.* at 430 (White, J.); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

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 more troubled when false scientific evidence may have tainted a conviction.⁴ It is thus hard to imagine that the public 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).

Further support for the proposition that such claims deserve special recognition under *Schlup* can be found in this Court’s precedents concerning the use of fabricated evidence in criminal trials. This Court has long held that “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). Proof of fabrication requires that the conviction be set aside unless the error was truly harmless, *i.e.*, if there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976). That is an even more exacting standard than applies when State officials deliberately withhold exculpatory information from the defense. *See, e.g., United States v. Bagley*, 473 U.S. 677, 682 (1985) (reversal warranted where there exists a “reasonable probability” that the jury’s verdict “would have been different”). Thus, while both claims involve intentional

⁴ *See, e.g.*, “Juror says scientist influenced Moon case rape verdict,” EL PASO TIMES, Dec. 23, 2004 (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that serology evidence at trial was “the majority” of what led jury to convict, as it was “what placed [Moon] at the scene more than anything else.”); “Convicted Killer Seeks DNA Evidence to Argue His Innocence,” AUSTIN AMERICAN STATESMAN, Feb. 11, 2005 (in wake of new evidence that Medical Examiner’s assessment in 1986 murder case was flawed and DNA could establish innocence, three jurors reported “that [the M.E.’s] estimation of time of death was a key factor in their decision to convict”).

misconduct on the part of State actors, the difference in the two standards makes clear that there is something particularly offensive about allowing convictions predicated on false evidence to stand uncorrected – because the public cannot (and would not) tolerate it.

The impact of objective, scientifically proven “false facts” on public confidence in the outcome of a criminal trial was not before the Court in *Schlup* or *Herrera*, nor has the Court addressed it in the intervening decade. But given the extent to which remarkable advances in DNA technology have already transformed the justice system, and will continue to do so, Petitioner’s claim is timely indeed.

B. Impact on Other “Inculpatory” Evidence

Objective, scientifically proven “false facts” invariably do more than invalidate “old” forensic testimony relied upon by the jury. They also transform how a jury would evaluate the entirety of the prosecution’s case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is sometimes described as the “simplest” of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active (*i.e.*, all parties agree that semen from the victim’s body came from the rapist). In-court identification testimony by the victim at trial (“I’m positive he’s the one who raped me”) is well known to have an enormous impact on juries – and, in the pre-DNA era, it was often “confirmed” by serological analysis of the blood type of the rapist’s semen. Yet over 75% of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim’s eyewitness testimony at the original trial. In such cases, DNA tests showing that the defendant could not possibly have been the source of the semen immediately cast the once-“certain” identification in an entirely new light. It does not “erase” the victim’s original testimony, of course, but eviscerates its

persuasive force, by providing scientific proof that the victim was honestly, but tragically, mistaken.

For a prime example, one need look no further than a case which had earlier reached this Court's own docket: *Arizona v. Youngblood*, 481 U.S. 51 (1989). In *Youngblood*, this Court held that, absent proof of bad faith, the Due Process Clause was not violated by a State's failure to preserve potentially exculpatory evidence in its custody – in that case, semen-stained clothing from the sexual assault of a child. In denying relief, one member of this Court took pains to note that Mr. Youngblood was unlikely to have been prejudiced by the evidence destruction, given what appeared to be “overwhelming” evidence of his guilt at trial. *Id.* at 60 (Stevens, J., concurring in the judgment). That evidence included the fact that the child victim who identified Youngblood in lineup had spent a full one-and-a-half hours in the perpetrator's presence, in broad daylight. He had also described the rapist as a black man with a defective right eye – a telling link to Youngblood's own “bad eye.” *See State v. Youngblood*, 790 P.2d 759, 761 (Ariz.App.1989). The fact that Youngblood's defect was in his left eye, not his right, was seen as but a minor discrepancy in an otherwise solid identification. But when a cotton swab was located and DNA tested a decade later, the results squarely proved Youngblood's innocence – and ultimately identified the real perpetrator, a pedophile who was, in fact, missing his right eye.⁵ Viewed in light of the DNA evidence, then, the in-court identification that had seemed so powerful at the time of trial was shown to be utterly mistaken and erroneous.

The power of “false facts” to alter the evidentiary landscape holds equally true in more complex cases. *Amicus* has represented dozens of clients against whom evidence in the trial record appeared massive – until DNA test results proved otherwise, generating a complete paradigm shift. In

⁵ *See* Scheck et. al., ACTUAL INNOCENCE 334-35.

these cases, a single new key fact can radically change the lens through which all of the “overwhelming” trial evidence – and the culpability of the defendant – is viewed.

Kirk Bloodsworth, for example, was convicted and sent to Maryland’s death row for the rape-murder of an eight-year-old girl in 1985. Five separate eyewitnesses testified that Bloodsworth was the man seen with the victim just prior to her death. Were that not enough, the jury also heard that (a) a shoeprint near the body was the same size as Bloodsworth’s own; and (b) while being interrogated, he had revealed knowledge of a “bloody rock” at the crime scene – a detail then known only to police. Indeed, prosecutors were so convinced of Bloodsworth’s guilt that even after DNA tests excluded him as the source of semen on the girl’s underwear in 1992, they only conceded they were bound to reverse his conviction, but did not concede his innocence. It was not until ten years later, when DNA yielded a databank “hit” on the real killer – a convicted pedophile – that they did so, and belatedly apologized to Bloodsworth. By then, the evidentiary house of cards had truly fallen apart – revealing that the eyewitnesses (including heavily-coached children) were all mistaken; the same-sized shoeprint near the body a mere coincidence; and Bloodsworth’s “knowledge” of the bloody rock a fabrication by the police.⁶

A similarly “overwhelming” evidentiary record marked the 1988 trials of **Ron Williamson and Dennis Fritz** in Oklahoma, before DNA testing conducted on semen and hair evidence from the rape/murder victim exonerated them in 1999. Jurors had convicted both men, sentencing Williamson to death, after hearing the account of a man named Glenn Gore that he saw Williamson at the victim’s workplace just before her murder; the testimony of three fellow inmates that

⁶ Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Nat’l Instit. Just., U.S. Dept. Just., NCJ161258 (June 1996) at 36; “In Same Case, DNA Clears Convict and Finds Suspect,” NEW YORK TIMES, Sept. 6, 2003

