No. 04-8990

IN THE

Supreme Court of the United States

PAUL GREGORY HOUSE,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In response to recent exonerations of numerous individuals who were "actually innocent" of the serious crimes of which they had been convicted, the American Bar Association has engaged in substantial study of issues relating to actual innocence, and has adopted a number of policies that address now-recognized weaknesses in the criminal justice system that have led to erroneous convictions. The ABA therefore files this *amicus* brief to address the following question:

> What factors should this Court consider in formulating and applying standards for "actual innocence" claims under either *Herrera* v. *Collins*, 506 U.S. 390 (1993), or *Schlup* v. *Delo*, 513 U.S. 298 (1995), in light of now-acknowledged flaws in the criminal justice system that can cause erroneous convictions—flaws not well-recognized when *Schlup* and *Herrera* were decided?

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INTEREST OF THE ABA AS AMICUS CURIAE[1]

The American Bar Association is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. It has long been dedicated to promoting a fair and balanced system of justice. Its mission is to serve the public and the profession by promoting justice, professional excellence, and respect for the law. Among the ABA's Goals are "[t]o promote improvements in the American system of jus-

[1] Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

tice" and "[t]o provide ongoing leadership in improving the law to serve the changing needs of society."[2]

The ABA's 408,000 members reside in all 50 States and other jurisdictions. ABA members include prosecutors, public defenders, private attorneys, legislators, law professors, law-enforcement and corrections personnel, law students, and non-lawyer "associates" in related fields. The ABA devotes substantial resources to the development of policies that speak to current legal issues. It approves such policies only after significant study, discussion, and consideration of comments from all segments of its membership.[3]

Petitioner, who is under sentence of death in Tennessee, asks the Court to identify and clarify the standards suggested in *Schlup* v. *Delo*, 513 U.S. 298 (1995), and *Herrera* v. *Collins*, 506 U.S. 390 (1993), for evaluating claims of "actual innocence" in federal habeas corpus proceedings. The ABA takes no position regarding the desirability of capital punishment. However, in light of the finality and severity of the death penalty, the ABA has long been concerned about the fair and balanced administration of justice in capital cases.

In 1990 after much study, the ABA adopted a set of policies related to the litigation of federal death penalty habeas corpus actions.[4] As explained below, portions of these Capital Habeas Corpus Litigation policies are relevant to the Court's resolution of the questions presented by Petitioner.

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[2] *ABA Policy and Procedures Handbook, 2004-2005* (Goals I & III), *available at* http://www.abanet.org/about/goals.html.

[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[4] These 1990 Capital Habeas Corpus Litigation policies, as well as the texts of all other ABA policies referenced in this brief, are reproduced in the accompanying appendix (App. 1a-14a).

In addition, the ABA has recently engaged in substantial study of, and policy-making regarding, claims of actual innocence by defendants in non-capital as well as capital cases. This effort was begun in the late 1990s as the seriousness and legitimacy of some "actual innocence" claims, and the flaws in the criminal justice system that can engender them, began to gain public recognition and acceptance.[5] As a 2005 ABA report noted, "recent exonerations of convicted defendants condemned to death have demonstrated the fallibility of a process susceptible to human error." ABA Report, *Systemic Remedies* 2 (Aug. 2005).[6]

Thus in the wake of "emerging instances of convicted persons who are exonerated by DNA and other biological evidence," ABA Report, *Criminal Justice*, No. 115, at 2 (July 2000), the ABA has adopted "Principles Concerning Biological Evidence" (App. 8a) that bear on this case in light of Petitioner's presentation of (1) DNA evidence that contradicts a portion of the prosecution's claims at trial and (2) evidence of mishandling of blood-sample evidence that was important to the prosecution's case.[7]

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[5] Similarly, acknowledging the changed legal and factual landscape of innocence claims, last year Congress enacted the Justice For All Act, Pub. L. No. 108-405 (2004), which encompassed the Innocence Protection Act, 18 U.S.C. § 3600 *et seq.* *See also United States* v. *Sampson*, 275 F. Supp. 2d 49, 56 (D. Mass. 2003) ("[I]n the past decade, substantial evidence has emerged to demonstrate that innocent individuals are sentenced to death, and undoubtedly executed, much more than previously understood."); *Harvey* v. *Horan*, 285 F.3d 298, 305-306 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*) ("[T]hese scientific advances must be recognized for the singularly significant developments that they are. . . .").

[6] All of the ABA's Innocence Resolutions and their accompanying Reports are available at http://www.abanet.org/crimjust/news/home.html except for the August 2005 Report, by clicking on "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process." The texts of the Resolutions are also reproduced in the Appendix to this brief. App. 1a-8a.

[7] The Biological Evidence Principles can also be found at http://www.abanet.org/crimjust/policy/cjpol.html#am00115.

Finally, over the past three years, the ABA has devoted significant effort to the study, formulation, and adoption of policies aimed directly at the now-recognized shortcomings of the criminal justice system in the context of "actual innocence" exonerations. To date, the ABA has adopted nine separate "Innocence Resolutions," addressing various issues now recognized as potential sources of erroneous convictions. App. 1a–8a.[8]

The ABA's interest here is to advise the Court of its efforts in this area, particularly because a number of its policies are relevant to issues or factors presented in Petitioner's case. The ABA's policy responses to shortcomings in various areas of the criminal justice system—shortcomings only recently recognized, but now well-acknowledged, sometimes lead to erroneous conviction of the innocent—are relevant to this Court's effort to elucidate standards for federal habeas petitioners who claim "actual innocence" based on such shortcomings. The same short-

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[8] In addition, at least two of the ABA's general Standards for Criminal Justice also bear consideration here. *See* nn.15, 25 *infra*. *See generally* ABA, *Standards for Criminal Justice* (2d ed. 1980, Supp. 1986) ("Standards"). As explained in the Introduction to the Prosecution Function and Defense Function Standards, the Standards are

> the result of careful drafting and meticulous and extensive review by representatives of all segments of the criminal Justice system: judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice teaching and research. Circulation of the standards to a number of individuals with a wide range of outside expertise in criminal justice has also assured the consideration of a rich array of comment and criticism that has greatly strengthened the quality of the final product.

In light of this balanced and careful approach, this Court "long ha[s] referred to these ABA Standards as 'guides to determin[e] what is reasonable.'" *Rompilla* v. *Beard*, 125 S. Ct. 2456, 2467 (2005) (brackets and citations omitted).

The ABA's 1997 Death Penalty Moratorium policy is also relevant, as it recommends adherence to, *inter alia*, the 1990 Capital Habeas Litigation policies. App. 8a-9a.

comings that can lead to erroneous convictions are also likely to frustrate a convicted defendant's efforts to conclusively prove his "actual innocence" many years later. Thus, standards for federal habeas review that this Court develops and applies to innocence claims must be robust enough to ensure fair examination of precisely the types of constitutional shortcomings that may have compromised the Petitioner's ability to demonstrate innocence below, as well as at trial.

The ABA therefore respectfully submits this brief to advise the Court of its nine Innocence Resolutions, its Biological Evidence Principles, and its Capital Habeas Corpus Litigation policies. These materials support standards for "actual innocence" habeas corpus cases that are sufficiently robust to accommodate the various evidentiary and systemic shortcomings revealed by "actual innocence" cases—systemic shortcomings that were simply not well-appreciated at the time *Herrera* and *Schlup* were decided.

SUMMARY OF ARGUMENT

In the decade since this Court decided *Herrera* v. *Collins*, 506 U.S. 390 (1993), and *Schlup* v. *Delo*, 513 U.S. 298 (1995), the American Bar Association has undertaken substantial study of the issues relating to "actual innocence" claims. The ABA's work has confirmed now-well-acknowledged existence of serious shortcomings in the administration of the criminal justice system.

In an effort to remedy these shortcomings and to addresses the rapidly evolving landscape of DNA and biological evidence, the ABA adopted a series of policy responses and recommendations. Specifically, the ABA adopted:

1. "Principles Concerning Biological Evidence" (2000), which recommended (a) that such evidence be made available to defendants and convicted persons upon request and (b) that they "may seek appropriate relief notwithstanding any other provision of law" (App. 8a); and

2. Nine separate "Innocence Resolutions" (2004-2005) that make specific recommendations for addressing the sources of erroneous convictions, including, *inter alia*, false

confessions and mishandling of forensic evidence, in order to "reduce the risk of convicting the innocent while increasing the likelihood of convicting the guilty." *See, e.g.*, App. 1a.

These recommendations, along with the ABA's Capital Habeas Corpus Litigation Policies, which address specific circumstances that justify overlooking procedural bars to raising innocence claims, are important guideposts in the development of standards for adjudicating claims under *Schlup* and *Herrera*. They support adoption of standards that are sufficiently robust to accommodate shortcomings of the criminal justice system that sometime produce erroneous convictions of persons who are actually innocent.

ARGUMENT

ABA Policies Support The Formulation And Application Of Robust Actual Innocence Standards In Capital Habeas Corpus Proceedings

As the United States Senate reported in 2002, "[r]ecent exonerations of inmates awaiting capital punishment or serving lengthy prison sentences have cast doubt on the reliability of the criminal justice system." S. Rep. No. 107-315, at 7 (2002) (accompanying the Innocence Protection Act, subsequently enacted as part of the Justice for All Act of 2004, Pub. L. No. 108-405 (2004), and codified at 18 U.S.C. § 3600 *et seq.*) ("Senate Report"). These exonerations have demonstrated, as Justice O'Connor has observed, that "the system may well be allowing some innocent defendants to be executed." 2001 Address to Minnesota Women Lawyers Association, *quoted in* Senate Report 7. Because the punishment of those who are actually innocent impairs the administration of justice and corrodes public confidence in the criminal justice system, the ABA has devoted substantial resources to studying issues related to actual innocence (in both capital and non-capital contexts) since the late 1990s.[9]

[9] The 2002 Senate Report on the Innocence Protection Act specifically referenced ABA standards in addressing these issues. Senate Report 25.

A number of the resulting policies adopted by the ABA as a whole are relevant to this Court's efforts to formulate and apply standards for review of *Schlup* or *Hererra* "actual innocence" claims.

1. Biological Evidence Principles. "Three developments in the 1990s dramatically altered the judicial approach to scientific evidence." ABA Report, *Crime Laboratories and Forensic Evidence*, No. 111B, at 2 (Aug. 2004). First, the advent of more precise DNA profiling "revolutionized forensic science." *Id.*[10] Second, this Court's triumvirate of evidentiary decisions "revolutionized the admissibility of evidence based on forensic science." *Id.* at 3.[11] And third, forensic "abuse" cases involving hair sampling and pre-DNA serological evidence led to "nationwide criticism of forensic evidence in general." *Id.* at 5 (quoting *Ramirez* v. *State*, 810 So. 2d 836, 853 (Fla. 2001)).[12]

These developments led the ABA in 2000 to adopt a set of "Principles Concerning Biological Evidence." These principles recommend that "[a]ll biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law." App. 8a.

The revolution in DNA testing was in its infancy in the early 1990s, when this Court's opinions in *Herrera* and

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[10] *See, e.g.*, *Harvey*, 285 F.3d at 306 (separate opinion of Luttig, J., discussing these "singularly significant developments").

[11] *See Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999*); General Elec. Co.* v. *Joiner*, 522 U.S. 136 (1997); *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[12] Notably, Petitioner's case involves these very factors: (1) new DNA testing, not available at the time of his state-court proceedings, that proves that semen on the victim's nightgown was not his and (2) now-undisputed mishandling of the victim's serological (blood) evidence (albeit the timing of the mishandling remains disputed).

Schlup were handed down.[13] Only in 2000 did the ABA first formally recognize "the need to study the apparently emerging instances of convicted persons who are exonerated by DNA and other biological evidence." ABA Report 115, *supra*, at 2.[14] That Report noted that "DNA testing has been made widely available" only in "the [past] seven years." *Id.* at 3. Explaining that "[w]ith the recent development of DNA testing, ... science presents an opportunity to both improve the reliability of the criminal justice system, and to reveal the errors of the past," the Report recommended that DNA and other biological evidence be permitted to be raised in challenge to convictions "*no matter when such evidence is discovered*," in order to "ensure the equitable dispensation of justice." *Id.* at 1, 4 (emphasis added).[15]

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[13] As a United States Department of Justice report recognized in 1999, DNA exonerations have changed the perspective on which *Hererra* (and, we would add, *Schlup*) was based: the notion that "there is [with the passage of time] no guarantee that the guilt or innocence determination would be any more exact." *Hererra*, 506 U.S. at 403. Rather than "the passage of time only diminish[ing] the reliability of" criminal guilt/innocence evidence (*id.*), "[t]o the contrary, the probative value of DNA testing has been steadily increasing." Nat'l Inst. of Justice, U.S. Dep't of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 9-10 (NIJ 177626, Sept. 1999). Thus, this NIJ Report concluded, "[t]he strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA test results." *Id.* at 10.

[14] The accompanying Report can be found at ABA, *Reports with Recommendations to the House of Delegates*, ABA Annual Meeting, New York, New York, July 10-11, 2000 (2002).

[15] Congress took the same view in the 2004 Innocence Protection Act: "[I]f DNA test results ... exclude the applicant as the source of the DNA evidence," a defendant must be permitted to file a motion for new trial or resentencing "[n]otwithstanding any law that would bar [such] a motion ... as untimely." H.R. 5107, § 411, *codified at* 18 U.S.C. § 3600(g)(1).

Similarly, Criminal Justice Standard for Post-Conviction Relief 22-2.1 provides in relevant part that "A post-conviction proceeding should be sufficiently broad to provide relief: (a) for meritorious claims ... (v) that there exists evidence of material facts which were not, and in the exercise

This ABA policy supports the principle that courts should be empowered to overlook procedural bars when material DNA or other scientific evidence that could not have been offered at the time of conviction is proffered in support of an innocence claim. Standards that this Court develops in furtherance of *Herrera* and *Schlup* should be sufficiently robust to accommodate advances in our understanding of biological evidence and its abuses.

2. **The Innocence Resolutions.** Although the revolution in forensic DNA analysis provided the initial stimulus for many "actual innocence" cases, the systemic shortcomings of the criminal justice system that have sometimes led to erroneous convictions are not limited to flaws in forensic evidence, and they cannot always be corrected simply by new scientific testing.[16] To study issues beyond DNA, the ABA formed an Ad Hoc Committee to Ensure the Integrity of the Criminal Process, in order to recommend policies that could address other flaws in the criminal justice system that have produced the conviction of actually-innocent defendants.

The result has been a series of nine separate Innocence Resolutions adopted by the ABA's House of Delegates between February 2004 and August 2005. The primary goal as stated in many of the Resolutions is "to reduce the risk of

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of due diligence could not have been, theretofore presented . . . and that now require vacation of the conviction or sentence." App. 13a-14a.

[16] Senate Report 20-21 ("The root causes of wrongful convictions are varied. They include flaws in eyewitness identification procedures, undue reliance on jailhouse informants, police misconduct and prosecutorial misconduct. . . . DNA testing . . . is not a comprehensive solution . . . . Instead, the causes of wrongful convictions must be addressed directly.") Consequently, the Justice for All Act of 2004 addressed not only DNA evidence, but also related topics, such as funding and standards for crime laboratories, providing incentives for States to consider innocence claims, and adequate funding for competent capital defense counsel. *See* H.R. 5107, Sec. 1 (Table of Contents); *accord*, Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. Crim. L. & Criminology 523, 524 (2005) (noting that out of 340 exonerations, 144 resulted from DNA evidence, and 196 by evidence of other problems).

convicting the innocent, while increasing the likelihood of convicting the guilty." App. 1a-4a, 6a. This latter point is critical: for every innocent person left imprisoned, a guilty one remains at large, and attention paid to non-frivolous innocence claims can benefit interests of the prosecution, defendants, and the general public. In innocence cases, the actual perpetrators are often identified in the process of exoneration, thereby serving the interests of justice and benefiting public safety.[17] As Congress recognized in entitling the Justice for All Act, ensuring avenues for the exoneration of innocent persons benefits all involved in the criminal justice system. *Accord*, Senate Report 1 ("The purpose of the Innocence Protection Act . . . is to help reduce the risk both that innocent persons will be put to death and that those guilty of violent crimes will remain at large."); H.R. Rep. No. 108-711 (2004), *reprinted in* 2005 U.S.C.C.A.N 2274, at 2278 (noting that encouraging accurate DNA testing and competent defense counsel "is the best way to ensure that the right person is convicted" as well as "prevent[ing] wrongful convictions").

The Innocence Resolutions address a number of now-recognized sources of erroneous convictions, and the ABA urges the Court to examine the Resolutions and the Reports that accompany them in full.[18] They bear directly on issues

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[17] For example, in this case, Petitioner's DNA evidence not only proved that it was not his semen on the victim's nightgown; it also proved that the semen was the victim's husband's. Investigatory resources were then redirected toward the husband, resulting in discovery of additional evidence exculpatory of House and inculpatory of the husband. *See House* v. *Bell*, 386 F.3d 668, 686-687 (6th Cir. 2004) (Merritt, J., dissenting). The husband, however, has never been prosecuted or charged.

[18] The complete texts of these Resolutions are reproduced in the Appendix. App. 1a-8a. Their accompanying Reports (which do not represent adopted ABA policy, but were before the House of Delegates when the policies were adopted and may help explain their rationale) can be found on the ABA's website at http://www.abanet.org/crimjust/news/home.html under "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process."

presented by Petitioner's case and place consideration of *Herrera* and *Schlup* within the contemporary understanding of factors that lead to valid innocence claims and exonerations. In addition to the new DNA evidence in this case (evidence that apparently disproves a central prosecution claim for both conviction and the death penalty) other factors addressed by the ABA's Innocence Resolutions are also present in Petitioner's case. Relevant excerpts include:

A. From "*Crime Laboratories and Forensic Evidence*" (App. 1a-2a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty . . . , (1) . . . procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence. . . . (3) The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense. . . . (5) Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case."

As the accompanying Report explained (at 2), although it seems "astounding[,] . . . a *third* of [exoneration] cases involved 'tainted or fraudulent science.'" The Report also concluded (at 13) that "incompetence of counsel cases involving scientific evidence are not hard to find."

In his federal habeas proceeding, Petitioner demonstrated to the satisfaction of all the judges that faulty forensic handling of the victim's blood samples—evidence that was central to the prosecution's case—occurred before trial. 386 F.3d at 682, 685. In addition, Petitioner complains of the "scientific" testimony the prosecution relied upon to argue that the semen on the victim's nightgown was Petitioner's—an argument now proven false by DNA analysis. *See id.* at 685. Compliance with the ABA's recommendations could well have avoided these flaws.

B. From "*Investigative Policies and Personnel*" (App. 3a): All jurisdictions should "[e]stablish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations" and "[e]stablish adequate opportunity for

citizens and investigative personnel to report misconduct in investigations."

As the accompanying Report noted (at 2), "[t]he quality of a criminal investigation and prosecution turns on the actions of the law enforcement personnel." Moreover, "complaints and comments [about an investigation] should be taken seriously by the officials . . . because misconduct could lead to the conviction of an innocent person or the escape of a guilty party." *Id.* at 5.

Again, Petitioner has raised serious questions about the collection, handling, and preservation of the blood evidence and his blue jeans, a central link in the prosecution's case. 386 F.3d at 680-681. Additionally, Petitioner produced a witness who testified that she tried unsuccessfully to report to officials about a confession to the crime she had heard from the victim's husband. *Id.* at 683. The ABA Resolution indicates that concerns about these areas are not unwarranted.

C. From "*Prosecution Practices*" (App. 4a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, . . . [jurisdictions should] (3) ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence."

The accompanying Report noted (at 2-3) "the integral role prosecutors play to ensure that fair process is followed" and emphasizes that "prosecutors should establish guidelines and procedures" not only for "turning *Brady* evidence over to the defense," but also for "receiving that information from its partners and agents including police department and laboratories."

Petitioner's evidence regarding the mishandling of the blood samples in his case suggests that agents of the prosecution possessed potentially exculpatory evidence that was not disclosed to Petitioner pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny.

The Report accompanying this Resolution also noted (at 5) that "among the many factors that lead to the wrongful conviction of the innocent, eyewitness testimony and confessions were the most problematic." In the federal evidentiary hearing below, the eyewitness conceded that his trial testimony had been inaccurate, and Petitioner's evidence challenging the eyewitness testimony that placed him near the scene where the body was found was sufficient to lead the majority to question it. 386 F.3d at 679 (positing "even if we accept [the] contention that" the eyewitness testimony was false). Conditions that might explain Petitioner's initial, false statements to investigators were also presented below. The ABA's study of such factors is relevant to this Court's consideration of how such evidence should be evaluated under *Schlup* and *Herrera*.[19]

D. From "*Defense Counsel Practices*" (App. 6a-7a): Jurisdictions should "establish[] standards of practice for defense counsel in serious non-capital criminal cases that: . . . (5) require defense counsel to investigate circumstances indicating innocence regardless of . . . facts constituting guilt . . . ."

As the accompanying Report noted (at 3), "the role of defense counsel is critical" to ensure that the guilty are accurately convicted and the innocent are not. Because the ABA has adopted elsewhere "Guidelines for the . . . Performance of Defense Counsel in Death Penalty Cases," *see Rompilla* v. *Beard*, 125 S. Ct. 2456, 2466 n.7 (2005) (citing these ABA Guidelines with approval), the Innocence Resolution on this topic addresses only other "serious criminal cases." Report at 4. This Court has also recognized that in-

[19] In this regard, two of the ABA's Resolutions deal directly, and at length, with improvements that ought to be made in the contexts of eyewitness identification and interrogations. App. 1a, 2a-3a. While not directly relevant to Petitioner's case, these Resolutions and their accompanying Reports are relevant to this Court's consideration of the general category of actual innocence cases, as these two areas were identified in the Prosecution Policies Report (at 5) as the "most problematic" of all.

effective investigation by defense counsel can give rise to a Sixth Amendment violation regarding "penalty innocence" as well as innocence of the crime. *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (citing ABA guidelines). The ABA's Innocence Resolution Report on this topic (at 9) "concluded that establishing, implementing, and enforcing heightened standards for such defense counsel would tend to avoid instances of the innocent being wrongly convicted."

Petitioner seeks to demonstrate that he was denied the effective assistance of counsel—provided the *Schlup* "gateway" can be crossed. As just one example of the constitutional inadequacy of his counsel, Petitioner pointed out that no fewer than *five* exculpatory witnesses (*see* 386 F.3d at 686-687) were located ten years later—two of whom testified without obvious bias to having heard a contemporaneous confession to the crime by someone other than Petitioner.[20]

The ABA's Innocence Resolutions underscore the compelling need for *courts* to examine the merits of claims presented by potentially innocent persons, for two additional reasons.

First, the recommended policies have not yet been adopted, let alone implemented, in many jurisdictions. They certainly were not in place a decade ago or more, when many defendants with highly plausible claims of innocence (including Petitioner) were convicted. Thus, the flaws observed by Congress in connection with the Innocence Protection Act, and by the ABA in the work described above, are likely to

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[20] Another Resolution, "*Systemic Remedies*" (App. 7a-8a), "urges federal, state and territorial governments to identify and attempt to eliminate the causes of erroneous convictions." The accompanying Report states (at 3) that "[i]t is time to adopt an explicit innocence exception to current bars to obtaining habeas review." This Resolution simply underscores the fact that there are other systemic flaws in the criminal justice system that need to be addressed at fundamental levels, if erroneous convictions are to be avoided. The ABA is continuing to study these flaws, and further development of bipartisan policies is anticipated.

be pervasive and difficult to prove in the habeas context for some time to come.

Second, and as a direct consequence of the first point, in many cases the very evidence that could conclusively exonerate an individual has been lost precisely because of the identified problems, such as: the failure of defense counsel to conduct a timely or thorough investigation, the loss or contamination of evidence due to faulty law enforcement and forensic guidelines and techniques, and the failure to provide all exculpatory evidence at the time of trial.

During the necessarily cautious process of studying and accepting improvements to the criminal justice system designed to prevent erroneous convictions, federal habeas courts will necessarily be asked to act as protectors of those who may be actually innocent. If federal courts are to assure that only culpable defendants are punished, this Court must set standards that allow for the possibility that a defendant with a colorable claim of innocence may be unable to produce evidence that would satisfy the extremely exacting standard adopted by the *en banc* majority in this case precisely *because* of the systemic shortcomings that led to their erroneous conviction in the first place. The Court should therefore adopt a sufficiently robust standard of review to permit full examination of such claims. The standard should acknowledge that the same flaws that can lead to erroneous convictions can also lead to shortcomings in proof years later. Otherwise, potentially innocent defendants will be denied review of the very defects in the system that initially violated their rights and led to an unjust result.

3. **Capital Habeas Corpus Litigation Policies.** In 1988 the ABA formed a Task Force to comprehensively study capital cases in the context of federal habeas corpus review. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (ABA 1990), *reprinted in* 40 Am. U.L. Rev. 1, 13 (1990) ("A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus") ("1990 Report"). The Task Force, comprised of state and federal

judges, prosecutors and defense counsel, court administrators, and academics, proposed, and the ABA adopted, policies addressing the handling of federal habeas corpus petitions in the capital context. *Id.* at 9-12; App. 9a-12a. The purpose of the policies is to "enhance both the efficiency and the fairness of state and federal review procedures." 40 Am. U.L. Rev. at 13.

Two paragraphs of the ABA's Capital Habeas Corpus Litigation policies are particularly relevant to the question when to allow federal courts to overlook procedural bars in order to examine constitutional claims in the innocence context.

First, paragraph 13 (App. 11a-12a), which recommended a "one-year limitations period" for federal habeas petitions, expressly provides that such "time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty" (App. 12a).

The ABA borrowed this "colorable claim" of innocence standard directly from this Court's then-most recent decision on point, *Kuhlman* v. *Wilson*, 477 U.S. 436, 454 (1986). The *Kuhlman* Court had expressly "adopt[ed]" a "colorable claim of factual innocence . . . standard" to define when an otherwise-applicable procedural bar to federal habeas review should be overlooked to satisfy the "ends of justice" exception previously expressed in *Sanders* v. *United States*, 373 U.S. 1 (1963). *See* 477 U.S. at 444-445, 454.[21]

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[21] The *Kuhlman* Court noted (477 U.S. at 454) that it was borrowing its "colorable showing" language from Judge Henry Friendly's famous article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-148 (1970).

Because three other Justices would have adopted an even more forgiving standard, "colorable claim" represented the maximum standard for actual innocence habeas claims, agreed upon without dissent by at least seven members of this Court. *See* 477 U.S. at 454 (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.) ("colorable showing . . . col-

Five years after the ABA adopted paragraph 13, this Court endorsed the "colorable claim of factual innocence" standard from *Kuhlman* in *Schlup* v. *Delo*, 513 U.S. at 322. The Court noted (*id.*) that in *Kuhlman* it had "elaborated" that this phrase represented a "fair probability" standard or, in other words, a "probably" standard as explained in *Murray* v. *Carrier*, 477 U.S. 478 (1986) (decided the same day as *Kuhlman*). In adopting this "colorable claim, fair probability" standard for actual innocence "gateway" claims, *Schlup* expressly rejected a more stringent "clear and convincing" standard that had been suggested in a prior case (*Sawyer* v. *Whitley*, 505 U.S. 333 (1992)). 513 U.S. at 323, 326-327.[22] The *Schlup* Court explained that actual innocence represents a "miscarriage of justice" exception to normal habeas corpus cause-and-prejudice rules, and that its choice of a "colorable claim ... probability" standard represented "less of a threat to scarce judicial resources and to principles of finality and comity" in the actual innocence context. *Id.* at 322, 324. Meanwhile, the "individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.* at 324-325. Thus a "somewhat less exacting standard of proof" is appropriate." *Id.* at 325.

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orable claim of factual innocence"); *id.* at 476 (Stevens, J., dissenting) ("colorable claim of innocence"); *id.* at 466 (Brennan, J., dissenting, joined by Marshall, J.) (arguing that colorable claim of innocence is too narrow a standard). Chief Justice Burger and Justice White did not join the "colorable claim" portion of Justice Powell's opinion, nor did they explain why.

[22] *Schlup* noted that *Sawyer* had adopted a "clear and convincing" standard for death penalty-innocence cases, as distinguished from claims of innocence of the underlying crime. 513 U.S. at 323. To this extent, *Sawyer* has rejected the ABA's 1990 policy recommendation in paragraph 13 of a "colorable claim" standard for penalty-ineligibility. It would not be unreasonable, however, to revisit this stringent standard for penalty-innocence claims in light of the dramatically changed landscape of "actual innocence" exonerations which was simply not appreciated at the time of *Sawyer*.

Second, paragraph 14 of the ABA's 1990 policy (App. at 12a) also speaks to when a court should overlook a procedural bar in the face of an actual innocence claim. Paragraph 14 recommends that the procedural bar to *successive* habeas petitions (which the petition in this case is not) should not be applied if a petitioner advances "facts . . . sufficient . . . to undermine the court's confidence in the jury's determination of guilt on the offense." Virtually identical language was employed subsequently in *Schlup*, where the Court explained that a habeas petitioner could get through the "gateway" if his "new facts raised sufficient doubt about guilt to undermine confidence in the result of the trial." 513 U.S. at 317. There is no indication that the ABA in 1990—or this Court five years later in *Schlup*—perceived any substantive difference between this phrasing and the "colorable claim" language employed elsewhere in both *Schlup* and the 1990 policy. It is simply another way of describing the standard of proof for an innocence claim in the death penalty habeas context.[23]

While the ABA does not recommend a particular standard of review for this Court, it urges the Court to adopt a standard that is robust enough to fairly evaluate nonfrivolous claims of innocence on their merits. The standard should be informed by the fact that conclusive proof of innocence may itself be hamstrung by the very flaws that led to the claimed erroneous conviction. A standard consistent with the policies advanced by in paragraphs 13 and 14 of the 1990 Capital Habeas Corpus Litigation policies would promote this goal.

As Justice Stevens explained for the Court in *Schlup*, innocence claims that actually meet the standard will be "rare"—yet the "compelling" interest "in avoiding injustice" will be met by not rejecting claims that show a probability of innocence. 513 U.S. at 321, 324. The standards adopted and

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[23] In 1997, after *Schlup* was decided, the ABA endorsed the 1990 policies when it adopted its Death Penalty Moratorium resolution. App. 8a-9a.

applied by this Court for modern-day innocence claims should fairly accommodate the dramatically changed criminal justice landscape revealed by recent "actual innocence" exonerations—a pattern of exonerations that was simply not appreciated at the time of *Herrera*, *Sawyer*, or *Schlup*.[24]

CONCLUSION

This Court should take into account the dramatically changed legal and factual landscape resulting from innocence exonerations that have become increasingly frequent in recent years in formulating and applying evidentiary standards for actual innocence claims. A robust standard should be adopted—one that acknowledges that new DNA testing may not have been available at the time of many state-court proceedings and that allows for the possibility that the very flaws that lead to erroneous convictions can also lead to shortcomings of proof subsequently in habeas proceedings. The ABA's Innocence Resolutions, Biological Evidence Principles, and 1990 Capital Habeas Corpus Litigation policies should be considered in this regard.

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[24] *See* 513 U.S. at 321-322 & n.36 (noting that no party had cited a proven "actual innocence" case and that, at that time (1995), the Court itself could find only two such decisions, indicating that valid actual innocence cases are "rare" and "extraordinary"). In addition to the path-breaking 1996 NIJ report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (Dep't of Justice 1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf, popular understanding and acceptance of the actual innocence phenomenon can be traced to James S. Leibman *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*" (Columbia University, 2000), *available at* http://ccjr.policy.net/proactive/newsroom/release.vtml?id=18200 and Barry Scheck, Peter Neufield & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongfully Convicted* (2000). Thus, the Death Penalty Information Center reports that the rate of death penalty exonerations almost tripled only recently, in the six-year period from 1998 to 2003. http://www.deathpenaltyinfo.org/article.php?did=412&scid=6. Today, while still uncommon, exonerations have become a well-recognized, if disturbing, facet of our criminal justice system.

Respectfully submitted,

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