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NOT ALL EVIDENCE IS THE SAME: HABEAS CORPUS AND ACTUAL INNOCENCE. A PRACTICALLY UNUSABLE EXCEPTION FOR FUNDAMENTAL MISCARRIAGES OF JUSTICE?

Samantha C. Olexa*

For many, being convicted of a crime they did not commit would be a living and breathing nightmare. However, for some American prisoners, that nightmare is an unfortunate reality. Although reform focused on how an innocent individual came to be wrongfully convicted—via prosecutorial inaccuracies, forensic and eyewitness errors, jailhouse informants, forced confessions and inadequate representation—and how to prevent it in the future has seen success in recent years, the American legal system continues to fail those currently incarcerated trying to prove their innocence. When seeking habeas relief, the utmost hurdle in proving actual innocence is what type of "new" evidence should be used in order for the actual innocence gateway exception to apply. Defining what constitutes "new" evidence in this context has caused a significant split, causing circuits to apply either a newly presented *or newly* discovered *standard. However, implementing yet another barrier to actual innocence claims under the newly discovered view directly contradicts the intended purpose of the innocence gateway and thus, this Article explores and promotes unilateral application of the newly presented standard.*

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INTRODUCTION

Executing an individual who can show his innocence comes dangerously close to murder.[1] While convicting the innocent may seem like a vicious nightmare, it instead is an unfortunate reality in the American legal system.[2] Largely a product of police and prosecutorial inaccuracies, forensic

[1] Herrera v. Collins, 506 U.S. 390, 446 (1993) (Blackman, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder.").

[2] Gwynn X. Kinsey Jr., *Post-Trial Claims of Actual Innocence*, 28 MD. BAR J. 15, 15–16 (1995); United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.").

and eyewitness errors, jailhouse informants, and false confessions,[3] the American legal system is often "haunted by the ghost of the innocent man convicted."[4] However, a prisoner may claim his "actual innocence" meaning, under the law, the individual has been convicted of a crime he in fact did not commit.[5] Still, the public—as well as the court system—habitually greets actual innocence claims with frightful skepticism, rarely resulting in prisoner relief.[6] Rather, placing strong emphasis on finality and comity, federal habeas law places considerable burdens on prisoners trying to set aside wrongful convictions.[7] Emphasis on these principles create a variety of "procedural hurdles for prisoners seeking federal habeas relief,"[8] making it astonishingly difficult—and often impossible—for the innocent man to reclaim his freedom.[9] Although actual innocence cases only consume a small portion of total exonerations in the United States, a terrifying inference is created, that "actual innocence" is not a legally recognizable basis "for overturning a wrongful conviction"—puncturing the very fabric of justice by denying a truly innocent person absolution under the law.[10]

One of the most prominent hurdles for prisoners seeking habeas relief, however, is what type of "new" evidence can be used to prove actual innocence.[11] While the prisoner must present "new, reliable evidence," the Supreme Court has failed to define whether new, reliable evidence includes, simply, *all* evidence not presented at trial, or only evidence that, with appropriate due diligence, is newly *discovered*.[12]

This Article addresses the application of the actual innocence gateway exception to federal habeas corpus claims, otherwise time barred under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) one year

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[3] Clanitra Stewart Nejdl & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography*, 37 N. ILL. UNIV. L. REV. 401, 401 (2017).

[4] Kinsey, *supra* note 2, at 15 (quoting *Garsson*, 291 F. at 649).

[5] Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, 34 LITIG. 35, 35 (2008).

[6] *Id.*

[7] *Id.* at 37.

[8] *Id.*

[9] Jonathan Potts, Charles Weiss & Stephen Snodgrass, *Federal Habeas Corpus Review is Broken*, 47 LITIG. 34, 34–40 (2021).

[10] *Id.* at 36.

[11] Rodriguez & Atlas, *supra* note 5, at 38.

[12] *Id*.

statute of limitations,[13] and will (1) review the actual innocence gateway and prominence of wrongful convictions in Part I; (2) examine the current circuit split between the newly presented and newly discovered standard of evidence in an actual innocence claim in Part II; and (3) explore the solution that courts should broadly adopt the newly presented standard in Part III. Thus, this Article rejects implementation of yet *another* barrier to prisoners claiming actual innocence under the newly discovered view, setting forth an additional requirement of due diligence, because it directly contradicts the intended purpose of the innocence gateway.

I. BACKGROUND

Under 28 U.S.C. § 2255, a federal prisoner can file a motion to be released "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States," known as a habeas motion.[14] For a prisoner's second or successive motion to be heard, there must be new evidence "sufficient to establish by clear and convincing evidence that no reasonable jury would have found the movant guilty."[15] Further, because the prisoner has already been convicted of the contested crime, habeas petitioners no longer enjoy a presumption of innocence.[16] Thus, a prisoner is confronted with the difficult task—especially while behind bars—of obtaining the evidence necessary to prove their innocence, all while being faced with a high burden of proof.[17] Although a one-year statute of limitations is typically imposed on this type of claim,[18] the actual innocence gateway allows petitioners to overcome this, and file after the statute of limitations has expired, because the risk of a miscarriage of justice—the imprisonment of an innocent person—is so substantial.[19]

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[13] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 101, 110 Stat. 1214, 1217.

[14] 28 U.S.C. § 2255(a) (as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 105, 110 Stat. 1214, 1220).

[15] § 2255(h)(1).

[16] *See* § 2255(a) (applying the habeas statute to a "prisoner in custody under a sentence of a court").

[17] *See id.*; § 2255(h)(1).

[18] § 2255(f).

[19] Brandon Sample, *Actual Innocence Can Overcome § 2255 Statute of Limitations*, 2255 MOTION, (Jan. 28, 2022), https://2255motion.com/actual-innocence-%C2%A72255-statute-limitations [https://perma.cc/RG85-7A9Q].

Critically, many prisoners who bring habeas petitions are on death row, and it is their final chance to prove their innocence, and, if successful, prevent their own death.[20]

A. WRONGFUL CONVICTIONS GENERALLY

Although difficult to digest, a shocking number of innocent individuals have been convicted of crimes they did not commit. In fact, approximately 2,800 individuals have been exonerated since 1989.[21] Such wrongful convictions are a result of significant errors such as: (1) eyewitness misidentification; (2) false confessions; (3) misapplication of forensic science; (4) unreliable jailhouse informant testimony; and (5) inadequate defense.[22] Moreover, jury verdicts in wrongful conviction cases are often based on "eyewitness accounts or deductions by witnesses from their perceived recollections, with little or no definitive, objectively verifiable, or scientific evidence."[23] Not only are eyewitness accounts often inaccurate, they can also unintentionally be based on faulty recollections.[24] Indeed, a study found erroneous eyewitness identification was the leading cause (79%) of wrongful convictions.[25]

The consequences of wrongful convictions are colossal, affecting not only the innocent prisoner, but also the victims, their loved ones, the general

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[20] Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 676 (2008).

[21] *Missouri Enacts New Mechanism for Prosecutors to Address Wrongful Convictions*, EQUAL JUST. INITIATIVE (Nov. 23, 2021), https://eji.org/news/missouri-enacts-new-mechanism-for-prosecutors-to-address-wrongful-convictions [https://perma.cc/H7M5-Q3BV].

[22] Greg Stratton, *Wrongfully Convicting the Innocent: A State Crime?*, 23 CRITICAL CRIMINOLOGY 21, 22 (2015) ("Common causes of wrongful conviction include misleading eyewitness testimony, false or coerced confessions, investigator tunnel vision, prosecutorial misconduct, and a combination of systemic issues that allow for the oversight of key evidence."); *The Causes of Wrongful Convictions*, INNOCENCE PROJECT (last visited Oct. 23, 2022) https://innocenceproject.org/causes-wrongful-conviction [https://perma.cc/TBF5-XBZ4] .

[23] Rodriguez & Atlas, *supra* note 5, at 36.

[24] *Id.*

[25] *Id.* (citing Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES (July 23, 2007), https://www.nytimes.com/2007/07/23/us/23bar.html [https://perma.cc/U5EZ-MF8T]).

public, and the American legal system itself.[26] Perhaps the most horrific damage done is that to the innocent offender, who has years of their lives stolen from them while being imprisoned for a crime they did not commit. Years behind bars, coupled with the inevitable violence occurring in prisons, is a nightmare many cannot fathom. Rather, while the plague of violence behind bars is frequently overlooked, many compare the traumatic events occurring in prisons, affecting both health and social functions, akin to "the aftereffects faced by survivors of direct violence and war."[27]

B. REAL-LIFE IMPACT OF WRONGFUL CONVICTIONS

1. Kenneth Waters

A profound example of this is the case of Kenneth Waters, a Massachusetts man wrongly convicted of murder in 1983.[28] Despite being initially excluded as a suspect because his fingerprints did not match the evidence, the case against Kenneth relied heavily on what was later determined to be false testimony of three witnesses and a misstatement of his blood type in reference to blood found at the crime scene.[29] After being sentenced to life in prison, Kenneth's sister Betty Anne sought to prove his innocence by obtaining her college degree and graduating from law school.[30] After years of searching for allegedly destroyed DNA evidence, Betty Anne located the DNA that proved Kenneth's innocence, resulting in his release.[31] Even so, after being imprisoned eighteen years for a crime he did not commit,

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[26] *See generally* Seri Irazola, Erin Williamson, Julie Stricker & Emily Niedzwieski, *Addressing the Impact of Wrongful Convictions on Crime Victims*, 274 NAT'L INST. JUST. J. (2014), https://nij.ojp.gov/topics/articles/addressing-impact-wrongful-convictions-crime-victims [https://perma.cc/N6LS-ZYJV].

[27] Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence [https://perma.cc/22S2-SAFX].

[28] *Kenny Waters*, INNOCENCE PROJECT, (Jan. 28, 2022), https://innocenceproject.org/cases/kenny-waters/ [https://perma.cc/ULP2-66W6].

[29] *Kenneth Waters*, NAT'L REGISTRY OF EXONERATIONS (March 18, 2020) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3722 [https://perma.cc/G2W7-B9YY] ("Investigators had found Type O and Type B blood at the crime scene. Brow was Type B, leading to the hypothesis that the killer was Type O and had been wounded during the struggle. When police had questioned Waters the day of the murder, they had found no wounds on his body. Waters and Brow's husband and son were all Type O, and a forensic scientist testified that Type O was found in 48 percent of the population.").

[30] *Kenny Waters*, *supra* note 28.

[31] *Id.*

Kenneth passed away six months after being released.[32] In his honor, Betty Anne continues to assist in wrongful conviction cases with the Innocence Project.[33]

2. Fontenot v. Crow *(2021)*

Similarly, with almost no evidence connecting him to the crime, Karl Allen Fontenot spent over thirty years in prison for the kidnapping, robbery, and murder of an Oklahoma woman—a crime he did not commit.[34] After being tried and found guilty twice, Fontenot made his last attempt at freedom, petitioning for habeas relief under the actual innocence gateway after the state suppressed favorable material evidence known to the state, but never disclosed to Fontenot's lawyer.[35] Unlike many other innocent prisoners, the district court granted Fontenot habeas relief and the United States Court of Appeals for the Tenth Circuit affirmed the district court ruling to "prevent the further perpetuation of a fundamental miscarriage of justice."[36]

Although the actual innocence exception exists to combat decades of errors in the criminal justice system—and acts as a prisoner's last resort to freedom—the federal circuit courts have long debated the type of evidence required to bring a claim for actual innocence.

II. CIRCUIT SPLIT

A. *SCHLUP V. DELO* (1995)

As the Supreme Court explained in *Schlup v. Delo*, for a claim of actual innocence to be credible, a petitioner must present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial."[37] Further, the Court will consider all evidence, regardless of whether it would necessarily have been admitted at trial, including evidence that may have been illegally admitted, and evidence that was "wrongly excluded or

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[32] *Id*.

[33] Decca Aitkenhead, *Betty Anne Waters: 'We Thought Kenny was Coming Home'*, GUARDIAN (Dec. 10, 2010), https://www.theguardian.com/film/2010/dec/11/betty-anne-waters-interview [https://perma.cc/W87S-V3KW].

[34] Fontenot v. Crow, 4 F.4th 982, 992 (10th Cir. 2021).

[35] *Id*.

[36] *Id*.

[37] Schlup v. Delo, 513 U.S. 298, 324 (1995).

[became] available only *after* the trial."[38] In light of this new evidence, prisoners asserting actual innocence claims also must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[39] Thus, evidence—old and new—will be viewed as whole, and a court will determine the effect on reasonable jurors by applying the reasonable doubt standard.[40] The *Schlup* Court reasoned that this process would ensure the prisoner's case be genuinely "'extraordinary,' . . . while still providing the petitioner a meaningful avenue by which to avoid a manifest injustice."[41]

What the Supreme Court failed to do in *Schlup v. Delo* was distinguish what "*new reliable evidence that was not presented*" at trial precisely meant.[42] Unsurprisingly, this has led to a significant circuit court split, leaving lower courts to define new reliable evidence as either (1) newly *discovered* evidence that was not available at the time of trial; or (2) newly *presented* evidence that was not shown at trial.[43] The difference between these two definitions, while seemingly similar, is far from trivial. Rather, newly *discovered* evidence not available at the time of trial would only include evidence that could not have been discovered through due diligence at the time of trial, whereas newly *presented* evidence is more expansive, encompassing any and all evidence that was not presented at trial.[44] Thus, under the strict newly discovered standard, evidence cannot be defined as "new" unless it was beyond the reach of the petitioner's "personal knowledge or reasonable investigation" at the time of trial.[45] Simply put, newly presented evidence is a broader standard for petitioners to meet and newly discovered evidence is more difficult.[46]

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[38] *Id*. at 328 (emphasis added).

[39] *Id.* at 327; House v. Bell, 547 U.S. 518, 536–37 (2006) (quoting *Schlup*, 513 U.S. at 327).

[40] *Fontenot*, 4 F.4th at 1032.

[41] *Schlup*, 513 U.S. at 327 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)); *see also House*, 547 U.S. at 537.

[42] *See Schlup*, 513 U.S. at 298.

[43] *Fontenot*, 4 F.4th at 1032.

[44] *Id.*

[45] *Id*.

[46] Case, *supra* note 20, at 690.

B. *MCQUIGGIN V. PERKINS* (2013)

Almost twenty years after *Schlup v. Delo,* the Supreme Court dealt once again with an actual innocence case in *McQuiggin v. Perkins*.[47] The Court held that a successful actual innocence claim allows a habeas petitioner's claim to be heard in federal court, even after the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations has run.[48] Signed into law by President Clinton in 1996, shortly after *Schlup v. Delo,* AEDPA was an attempt to lessen the number of habeas motions flooding courts by adding a harsh one-year restriction for habeas relief, hoping to speed up the death penalty and reduce terrorism.[49] Theorizing that a quick review of constitutional errors improves accuracy and finality of state court judgments as well, AEDPA required state prisoners to file habeas challenges to state convictions within one year of the final judgment.[50]

A one-year limitation for habeas relief, however, can be extremely detrimental to prisoners whose convictions date back years, or even decades. This is because errors leading to wrongful convictions[51] were especially prominent prior to the contemporary innocence revolution and DNA testing, with the errors occurring between the 1920s and 1990s.[52] For example, in *McQuiggin v. Perkins*, a jury convicted Perkins of first-degree murder and sentenced him to life in prison without the possibility of parole in 1993.[53] Although he asserted three affidavits as newly discovered evidence showing another person committed the murder, in 2008, the district court denied him habeas relief, in part, because of the amount of time that had lapsed since Perkins' conviction, as well as the date of the most recent affidavit, which allegedly showed a lack of "necessary diligence in exercising his rights."[54]

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[47] McQuiggin v. Perkins, 569 U.S. 383 (2013).

[48] *Id*. at 392–98.

[49] Dale Chappell, *25 Years of the AEDPA: Where do We Stand?* PRISON LEGAL NEWS (June 2021), https://www.prisonlegalnews.org/news/2021/jun/1/25-years-aedpa-where-do-we-stand/ [https://perma.cc/254W-X92L].

[50] Rodriguez & Atlas, *supra* note 5, at 39.

[51] *See supra*, Part I.A.

[52] Joshua A. Jones, *Wrongful Conviction in the American Judicial Process: History, Scope, and Analysis*, INQUIRIES JOURNAL (2012), http://www.inquiriesjournal.com/articles/682/wrongful-conviction-in-the-american-judicial-process-history-scope-and-analysis [https://perma.cc/MAH4-2XR7].

[53] McQuiggin v. Perkins, 569 U.S. 383, 388 (2013).

[54] *Id*. at 390.

On appeal, the Supreme Court explained that a lack of diligence was not a standalone requirement for relief in overcoming AEDPA's statute of limitations, but instead was simply one consideration in evaluating the overall sufficiency of an actual innocence claim.[55] Despite this, Perkins was unsuccessful—as many are—because the affidavits were insufficient to prove that a reasonable jury would not have convicted him.[56] Thus, while he won the battle to overcome AEDPA's statute of limitations, he lost his claim of actual innocence. However, while critics of AEDPA believe that the Act unnecessarily and even unconstitutionally obstructs prisoners' access to the habeas remedy, the "actual innocence gateway" seems to have successfully steamrolled over the time constraints, allowing possibly wrongfully convicted prisoners to overcome the one-year restriction for habeas relief.[57]

C. "NEWLY PRESENTED" VS. "NEWLY DISCOVERED" EVIDENCE

1. "Newly Presented" Evidence

Recently in *Fontenot*, the Tenth Circuit adopted the broader newly *presented* view, joining the Second, Sixth, Seventh, and Ninth Circuits, creating a five-to-one majority against the stricter, newly *discovered* view.[58] In explaining its decision, the *Fontenot* Court reasoned that requiring a petitioner to show he could not have discovered the new evidence through proper due diligence at the time of trial would, in fact, add a procedural obstacle to having his claim heard.[59] Further, the addition of this procedural obstacle would run afoul of the purpose of the actual innocence gateway, which aims to *remove* procedural obstacles to habeas relief, and does not require a showing of due diligence to have the otherwise time-barred claim heard.[60] Similarly, the additional due diligence requirement would be in direct conflict with the purpose of the miscarriage of justice exception, which

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[55] *Id*. at 398–99 ("Considering a petitioner's diligence , . . . as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence.")

[56] *Id*. at 400–01.

[57] *See* Jonathan Potts, Charles Weiss & Stephen Snodgrass, *Federal Habeas Corpus Review Is Broken*, 47 LITIG. 34 (2021).

[58] Fontenot v. Crow, 4 F.4th 982, 1032 (10th Cir. 2021); Case, *supra* note 20, at 679–81 (explaining that the Second, Sixth, Seventh, and Ninth Circuits adopted the newly presented view, and the Third, Fifth, and Eighth Circuits adopted the newly discovered view).

[59] *Fontenot*, 4 F.4th at 1032–33.

[60] *Id*. at 1032.

serves as an "unconditional safety net to ensure that constitutional claims receive consideration in the 'extraordinary' case."[61] Thus, in forbidding new evidence because the petitioner could not show due diligence, the equitable discretion of habeas courts would be critically hindered, greatly reducing a court's ability to locate federal constitutional errors resulting in the incarceration of the innocent and placing a barrier where it does not belong.[62]

The *Fontenot* Court also reasoned that the petitioner's evidence is required to lend credibility to his claim of innocence, and does not rely solely on evidence that a jury already found sufficient to convict.[63] Rather, due diligence of the petitioner at the time of trial is outside of the scope and principle point of avoiding a manifest injustice, and the risk of a flood of meritless claims is mitigated by the fact that new reliable evidence is unavailable in most cases and successful claims of actual innocence are rare.[64] Thus, avoiding a manifest injustice—not to mention the myriad of negativity in the public view of the law and criminal justice system each time an innocent person is released—is worth the risk of meritless claims because if there is even a chance a prisoner's actual innocence claim is legitimate, courts should not unreasonably restrict petitioners from arguing the merits of their case.

2. "Newly Discovered" Evidence

In opposition to sister courts, the Third, Fifth, and Eighth Circuits have held that evidence is only new "if it was not available at the time of trial through the exercise of due diligence."[65] Mainly, the minority view is that *if* the evidence was always within reach of the petitioner's "personal knowledge or reasonable investigation," then it fails to qualify as new under *Schlup*.[66] In reviewing *Schlup*, proponents of the newly discovered evidence standard theorize that because the Court used the words "new reliable evidence . . . that was not presented at trial," the use of both "new" and "not presented at trial" would be redundant had the Court meant "newly

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[61] *Id*. at 1033 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

[62] *Id*.

[63] *Id.*

[64] *Id*.

[65] *Id.* at 1032; Kidd v. Norman, 651 F.3d 947, 952 (8th Cir. 2011); Hubbard v. Pinchak, 378 F.3d 333, 341 (3d Cir. 2004).

[66] Fontenot v. Crow, 4 F.4th 982, 1032 (10th Cir. 2021); Hancock v. Davis, 906 F.3d 387, 389–90 (5th Cir. 2018); Moore v. Quarterman, 534 F.3d 454, 465 (5th Cir. 2008).

presented."[67] However, removing the text between "new reliable evidence" and "not presented at trial" is critical, as it alters the context of the Court's discussion. Rather, the full sentence reads:

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.[68]

Viewing the sentence in its entirety, a more reasonable interpretation of what the Court meant is that new reliable evidence includes "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," that was not presented at trial.[69] Similarly, had the Court intended to limit the definition of "new reliable evidence," they were more than capable—in a twenty-one-page opinion—to describe this evidentiary restriction, but did not.

The Third Circuit, in *Wallace v. Superintendent Mahanoy SCI*, defined "new" evidence for actual innocence purposes as "evidence includ[ing] both newly discovered evidence as well as exculpatory evidence that counsel failed to discover or present at trial."[70] Additionally, if the petitioner is also asserting ineffective assistance of counsel, evidence that counsel failed "to discover or present to the fact-finder the very exculpatory evidence [demonstrating] his actual innocence . . . constitutes new evidence for purposes of the *Schlup* actual innocence gateway."[71] However, this may deny petitioners evidence that was not presented at trial, by no fault of counsel or the petitioner—such as in cases where the prosecution suppressed evidence—especially when it is difficult to prove that the evidence could not have been found through the exercise of due diligence. This additional hurdle of due diligence, while it may seem trivial, is crucial due to the multitude of wrongful convictions stemming from older cases, where showing due diligence can be incredibly difficult simply due to the amount of time passed. Thus, had *Fontenot* been decided prior to the innocence movement and under the minority view using the *newly discovered* standard, Fontenot would

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[67] Case, *supra* note 20, at 687.

[68] Schlup v. Delo, 513 U.S. 298, 324 (1995).

[69] *Id.*

[70] Wallace v. Superintendent Mahanoy SCI, 2 F.4th 133, 152 (3d Cir. 2021).

[71] *Id.*

continue to be behind bars—after thirty years—for a crime he did not commit.

3. Fontenot *Dissent*

The dissenting opinion in *Fontenot*, seemingly mocking the majority opinion's lengthy discussion of case evidence, brings to light a few other concerns regarding the thin line between applying the "no reasonable juror" standard with evidence that—while considered new—can be peripheral or based on recollections that are three decades old.[72] The ideal result then, according to the dissent, would be that a reasonable juror would take those evidentiary weaknesses into consideration and, therefore, still may convict.[73] This time-based argument, however, is a deteriorating one. Specifically, the two pieces of evidence at issue for the dissent's argument are two affidavits, written nearly three decades after original testimony, which claim that reasonable jurors would discount both affidavits because the amount of time that has lapsed resulted in their unreliability.[74] This, however, is not the only evidence to be considered.

The dissent continues, alleging the majority's view of the evidence is based mostly on unreasonable inferences, and—taking the *Schlup* Court's words at face value—interprets "new reliable evidence" quite differently.[75] Rather, the dissent, quoting *Schlup*, states that Fontenot needed to "present 'new reliable evidence—whether it be *exculpatory* scientific evidence, *trustworthy* eyewitness accounts, or *critical* physical evidence—that was not presented at trial,'" but had not done so because he had not shown any exculpatory scientific or physical evidence, nor had he presented—what the dissent deemed to be—trustworthy eyewitness accounts.[76] In other words, Fontenot's new evidence did not *word-for-word* meet the quoted description of new reliable evidence; and was over emphasized, based on unreasonable inferences.[77]

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[72] Fontenot v. Crow, 4 F.4th 982, 1083 (10th Cir. 2021) (Eid, J., dissenting) ("The majority does a meticulous job of recounting the evidence in this case, and it states that it is applying the 'no reasonable juror' standard. Yet in practice it views the evidence in the light most favorable to Fontenot, failing to account for the reality that the relevant new evidence is either peripheral, cumulative of trial evidence, or based on recollections that are three decades old.").

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995).

[77] *Id.* at 1084.

In contrast, what the dissenting opinion fails to recognize is how unrealistic it would be for courts to heavily emphasize the amount of time that has lapsed in these cases; namely due to the large majority of wrongful convictions occurring decades ago. Thus, if timing were to be such a prominent factor, courts would further bury their own mistakes by casting doubt on older evidence, therefore perpetuating the long-term problem of wrongful convictions. In other words, it would be counterproductive to the actual innocence gateway to penalize prisoners who have no control over the timeframe of their convictions and imprisonment. Rather, it would push the public to believe that American courts refuse to admit past mistakes and intend to hide those mistakes by casting a shadow on older evidence in actual innocence claims, especially considering how rarely prosecutors, judges and police are held accountable for misconduct leading to wrongful convictions.[78] In fact, only four percent of prosecutors involved in wrongful convictions are disciplined for their involvement.[79] Even more significant is society's increasing support of the innocence movement due to the overwhelming success of wrongful conviction narratives extracting emotional reactions from the public and wavering trust in the entire justice system.[80]

Furthermore, when deciding whether or not a reasonable juror would have found a defendant guilty, a court must look at the old evidence in light of the new evidence, and not the new evidence alone. Rather, "the standard requires the . . . court to make a probabilistic determination about what reasonable, properly instructed jurors would do," and therefore, focuses on

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[78] *Official Indifference*, EQUAL JUST. INITIATIVE (Aug. 27, 2022), https://eji.org/issues/wrongful-convictions [https://perma.cc/KSV2-4S5Y].

[79] Tom Jackman, *More Than Half of All Wrongful Criminal Convictions are Caused by Government Misconduct, Study Finds*, WASH. POST (Sept. 16, 2020), https://www.washingtonpost.com/crime-law/2020/09/16/more-than-half-all-wrongful-criminal-convictions-caused-by-government-misconduct-study-finds [https://perma.cc/F7FH-RSQ6] ("The [2019 National Registry of Exonerations] study also found that police and prosecutors are rarely disciplined for actions that lead to a wrongful conviction. Researchers found that four percent of prosecutors involved in those convictions were disciplined, but the penalties were 'comparatively mild' and only three were disbarred.").

[80] *Public Opinion on Wrongful Convictions Swayed by Entertainment Series, Study Finds*, U. KAN. (June 24, 2019), https://today.ku.edu/2019/06/24/public-opinion-wrongful-convictions-swayed-entertainment-series-study-finds-1 [https://perma.cc/3LNX-D6UJ]. Assistant Professor of Political Science, Kevin Mullinix, who co-authored the study, said, "When we give people numbers about a society, they think broadly, and it impacts things like their trust in the justice system. . . . When we give them a narrative such as 'When They See Us' that elicits emotional reactions, they get concerned and actively want change." *Id*.

all evidence presented.[81] In other words, an actual innocence finding "requires a holistic judgment about 'all the evidence' . . . and its likely effect on reasonable jurors applying the reasonable-doubt standard."[82] Thus—focusing on the total evidentiary record—while some of the new evidence may not be conclusive of innocence, it nevertheless may, in combination with all other evidence, be sufficient for a court to determine no reasonable juror would find the prisoner guilty beyond a reasonable doubt.[83]

Finally, the dissent's static interpretation of "new reliable evidence" is also flawed.[84] In unnecessarily limiting its scope to the three categories of "exculpatory scientific evidence, trustworthy eyewitness accounts, [and] critical physical evidence," the dissent's narrow interpretation relies on further defining "trustworthy eyewitness accounts," and indicates the absence of new reliable physical evidence.[85] First, it is unrealistic to deem recent affidavits to be untrustworthy solely due to the amount of time that has passed since trial.[86] Rather, it is more reasonable to assume that the inclusion of "trustworthy" refers to the credibility of the individual writing the affidavit. Second, it is even more unrealistic to add an additional restriction to new reliable evidence to require physical evidence, as for many cases—namely ones that occurred decades ago—physical evidence will not reveal itself years later, essentially making the actual innocence gateway irrelevant.

4. Meritless Claims

Another alleged advantage expressed by proponents of the stricter newly discovered standard is the perception that it would limit the amount of frivolous habeas motions filed, which would otherwise delay "the administration of justice, prevent[] the finalization of verdicts, frustrate[] federal-state relations, and undermine[] public confidence in the criminal justice process."[87] However, while such policy concerns are important, to

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[81] *Fontenot*, 4 F.4th at 1030.

[82] House v. Bell, 547 U.S. 518, 539 (2006) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970)).

[83] *Id.*

[84] *Fontenot*, 4 F.4th at 1084 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

[85] *Fontenot*, 4 F.4th at 1084–85 (emphasis omitted).

[86] *See id.*

[87] Case, *supra* note 20, at 688 (quoting Mark M. Oh, Note, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo*'s Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2342 (1998)).

state that the newly discovered standard would significantly reduce the amount of frivolous habeas motions is unfounded, as no numerical support exists showing how allowing newly presented evidence over newly discovered evidence would cause more frivolous filings. Rather, frivolous filings likely occur *regardless* of the standard employed, because it is a prisoner's last resort in seeking freedom—and sometimes avoiding death—and not because of changing evidence standards.[88] Similarly, if there already is a large number of frivolous petitions infecting circuits, who apply different standards, it is difficult to pin the blame on those circuits allowing newly presented evidence, rather than newly discovered.[89]

A somewhat more compelling argument is "the value of *finality* in criminal cases," and how broadening the standard to newly presented evidence for actual innocence claims may cause more prisoners to "file *numerous* habeas petitions," rather than frivolous ones.[90] However, these claims would still need to include new evidence—no matter which standard applies—which is easier said than done. Thus, while there may be more motions filed, the vast majority would not move past the initial filing stage, putting less of a burden on the court system.

While finality is of great importance, what is of far more importance is releasing wrongfully convicted prisoners. In reality, as Justice Stevens discussed in *Schlup*'s majority opinion, "[c]laims of actual innocence *pose less of a threat* to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty."[91] Instead, "the individual interest in avoiding injustice is most compelling in the context of actual innocence" and is of far greater interest.[92] This is further exemplified in public opinion, with over one million individuals supporting exonerations of the innocent through the Innocence Project,[93] overwhelming popularity of real life wrongful conviction cases

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[88] *See* Case, *supra* note 20, at 688 ("Recently, the volume of habeas petitions in federal courthouses has increased greatly because of petitioners filing a large number of frivolous petitions for habeas relief.").

[89] *See* cases cited *infra* note 63 (identifying circuits allowing newly discovered evidence); *infra* note 56 (identifying circuits allowing newly presented evidence).

[90] *Id*. at 692 (emphasis added).

[91] Schlup v. Delo, 513 U.S. 298, 324 (1995) (emphasis added).

[92] *Id*.

[93] *Get Involved*, INNOCENCE PROJECT, https://innocenceproject.org/getinvolved/ [https://perma.cc/Y9JH-M7RL] ("Join a movement of 1,000,000+ supporters on a mission toward criminal justice reform.").

brought to the screen,[94] and a majority believing that innocent individuals are imprisoned frequently enough to justify extensive criminal justice reform.[95]

Once again, in the face of a possible miscarriage of justice, finality is often of less importance. Rather, the mere existence of the actual innocence exception exemplifies the importance and willingness of the Supreme Court to correct convictions that would otherwise be unjust.[96]

5. Diminished Incentive

Another deteriorating argument against the application of newly presented evidence is that technological advances "significantly diminish any need for a 'newly presented' standard of evidence," because evidence that was *truly* missed would qualify under the newly discovered standard.[97] While technological advances may aid petitioners who were more recently convicted, such advances may not aid petitioners convicted prior to those advancements, such as the petitioner in *Fontenot*.[98] Additionally, proponents of newly discovered evidence claim that if evidence "is available or should be available at the time of trial," the defense should not wait to use that evidence in a motion for habeas relief.[99] However, it is unreasonable to assert that, more often than not, the defense would purposefully hide evidence with the intention to use it in habeas review instead.[100] Rather, there are far more

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[94] *See Public Opinion on Wrongful Convictions Swayed by Entertainment Series, Study Finds*, *supra* note 78. *See Must-See Films and TV Episodes on Wrongful Convictions*, INNOCENCE PROJECT, https://innocenceproject.org/must-see-films-and-tv-episodes-on-wrongful-convictions [https://perma.cc/6KUN-6KAR].

[95] Marvin Zalman, Matthew J. Larson & Brad Smith, *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. 51, 60 (2012) ("The majority, 404 of the 704 respondents (57.4%), believed that wrongful conviction happens frequently enough to justify major changes.").

[96] *Schlup*, 513 U.S. at 320–21.

[97] Case, *supra* note 20, at 689.

[98] *See* Fontenot v. Crow, 4 F.4th 982 (10th Cir. 2021); *Non-DNA cases: What happens if there is no DNA to test?*, Justice Brandeis Law Project, https://www.brandeis.edu/investigate/innocence-project/what-happens-when-there-is-no-dna.html [https://perma.cc/72DS-G336] ("Many experts say that DNA testing is not an option in the majority of cases in which people may claim to be innocent—evidence may have been lost, destroyed, or never collected or left in the first place.").

[99] *See* Case, *supra* note 20, at 689–90.

[100] *See Inadequate Defense*, INNOCENCE PROJECT, https://innocenceproject.org/causes/inadequate-defense/ [https://perma.cc/4VGP-STG2] (Defense attorneys linked to wrongful conviction are not purposely hiding evidence, but may fail to "investigate, call witnesses or prepare for trial has led to the conviction of innocent people.").

practical explanations as to why evidence is not presented at trial, such as—whether intentional or not—evidentiary suppression by the prosecution.[101]

In addition, some maintain that the trial court is in a far better position than a judge on habeas review to examine evidence.[102] While this may be true, a judge examining evidence for a habeas motion will do so, no matter which standard applies.[103] Whether it is evidence newly discovered or newly presented, both standards would encompass *new* evidence that the trial court had not examined. In other words, the sole purpose of habeas review is that a judge should review the *new* evidence in addition to the evidence already presented at trial; therefore, one standard over another does not alter the judge's position in review.

6. The Supreme Court

In both key Supreme Court cases regarding the actual innocence gateway, *Schlup* and *House v. Bell*, the evidence presented was newly discovered rather than newly presented.[104] Therefore, the Court failed to distinguish between newly discovered and newly presented evidence because that discussion was not pertinent to those cases.[105] However, it is important to note that Justice Stevens used the word "presented" rather than "discovered" in *Schlup*, thus allowing for a reasonable inference that—although not expressly defined—Justice Stevens' word choice was purposeful.[106] Contrastingly, Justice O'Connor's concurring opinion in *Schlup* suggests the opposite, as she used the term "discovered" rather than "presented."[107] However, the majority opinion also emphasized Judge Friendly's thoughts regarding habeas, claiming that the "habeas court must make its determination concerning the petitioner's innocence '*in light of all*

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[101] *See* Peter A. Joy, *Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006).

[102] *Id.* at 690 (citing House v. Bell, 547 U.S. 518, 557 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("A more restrictive standard makes certain that the defendant presents all of his evidence to the trial court, which is the most appropriate stage for factfinding. There is a strong argument that a trial court is in a better position to examine evidence than a judge on habeas review.").

[103] *See Fontenot*, 4 F.4th 982.

[104] *See Schlup*, 513 U.S. at 307–13; *House*, 547 U.S. at 534–36; Jay Nelson, *Facing Up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 HASTINGS L.J. 711, 718 (2007).

[105] Nelson, *supra* note 104, at 718.

[106] *Id.* (quoting *Schlup*, 513 U.S. at 324).

[107] *Id.* (quoting *Schlup*, 513 U.S. at 332 (O'Connor, J., concurring)).

the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial.'"[108]

Despite the lack of guidance from the Supreme Court, the newly presented evidence standard properly aligns with the overall purpose of the actual innocence gateway, while the limited newly discovered standard runs afoul of it.[109] Indeed, the prominence of wrongful convictions compels implementation of the newly presented evidence standard.[110] Requiring petitioners only to present newly discovered evidence after conviction is not only impractical, but also may result in the law not being able to clean up its own mess, thereby risking innocent prisoners living their very own nightmare behind bars. Simply put, expecting dishonest law enforcement officials, ineffective lawyers, unidentified guilty parties, or new witnesses to reveal themselves is unrealistic.[111]

Similarly, the unfortunate results of ineffective counsel have occurred more frequently than recognized, resulting from public defenders being overworked and underfunded.[112] In addition to ineffective counsel, many also attribute fault to prosecutors who refuse to "concede that misconduct-ridden convictions should be overturned . . . ."[113] Nevertheless, the key question is not who is to blame for the errors leading to wrongful convictions, but instead how the law can correct this harm, no matter *how* the wrongful conviction arose.

While rare, the severity of an individual being convicted of a crime they did not commit is obvious, shocking, and tragic.[114] Not only are decades of people's lives lost, but they are also isolated from their loved ones while at risk of both physical and sexual abuse in a prison they should never have

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[108] *Schlup*, 513 U.S. at 328 (emphasis added) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. Rev. 142, 160 (1970)).

[109] *See* Fontenot v. Crow, 4 F.4th 982, 1032-33 (10th Cir. 2021).

[110] Nelson, *supra* note 104, at 714, 722–23.

[111] *Id.* at 723.

[112] *Id.*; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1036 (2006).

[113] Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 328 (2016).

[114] Clare Gilbert, *Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem*, GA. INNOCENCE PROJECT (Feb. 1, 2022), https://www.georgiainnocenceproject.org/2022/02/01/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem [https://perma.cc/GQ8L-GHSK].

been placed in.[115] Indeed, "defendants have [collectively] spent more than 14,750 years in prison for crimes for which they should not have been convicted . . . ."[116]

Emotions aside, a 2015 study revealed that almost half of 1,600 exonerees between 1989 and 2015 were African American.[117] While African Americans only constitute thirteen percent of the American population, African Americans constitute forty-seven percent of exonerees listed in the National Registry of Exonerees as of October, 2016.[118] Sadly, innocent African Americans are seven times more likely to be convicted of murder than innocent Caucasians.[119] These staggering statistics sufficiently outweigh the possibility of embarrassment of prosecutors, defense attorneys, or law enforcement officers who, even if unintentionally, contributed to such convictions.

III. THE NEWLY *PRESENTED* EVIDENCE STANDARD SHOULD BE ADOPTED

A myriad of reasons suggest that courts should unanimously adopt the newly presented evidence standard. First and foremost, a plain language reading of *Schlup* in combination with the purpose of the actual innocence gateway, or the miscarriage of justice exception, reveals that any evidence not presented at trial can, and should, be used for an actual innocence claim.[120] Rather, as Justice Stevens described in *Schlup*, "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case,"[121] and "if a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . the petitioner should be allowed to pass through the gateway and argue the merits of his underlying

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[115] Bazelon, *supra* note 113, at 329.

[116] NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1600 EXONERATIONS 2 (2015), https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf [https://perma.cc/3BGG-DC79].

[117] *Id.*

[118] SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES, 1 (2017); Kristen Bialik, *5 Facts About Black Americans*, PEW RSCH. CTR. (Feb. 22, 2018) https://www.pewresearch.org/fact-tank/2018/02/22/5-facts-about-blacks-in-the-u-s/ [https://perma.cc/WLK3-PL94].

[119] Gross et al., *supra* note 118, at 3.

[120] *See* Schlup v. Delo, 513 U.S. 298 (1995).

[121] *Id.* at 324.

claims."[122] In other words, the focus should not be on whether due diligence was used at the time of trial to obtain the evidence, but rather, if we look at all of the evidence—old and new—should the prisoner be able to argue the merits of his actual innocence claim? Simply, if someone has evidence strongly showing they may have been wrongfully convicted, the courts should not deny such prisoner his day in court because the new evidence presented may have been discoverable at the time of the trial.

A. OVERALL RARITY OF APPLYING *EITHER* STANDARD

Tensions are high when trying to strike the proper balance between correcting past errors leading to actual innocence claims, with principles of finality and reduction of meritless claims; especially when courts are divided on allowing only newly discovered evidence rather than newly presented evidence.[123] However, as previously discussed, the fear of meritless claims should not hinder meritorious claims of innocence with newly presented, but not newly discovered, evidence.[124] Rather, even if "[t]he meritorious claims are few, . . . our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism . . . are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."[125] Similarly, what good is finality when the outcome is keeping a wrongfully convicted person in prison?

As seemingly rare as wrongful convictions may be[126]—mainly when compared to the 2,000,000 individuals currently in American prisons and jails[127]—the risk of continuing to imprison an innocent person or, more gravely, execute an innocent person, far outweighs the risk of meritless claims and finality. Once again, even if a prisoner's newly presented

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[122] *Id.* at 316.

[123] *See* cases cited *infra* note 63 (identifying circuits allowing newly discovered evidence); *infra* note 56 (identifying circuits allowing newly presented evidence).

[124] *See supra*, Part II.C.iv.

[125] Daniels v. Allen, 344 U.S. 443, 498 (1953).

[126] Clare Gilbert, Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem, GEORGIA INNOCENCE PROJECT (Feb. 1, 2022) https://www.georgiainnocenceproject.org/2022/02/01/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/ [https://perma.cc/L9K7-XAGH] ("Studies estimate that between 4-6% of people incarcerated in US prisons are actually innocent.").

[127] *Criminal Justice Facts*, SENTENCING PROJECT (Jan. 30, 2022), https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/ML95-44FT].

evidence is allowed, he still has other hurdles to overcome.[128] Thus, whether a prisoner shows newly presented or newly discovered evidence, the risk of meritless claims is still possible.

What is more important to note about rarity is precisely how uncommon newly presented evidence really is, leaving a court to only allow such evidence on a very finite amount of actual innocence claims.[129] Moreover, it is well established that the actual innocence exception applies to a "*severely* confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'"[130] Furthermore, the innocence movement of the 1990s not only coincided with clinical legal education growth,[131] but also paved the way for more than 2,500 exonerations,[132] optimistically limiting the number of prisoners still wrongfully convicted. Thus, the newly presented evidence standard would only be minimally applicable, due to the nature of the claim itself, as actual innocence is rare and applied only in extraordinary cases.[133] The rarity of these circumstances giving rise to the actual innocence gateway undermine its opponents' arguments of 'a flood of meritless claims' as exaggerations or overstatements.[134]

B. RISK OF FREEING THE GUILTY

While many in opposition may fear that allowing newly presented evidence over newly discovered evidence risks a guilty prisoner go free, this belief is unfounded. Rather, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. . . . reflected . . . in the 'fundamental value determination of

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[128] *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) ("[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.") (explaining how difficult it is to be successful in an actual innocence claim).

[129] Nelson, *supra* note 104, at 722–23.

[130] McQuiggin v. Perkins, 569 U.S. 383, 395 (2013) (emphasis added) (quoting *Schlup*, 513 U.S. at 329); House v. Bell, 547 U.S. 518, 536–37 (2006); Gunter v. Maloney, 291 F.3d 74, 83 (1st Cir. 2002).

[131] DANIEL S. MEDWED, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION 58–59, 117 (2017).

[132] *Research Resources*, INNOCENCE PROJECT, https://innocenceproject.org/research-resources [https://perma.cc/3DS8-KBW9] (Jan. 30, 2022).

[133] *See* Schlup v. Delo, 513 U.S. 298, 321 (1995); Awon v. United States, 308 F.3d 133, 143 (1st Cir. 2002).

[134] *See id.*

our society that *it is far worse to convict an innocent man than to let a guilty man go free*.'"[135] In other words, the "maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned."[136] Not to mention the rarity of new evidence presenting itself to the prisoner, as new evidence is exceptionally difficult to ascertain while behind bars, especially when coupled with limited means.[137] Thus, echoing Justice Stevens, because new reliable evidence is habitually unavailable in most cases and "claims of actual innocence are rarely successful,"[138] it would be counter-productive to the existence of the actual innocence gateway to further restrict the claim being heard by implementing an unforgiving and restrictive definition of new and reliable evidence.

Rather, proponents of the newly discovered standards' underlying objection to using the newly presented standard, seems to be that the prisoner *should have* discovered certain evidence at the time of trial, and presenting it later would be presenting inadmissible evidence that should not be allowed.[139] However, no matter which standard is applied, "the [c]ourt must consider all of the old and new evidence, both incriminating and exculpatory evidence, without regard to whether it would necessarily be admissible under the rules of evidence that would govern at a trial but with due regard to any unreliability of it."[140]

C. FEAR OF SHAME DOES NOT OUTWEIGH CORRECTING PAST ERRORS

Protecting those who had a hand, intentional or not, in a prisoner's wrongful conviction, does not outweigh the need to correct its occurrence. In fact, while many prosecutors accept responsibility for their own errors in the course of duty, many do not, sometimes actively delaying justice.[141]

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[135] *Schlup*, 513 U.S. at 325 (emphasis added) (quoting *In re* Winship, 397 U.S. 358, 372 (1970)).

[136] *Id*. (quoting THOMAS STARKIE, EVIDENCE 756 (1824)).

[137] *See* Nelson, *supra* note 104 at 722-23.

[138] *Id*. at 324.

[139] *See* Case, *supra* note 20.

[140] Brown v. Bauman, No. 2:10-cv-264, 2012 U.S. Dist. LEXIS 51546, at *12 (W.D. Mich. Apr. 12, 2012); *Schlup*, 513 U.S. at 328 ("The habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" (quoting Friendly, *supra* note 108, at 160)).

[141] Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 396 (2018).

Understandably, the emergence of judicial opinions publicly shaming prosecutors or defense attorneys for the part they played in a wrongful conviction can be embarrassing, but these measures are necessary.[142] This can be especially humiliating due to the rise of true crime podcasts and documentaries, now informing the public of attorneys violating ethical obligations, leading to convictions of the innocent.[143] However, the media's interest in wrongful convictions also showcases the efforts of good attorneys, working to correct wrongful convictions and upholding the profession's ethical obligations.[144]

Furthermore, it is reasonable to infer that, as the public becomes more concerned about wrongful convictions, the decision to apply the newly presented standard will become increasingly clear; in order to correct past errors leading to innocent prisoners, the court must allow all new evidence to be presented in an actual innocence claim. Recall that this is just the *first* hurdle a prisoner must overcome to even have the merits of their case heard. Even if a prisoner is successful in showing they have new evidence, the court also must determine whether all evidence—new and old—results in it being more likely than not that no reasonable juror would find the prisoner guilty beyond a reasonable doubt.[145] Thus, allowing only newly *discovered* evidence, requiring prisoners to show they could not have discovered the new evidence through proper due diligence at the time of trial, would add yet another procedural obstacle to having his claim heard.[146] Once again, this would only perpetuate the problem of innocent individuals being behind bars for a crime they did not commit. Essentially, the consequences of using the newly discovered standard could be detrimental to repairing wrongful convictions, making the actual innocence gateway inoperable and in turn, making innocence irrelevant.

D. DETERRENCE

Utilizing the newly presented evidence standard also leads opponents to question the effect on the incentive for judges, juries, and attorneys to put forth their best efforts to obtain the right outcome the first time, "if they know

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[142] *Id.* at 393.

[143] *Id.* at 394.

[144] *See id.* at 394, 450 n.469.

[145] *Infra*, Part I.

[146] Fontenot v. Crow, 4 F.4th 982, 1032–33 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2777 (2022).

the defendant will have multiple chances to correct a mistake later."[147] However, it is difficult to believe that the choice between allowing newly presented or newly discovered evidence attached to a postconviction claim of actual innocence would be prominent enough to deter court actors from giving their best efforts to the case at hand. Instead, some jurors—in the event they are even aware of actual innocence claims—may take solace in knowing if they convict an innocent person there is a pathway for the prisoner to take. Similarly, prosecutors and judges may be more ethical and cautious, due to fear of protentional personal shame and humiliation that may occur if the defendant is later exonerated. Thus, application of the newly presented standard may create more deterrence than originally anticipated.

E. DNA EVIDENCE

It is also important to note that for "a relatively small but important number of cases, DNA evidence has become the lynchpin for actual innocence claims."[148] Thankfully, new DNA evidence in actual innocence claims, no matter which standard applies, are often acceptable as new reliable evidence, as the technology was often unavailable at the time of trial.[149] However, DNA evidence cannot always be relied on to release the wrongfully convicted, despite what American television aims to portray.[150] Rather, in addition to being time consuming and expensive, "post-conviction DNA testing, more often than not, provides either inconclusive results or, in many cases, confirms the guilt of the prisoner seeking testing," creating yet another administrative burden on already over extended criminal justice systems.[151] Similarly, as in *House v. Bell*, production of DNA evidence does not always lead to "case[s] of *conclusive* exoneration."[152] Thus, DNA

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[147] Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, VAND. UNIV. L. SCH. 10, https://law.vanderbilt.edu/files/publications/King-CH13.pdf [https://perma.cc/5KDR-79GN].

[148] Rodriguez & Atlas, *supra* note 5, at 40.

[149] *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/3J9B-E29A].

[150] *Id*. ("An Innocence Project review of our closed cases from 2004 – June 2015 revealed that 29% of cases were closed because of lost or destroyed evidence.").

[151] Gwendolyn Carroll, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 665 (2007).

[152] *See* House v. Bell, 547 U.S. 518, 553 (2005) (emphasis added).

exonerations for the wrongly convicted only consume a small number of actual innocence cases.[153]

CONCLUSION

The Supreme Court has "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice."[154] This exception and the popularity of the innocence movement strongly suggest that courts should be willing to allow any and all new reliable evidence when a prisoner brings an actual innocence claim and should not restrict such evidence to being newly discovered.[155] In fact, the timing of the *Schlup* decision, occurring only a few years after the innocence movement began, signals once again to the Supreme Court's acknowledgment that the actual innocence gateway is necessary to overcome the transgressions of the past.[156] Contrastingly, implementation of the newly discovered standard would not only circumvent the core principle of the actual innocence gateway but would also disregard possible miscarriages of justice.[157]

Lack of clarification from the Supreme Court, coupled with a five to three majority of circuits interpreting "new reliable evidence" as newly *presented* evidence rather than newly *discovered* evidence,[158] show the addition of a separate requirement of due diligence is not only self-created by lower courts, but critically hinders a prisoner's ability to argue the merits of their case, and ultimately, their freedom. Moreover, because this standard is only applicable on a small-scale, the alleged burden on the court system of meritless claims is trivial.

Prisoners fighting for their freedom already have countless procedural hoops to jump through, all of which are time consuming, costly, and difficult to manage. Implementation of anything other than the newly presented evidence standard would indicate to the public–especially those impacted by wrongful convictions–that the American legal system not only wants to *deny* past transgressions of incarcerating the innocent entirely, *but that it also intends to keep them there*.

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[153] *See generally DNA Exonerations in the United States*, INNOCENCE PROJECT (Jan. 30, 2022), https://innocenceproject.org/dna-exonerations-in-the-united-states [https://perma.cc/JM7D-QKUR].

[154] Fontenot v. Crow, 4 F.4th 982, 1030 (10th Cir. 2021).

[155] *See id.*

[156] *See* Schlup v. Delo, 513 U.S. 298 (1995).

[157] *Supra*, Part III.

[158] *Fontenot*, 4 F.4th at 1032.

> The quintessential miscarriage of justice is the execution of a person who is entirely innocent . . . . [the] concern about the injustice [resulting] from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected . . . in the "fundamental value determination of our society that **it is far worse to convict an innocent man than to let a guilty man go free**."[159]

[159] Schlup v. Delo, 513 U.S. 298, 324–25 (1995) (emphasis added) (quoting In re Winship, 397 U.S. 358, 372 (1970)).