NO. 15-650

In the Supreme Court of the United States

SHONDA WALTER,
Petitioner,
v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF OF PETITIONER

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The "System" is Not Infallible

The Commonwealth suggests that the frequency of wrongful capital convictions, as evidenced by the number of subsequent exonerations, only "prove[s] the system in place is working." Brief in Opposition at 39. It overstates the role of the "system" in these exonerations, and avoids the question posed: whether the certainty of wrongful executions is incompatible with our evolving sensibilities.[1]

Contrary to the Commonwealth's assertions, the "system" is ill-equipped to remedy wrongful convictions. Although some provisions have substantive components, most constitutional protections guarantee fair process, not perfect results.[2] This Court has yet to clearly recognize a constitutional innocence claim,[3] limiting the relief a

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[1] *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent.").

[2] *See*, *e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations.").

[3] *Herrera v. Collins*, 506 U.S. 390, 417 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."); *House v. Bell*, 547 U.S. 518, 554–55 (2006) (emphasizing that *Herrera* "left open" the hypothetical possibility of a freestanding actual innocence claim); *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) ("We have not resolved whether a prisoner may be

court may grant, even in the face of compelling evidence of a miscarriage of justice. Rather, an innocence claim is availing only in reopening procedurally closed doors so that other claims of error may be litigated.[4]

In many of the known wrongful convictions, the exoneree had to overcome prosecutorial misconduct. It can hardly be said the system is working when a participant whose integrity is essential to its fairness, instead sullies the process through misdeeds. The case of Anthony Graves provides an example. Graves was convicted and sentenced to death in 1994 for the murder of six members of a family in Texas. There was no physical evidence linking Graves to the crime; the state's case against him was based primarily on the trial testimony of Robert Carter, another suspect in the case, who ultimately confessed to the murders and negotiated a plea arrangement in exchange for his testimony. In 2006, the United States Court of Appeals for the Fifth Circuit overturned Graves's conviction and ordered a new trial after finding that prosecutors elicited false statements and withheld evidence, including Carter's admission that he had acted alone.[5] Following a five-month investigation, the district attorney's office declared Graves to be "an innocent man" and dropped all charges against him.[6]

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entitled to habeas relief based on a freestanding claim of actual innocence.").

[4] *Schlup,*513 U.S. at 313-17; *McQuiggin*, 133 S. Ct. at 1931.

[5] *See Graves v. Dretke*, 442 F.3d 334, 337-38, 340 (5th Cir. 2006).

[6] *See* Brian Rogers, *Texas Sets Man Free from Death Row*, Houston Chronicle, Oct. 27, 2010.

Graves spent fourteen years protesting his innocence and appealing his conviction.

More frequently, prosecutors, whose duty it is to seek justice,[7] exploit procedural barriers to oppose access to potentially exculpatory evidence in its possession.[8] The case of Frank Lee Smith, cited by amicus, Witness to Innocence, provides an example.[9] In 1998, Smith's lawyers obtained a stay of execution and sought DNA testing following the recantation of the chief prosecution witness. Yet the district attorney successfully opposed motions seeking the testing, citing the absence of a right of access to the evidence. Only when another suspect was implicated in a series of rapes and murders in the area, was DNA testing finally conducted and Smith posthumously exonerated.[10]

The case of Bruce Godschalk, a non-capital Pennsylvania case, provides another example.[11] Godschalk had been convicted in 1987 of two rapes occurring in the same apartment complex. The

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[7] *Berger v. United States*, 295 U.S. 78 (1934).

[8] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 120 (2008) (an empirical study conducted by the author revealed that over half of the first 200 DNA exonerees were initially denied access to the physical evidence).

[9] Brief of *Amicus Curiae* Witness to Innocence, 5.

[10] *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987) (affirming a conviction of first-degree murder and a sentence of death); Frontline, *Requiem for Frank Lee Smith*, http://www.pbs.org/wgbh/pages/frontline/shows/smith/eight (last visited Dec. 21, 2015).

[11] Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, New York Times, Feb. 15, 2002, available at http://www.nytimes.com/2002/02/15/us/dna-testing-in-rape-cases-frees-prisoner-after-15-years.html (last visited Dec. 21, 2015).

Commonwealth successfully fought access to the physical evidence, even at one point maintaining it had the evidence tested of its own accord, with inconclusive results, and falsely claiming that all remaining samples had been fully consumed in the testing. Only after years of litigation, in 2002, was Godschalk permitted to conduct independent testing. The results indicated a single perpetrator had committed both rapes, and excluded Godschalk.[12] Bruce Godschalk spent seven of his fifteen years in prison seeking access to clothing and carpet samples sitting in a police evidence locker in the exclusive control of the prosecution, evidence that would ultimately free him.

With the courts' remedies limited, and frequent prosecutorial opposition, an innocent defendant's last hope often resides in post-conviction counsel. But the quality of post-conviction counsel varies greatly, and even effective counsel face resource and procedural obstacles.

The Sixth and Fourteenth Amendments guarantee effective assistance of counsel at trial[13] and on direct appeal,[14] but not in state post-conviction[15] or in habeas corpus,[16] the stages where most of the exonerations occur. Although states

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[12] National Registry of Exonerations, *Bruce Godschalk*, available at http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3240 (last visited Dec. 21, 2015).

[13] *Strickland v. Washington*, 466 U.S. 668 (1984).

[14] *Douglas v. California*, 372 U.S. 353 (1963); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Halbert v. Michigan*, 545 U.S. 605 (2005).

[15] *Coleman v. Thompson*, 501 U.S. 722 (1991); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

[16] *Bonin v. Vasquez*, 999 F.2d 425, 432 (9th Cir. 1993) ("Sixth Amendment is inapplicable to habeas representation").

typically provide counsel to the indigent[17] and capital defendants are by statute entitled to habeas corpus counsel,[18] an innocent defendant faces significant obstacles. Counsel may not aggressively pursue claims of innocence, particularly since it may not provide an independent avenue of relief. Post-conviction counsel may not have the investigative resources available to trial counsel.[19] Discovery may be wholly unavailable or face higher eligibility burdens.[20] And substandard performance by post-conviction counsel may be beyond an effective remedy.[21]

Even with competent counsel at their side, innocent defendants face substantial procedural hurdles in state post-conviction and in habeas corpus. Challenges to trial counsel's stewardship

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[17] *See, e.g.*, *Durocher v. Singletary*, 623 So. 2d 482, 483 (Fla.) (per curiam) (statutory right to post-conviction counsel "was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings, but did not add anything to the substantive state-law or constitutional rights of such persons") (internal citation omitted).

[18] 18 U.S.C. § 3599(a)(2); *McFarland v. Scott*, 512 U.S. 849, 855 (1994).

[19] *See*, *e.g.*, *Olive v. Maas*, 811 So.2d 644, 653 (Fla. 2002) (statutory investigator fee cap set forth in § 27.711(5), Fla. Stat. (2011) may be exceeded only "where extraordinary or unusual circumstances exist").

[20] *See*, *e.g.*, *People v. Hickey*, 792 N.E.2d 232, 243 (Ill. 2001) (court did not abuse its discretion in denying capital defendant's discovery requests for DNA evidence).

[21] *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (holding that ineffectiveness of post-conviction counsel can amount to cause and prejudice to overcome default, but declining to recognize a Sixth Amendment right to effective post-conviction counsel)

must overcome a presumption of effectiveness.[22] The standard for post-conviction relief may pose an insurmountable burden;[23] most exonerations have come after at least one appellate court has passed on the fairness of the proceeding.

In habeas corpus, a petitioner faces the highly deferential standard applicable under AEDPA.[24] And there are substantial obstacles to gaining a hearing in habeas corpus,[25] choking off an avenue for the evidentiary development that could demonstrate innocence.

Contrary to the Commonwealth's pronouncement that the system is working, as often as not, when the wrongfully convicted are exonerated, pure luck played a prominent role.

Many of the exonerations resulted from post-trial DNA testing, often years after the incident. Fortune shined twice on these defendants. First, the real perpetrator must have left testable biological material at the scene, and second, the evidence had to be retained and properly preserved long enough to allow for testing.

One study, reviewing 400 murder cases in five jurisdictions, found just 13.5 percent of the murder cases reviewed actually had physical evidence that linked the suspect to the crime scene or victim, and

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[22] *Strickland*, 466 U.S. at 689 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

[23] *See*, *e.g.*, 42 Pa.C.S.A. § 9543(a)(2)(i),(ii) (post-conviction relief may be granted only where error "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place").

[24] *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

[25] *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011).

DNA in just 4.5 percent.[26] Thus, in a significant majority of homicide cases, there is simply no avenue to develop irrefutable evidence of innocence. As amicus, Witness to Innocence, has demonstrated, often the innocent must overcome compelling evidence of guilt, including eyewitness testimony, strong circumstantial evidence, and even confessions.[27] The faces of the innocent are often not discernably different from the guilty.

Even in the limited cases where DNA is potentially recoverable, there is no assurance the evidence will be preserved, and when the evidence is destroyed, defendants face a heavy burden to gain due process relief.[28]

For the majority of cases where no scientific evidence contributed to the conviction, the path to exoneration is even more daunting. Witness misidentification remains common, and is particularly immune to traditional cross-examination as the witnesses honestly believe they have

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[26] Baskin, Deborah & Sommers, Ira. *The Influence Of Forensic Evidence On The Case Outcomes Of Homicide Incidents*. Journal of Criminal Justice 38, 1141-1149 (2010).

[27] Brief of *Amicus Curiae* Witness to Innocence, 3-11.

[28] *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (due process relief denied where Youngblood did not demonstrate that failure of the State to preserve evidentiary material for testing, the results of which might have exonerated him, was done in bad faith). Notably, Youngblood was exonerated in 2000 because advancements in DNA technology permitted testing of the degraded evidence, which both excluded Youngblood and inculpated another individual. The Innocence Project, Larry Youngblood, http:// www.innocenceproject.org/Content/303.php (last visited Dec. 21, 2015).

identified the correct suspect.[29] And often jurors must make this judgment without the benefit of expert testimony.[30] Similarly, witnesses seeking to later correct their perjured testimony will likely face a hostile reception.[31]

The "system" as lauded by the Commonwealth, may well reduce wrongful executions, but it will not eliminate them. Eyewitnesses will still sometimes be mistaken, self-interested witnesses will still sometimes lie, prosecutors will still sometimes hide evidence, and defense counsel will still sometimes fall short in their duties. And, inevitably, sometimes the innocent will be sentenced to death, with their ultimate fate resting not on the inscrutable workings of an infallible "system," but the vagaries of chance, the very arbitrariness abhorrent to the Eighth Amendment.

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[29] *See* Epstein, Jules, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 728 (2007).

[30] In Pennsylvania, it was not until 2012 that the state high court overruled its *per se* exclusion of eyewitness expert testimony. *Commonwealth v. Walker*, 92 A.3d 766, 792-93 (Pa. 2014) ("we hold that the admission of expert testimony regarding eyewitness identification is no longer *per se* impermissible in our Commonwealth").

[31] *See*, *e.g.*, *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) ("[C]ourts have . . . looked with disfavor on motions for a new trial founded on alleged recantations unless there are extraordinary and unusual circumstances.") (citation omitted).

Respectfully submitted,

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