No. 99-55000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY BURTON,

Petitioner-Appellant,

v.

J.W. FAIRMAN, Warden, et al.,

Respondents-Appellees.

OPENING BRIEF FOR PETITIONER-APPELLANT

Appeal from the United States District Court for the
Central District of California
D.C. No. CV 98-3915-ABC (SH)
The Honorable Audrey B. Collins, District Judge

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INTRODUCTION AND QUESTIONS PRESENTED

This is an appeal from the district court's denial of petitioner-appellant Anthony Burton's petition for a writ of habeas corpus. The petition presents very strong evidence of Burton's actual innocence of the charge of first-degree murder, on which he is serving the eighteenth year of a life sentence. This evidence is the authenticated written statement of the prosecution's star witness—Ronald Washington ("Ronald")—confessing that he testified falsely at trial, and that he did so at the instigation of the prosecutor.

The district court, however, did not even consider *any* of the petition's claims of actual innocence, prosecutorial misconduct and ineffective assistance of trial counsel. Instead, it dismissed the petition on purely a procedural ground—the asserted 25-day "untimeliness" of the petition under the one-year prescription of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244(d) (reprinted in the Statutory Addendum, *post).* The district court also refused to issue a Certificate of Appealability, but after consideration of the record, a motions panel of this Court issued a COA nonetheless, stating the questions thus:

> 1. Whether the combined showing of actual innocence and constitutional error described in *Schlup v. Delo*, 513 U.S. 298 (1995), is sufficient to overcome the AEDPA's one-year time bar.
>
> 2. If so, whether remand to the district court is warranted to establish whether petitioner can make a showing of actual innocence sufficient to open the 'gateway' to his claim that an eyewitness to the crime was induced by the prosecutor to give false testimony. *See* 28 U.S.C. §2253(c)(3).

(COA at 1; per Kleinfeld and Hawkins, CJJ).

This Court subsequently appointed counsel for petitioner.

The *"Schlup"* questions arise in this context: In 1982, a California jury convicted petitioner of first-degree murder in the 1981 shooting death of one Fred Wright. The *sine qua non* of the prosecutor's case was the eyewitness testimony of the aforesaid Ronald, who identified petitioner as one of three persons surrounding Wright when the fatal shots were fired. As it now turns out, however, this testimony was false. Ronald was a 13-year-old boy who was "scaird" [his word] of being prosecuted for murder himself and—under a grant of immunity—testified at trial against petitioner. Ronald did so because—again in his own words—the prosecutor "told me he didn't wont me, he wanted the two of you because you was older," and "if I put him [Burton] at the seen, he would drop charges on me." ER.109, 110.[1]

Needless to say, neither Ronald nor the prosecutor disclosed any of this at trial. Ignorant of the truth, the jury convicted petitioner, the trial judge sentenced him to 27 years to life, and the appellate court affirmed, *People v. Burton*, 2d Crim. 42138 (1984; unpublished). Petitioner sought no collateral relief in the federal system at that time.

But the truth will out. Thirteen years after the trial, Ronald came forward and—with nothing to gain and much to lose—confessed that his trial testimony against petitioner was false. He did so in a 1995 letter that Ronald himself wrote and mailed to petitioner's wife. It reads in full:

> I am writing to let you know, I know it has been along time ago in [and] you know I was scaird even though Mr. Solomon told me he didn't wont

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[1] As often as possible, we cite to the record by reference to the consecutively-numbered pages of the accompanying Excerpts of Record ("ER.___"). All emphasis in quoted materials has been supplied, and internal citations and footnotes omitted.

> me he wanted the both of you.[2] Cause you was older. That why I put you at the seen. If I can I would like to clean it up now if I can.
>
> I know it has been a long time in [and] I should have been did this cause I do allway think about you, cause I wish thing[s] could have been different. So now I am coming forward. I wish I can change something. I no I can't change the pass. But I can do right by it now.
>
> Cause in the alley I was their. Howl [Hal] Spring seen me their at the seen. When all this took place Anthony Burton was up the alley cause he really didn't no his way around. I most definely no Anthony Burton didn't do it.
>
> /s/ Ronald Washington

ER.109. Later, in a signed and dated statement, Ronald reiterated that his perjury at trial was induced by the prosecutor, who promised him immunity if, but only if, he implicated petitioner in the death of Wright. This statement reads:

> 5-22-96
>
> D.A. Solomon said if I put him Anthony Burton at the seen, he would drop charges on me.
>
> /s/ Ronald Washington

ER.110. After a handwriting expert confirmed that both the original letter of confession and the signed and dated statement were in fact written by Ronald (ER.118-19), petitioner sought collateral relief in the Supreme Court of California. ER.158. His state habeas petition was denied without comment. ER.179.

Having exhausted his state remedies, petitioner filed his federal habeas petition, in the court below, on May 19, 1998. ER.1. This *pro se* petition asserts actual

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[2] Ronald's reference to "the both of you" is to petitioner and his co-defendant, Sneed, who was also convicted by the jury. "Solomon" refers to Los Angeles County Deputy District Attorney Richard F. Sullivan, who tried the case for the State. Ronald's brother, Derek Washington, also testified—under a grant of immunity—that petitioner was one of the shooters of Fred Wright, but Ronald's confession casts doubt both upon the truth of Derek's testimony and the means by which the prosecutor procured it. *See post*, Argument, Part B.

innocence—as shown by Ronald's recantation of his trial testimony—as well as prosecutorial misconduct, and ineffective assistance at trial. ER.16-20. However, the Magistrate to whom the district court referred the petition did not consider the merits of any of petitioner's claims. Instead, the Magistrate labored to prove that the petition was all of 25 days "late" under the one-year proviso of the AEDPA. ER.100-03. The district court dismissed the petition on that ground alone (ER.105), without any consideration whatever of the "*Schlup* questions" that the motions panel of this Court subsequently framed in the COA.

Respectfully, the short answer to these two questions is that *Schlup* plainly requires this Court to set aside the procedural "default" and remand the case for plenary consideration of the claims of actual innocence and constitutional error presented in the petition.

STATEMENT OF JURISDICTION

The district court had jurisdiction in this habeas corpus case pursuant to 28 U.S.C. §2254(a). Its order, dismissing the petition with prejudice, was a final and appealable pursuant to 28 U.S.C. §1291. This order was entered on November 2, 1998 (ER.105), and the notice of appeal was timely filed on December 1, 1998. ER.100.

STATEMENT OF THE CASE

A. Petitioner Burton's Strong Evidentiary Showing of Actual Innocence and Prosecutorial Misconduct

1. The Events of the Homicide of Fred Wright

In January 1981, petitioner Burton attended a party at a home in Pomona, California in the company of Anthony Sneed (aka "Meyers"), and two brothers—Derek and Ronald Washington. During the party, two confrontations ensued, one between Duwan Franklin and Burton (ER.208),[3] and a second between Derek and Fred Wright. ER.182-83. During the altercation between Burton and Franklin, Sneed brandished a sawed-off .22 rifle (ER.206), and Ronald handed Burton a pistol. ER.211-12. Shots were fired, but no one was hit.

Burton, Sneed, and the two brothers then left the party and returned to the Washington residence. ER.302-03. Later that evening, the group saw Wright and several of his friends walking near the Washington home. Burton, Sneed, and the Washingtons went into an alley behind the home. ER.360-61. Three men went towards Wright and his friends at one end of the alley. Harry Wilson, who was watching, whistled to the group to warn them because Harry sensed that "something" was about to happen. RT.174-78. Shots were fired, resulting in the wounding of a bystander and the death of Wright, who was killed with a .22 caliber bullet from a gun never identified at trial.

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[3] The entire 800-page transcript of the Superior Court trial was filed in the California Supreme Court. Because the defense's carbon copy was difficult to read, petitioner's spouse retyped the entire transcript, matching each page and line, and portions of this more readable copy were filed in both the California Supreme Court and the district court as Exhibits S-PP. Critical parts of the transcript are included in the Excerpts of Record, and are cited as "ER.__."

2. The Key Evidence at Trial Was the Immunized Testimony of Ronald and Derek Washington

At trial, the prosecution presented a case based primarily on circumstantial evidence. Other than Ronald and his brother Derek, no witness placed petitioner Burton at the scene of the crime. ER.449-50. *Per contra*, witness Quinola Arnold testified that at the time of the shooting, Burton was standing *talking with her at the opposite end of the alley* in which Wright was shot. ER.401-03. Her identification of petitioner was strong, for upon encountering petitioner at the opposite end of the alley, Ms. Arnold called to him by name (ER.403), whereupon petitioner turned around and spoke with her, face-to-face, just as the fatal shots rang out at the other end of the alley. ER.407-08.

Consistently, witnesses testified that only *three* persons were present when the shooting took place. Not a single witness other than Derek or Ronald identified Anthony Burton as even one of these three, much less one of the two shooters. Although a gun was recovered from Burton's home, no evidence linked that gun to the death of Wright. Moreover, even Ronald testified that the gun recovered from Burton's home was *not* the pistol Ronald had handed to Burton during the altercation at the party earlier that evening. ER.323-24. The only evidence identifying Mr. Burton as the shooter came from the immunized Ronald and Derek.

The other eyewitnesses to the murder saw three men involved in the shooting, all wearing dark clothing. One wore a striped sweatsuit (ER.266); the evidence established that this was co-defendant Sneed. ER.274. The second participant wore a rust or orange-colored jacket (ER.242, 266); several witnesses testified that Ronald was wearing that jacket on the night of the incident, and even Ronald himself admitted that he was wearing the jacket that night. ER.321. Two witnesses testified that immedi-

ately following the shooting, they saw the person wearing the reddish brown jacket running away from the scene. ER.222-23, 234-42. Anthony Burton was wearing a light colored jacket the night of the shooting. ER.397. This jacket was described by witnesses at the preliminary hearing (ER.189-91) and was recovered during a search of Burton's home, but it was never introduced at trial.

It is thus abundantly clear that the immunized testimony of Ronald and Derek, implicating petitioner as a shooter of Fred Wright, was the *sine qua non* of the first-degree murder verdict returned against petitioner. Even the prosecutor began his jury summation by admitting he had only a "circumstantial" case "without the testimony of the Washington brothers," but "there's also the direct evidence, the eyewitness testimony of Ronald Washington and Derek Washington that they actually saw the guns fired." ER.447-48. But now, it has all unraveled.

3. Ronald Recants His Testimony: His Recantation Is Wholly Consistent with the Other Evidence at Trial

Sometime in 1995, thirteen years after the trial, petitioner's wife received the letter from "Ronald W." that we have quoted in full, *ante*, pp. 2-3. In the letter, Ronald admitted that he had testified falsely at the trial, in order to receive immunity from the District Attorney's office, saying in part:

> …I was scaird even though Mr. Soloman told me he didn't wont me he wanted the both of you … so now I am coming forward ... cause in the alley I was their … when all this took place, Anthony Burton was up the alley ... I most definely no Anthony Burton didn't do it.

ER.109.

After receiving Ronald's letter, petitioner and his wife sought assistance from many attorneys and legal aid groups, but none were able to take the case. Pet.Ex.L. Finally, late in 1995 or early in 1996, attorney James Farley agreed to represent

petitioner *pro bono.* After meeting with petitioner and obtaining and reviewing the trial court transcripts and the Pomona police reports, attorney Farley realized he needed Ronald's corroboration of the 1995 letter to petitioner's wife. ER.161. He persuaded a private investigator, William Kurta, to assist, again *pro bono.* ER.161. On May 22, 1996, Investigator Kurta visited Ronald at Tehachapi, where Ronald was incarcerated on an unrelated conviction. Ronald reaffirmed that petitioner was at the opposite end of the alley from Ronald, Derrick and Anthony Sneed when Fred Wright was killed. Ronald also stated that the only reason he testified against Burton was because the district attorney promised him that charges against him would be dropped if he did so. ER.115. Investigator Kurta also obtained from Ronald the signed statement, dated May 22, 1996, in which Ronald wrote that "*D.A. Solomon said if I put him Anthony Burton at the seen, he would drop charges on me.*" ER.117.

4. Ronald Develops Cold Feet, but Expert Analysis Confirms the Authenticity of His Written Confessions

Several months after meeting with Investigator Kurta, Ronald got cold feet, realizing that if he told the truth about petitioner's innocence and the prosecutor's misconduct, he would be naming himself and his brother as the shooters. Thus, in July 1996, Ronald wrote another letter to Ms. Burton, saying in part:

> I have been talking to lawyers in they say I can cross myself up … ****
> I have a son an I do very much want to be there for him … I am finally going to get my life together after so many years doing the same thing … I can't see myself going out backwards again… now I have to put myself first. ... I don't want this situation to turn on me … I can't take that chance.

ER.110-11.

In this latest letter, Ronald does not contradict or retract anything he had said about petitioner's innocence and the prosecutor's behavior. But attorney Farley doubtlessly realized that Ronald might "take the fifth" at an evidentiary hearing. Accordingly, it became critical to establish that the original letter was in fact written by Ronald Washington.[4] Attorney Farley persuaded a handwriting expert, Richard Fox, to assist on a *pro bono* basis. Mr. Fox examined the original letter, the signed statement of May 22, 1996, and the "cold feet" letter of July 1996 and, in a report dated November 19, 1996, presented his expert opinion that all three writings attributed to Ronald Washington were, in fact, written by the same person. ER.118-19. Because the second of those writings was written and signed by Ronald in the presence of Investigator Kurta (ER.115-17), authenticity of all three writings was confirmed.

Now armed with admissible evidence of Burton's actual innocence and of prosecutorial misconduct, attorney Farley filed a habeas petition in the Supreme Court of California on March 21, 1997. ER.158. The petition raised the same claims of actual innocence, prosecutorial misconduct and ineffective assistance of counsel that were later presented to the federal district court. Petitioner filed seven volumes of exhibits in the Supreme Court, including the letters from Ronald, the findings of handwriting expert Fox, and the report of investigator Kurta. In his petition, Burton asked for release and, alternatively, for an evidentiary hearing to establish his entitlement to relief. ER.159-60, 163-64. The Supreme Court called for an "Informal Response" from the State, but never referred the case for an evidentiary hearing. On

[4] This is so because Ronald's 1995 letter is admissible as a statement against interest if—but only if—it is first authenticated as a statement of Ronald Washington.

January 14, 1998, the Court issued a "postcard denial," an order stating—in its entirety—"Petition for writ of habeas corpus DENIED." ER.179.

Although the petition was denied on January 14, 1998, petitioner was moved from one prison to another and did not receive notice of the Supreme Court's denial until March 21, 1998. ER.7-8. Attorney Farley advised him that he could not assist in the preparation of a federal petition, because Farley lacked expertise in federal habeas law. ER.8. Petitioner's wife then obtained forms from the district court, and petitioner prepared his own pro se habeas petition, filing it in the district court on May 19, 1998. ER.8.

B. Proceedings in the District Court

In its Return, the State did not respond to the merits of the petition, but simply asserted that it was time-barred under the AEDPA. ER.24-35. Additional pleadings were exchanged on "equitable tolling," after which the Magistrate took the matter under submission. ER.38-62, 72-96. In his Final Report (which the district court then adopted), the Magistrate held that the petition was time-barred. ER.101-03.

The AEDPA was enacted April 24, 1996, and the Magistrate held that statute's one-year prescription began to "run" against petitioner on that date. In order to reach this conclusion, the Magistrate first had to determine "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," under 28 U.S.C. §2244(d)(1)(D), because *only* if that date *preceded* the enactment of the AEDPA could it be said that the one-year period began to "run" on the date of adoption of the statute. The Magistrate's reasoning on this score is found in footnote 5, on page 6 of his Report, thus:

> 5/ Petitioner argues that the newly discovered evidence which came to light in 1995 was a letter from one of the co-defendants who admitted he knew petitioner was not with him and the others at the end of the alley at the time of the shooting. This letter was not addressed to anyone, and was signed by 'Ronald W.' Petitioner's wife apparently received this letter from 'Ronald W.' (Pet., Ex. 4-A, p. 19). According to petitioner, this letter had to be 'authenticated in order I to insure its reliability,' and the authentication of this letter occurred on November 19, 1996 (Trav., p. 6) Petitioner's discussion on the authentication of this letter does not persuade this court that the statutory tolling provisions of 28 U.S.C. §2244(d)(1)(D) apply in this case. Rather, the year 1995, when the letter was discovered, is 'the date on which the factual predicate of the claim' presented was discovered.

ER.103.

The Magistrate then held that because the one-year AEDPA period had begun to run on April 24, 1996, only 34 days remained when, on March 21, 1997, petitioner filed his habeas petition in the Supreme Court of California. This filing tolled the statute at least until denial of the state petition on January 14, 1998. Accordingly, reasoned the Magistrate, as of January 14, 1998, only 34 days remained in the one-year AEDPA period of limitation. This meant that the petition, filed May 19, 1998 was time-barred, unless "equitable tolling" was available to petitioner. The Magistrate held that it was not, for these reasons:

1. Petitioner's lack of access to prison library facilities was not important, because "the claims petitioner is seeking to raise in the instant Petition are the same claims petitioner raised before the California Supreme Court, thereby undercutting his argument that the lack of access to the prison law library caused his delay." ER.102.

2. The Magistrate held that the delay in petitioner's receipt of actual notice of the denial of his state writ petition was his own fault, because petitioner failed to telephone his attorney and the Supreme Court's clerk, during the pendency of the state writ petition. ER.102 (fns. 2 & 3). Then, possibly realizing that no Warden or,

indeed, no court in this state would applaud a result that would lead to daily collect phone calls to the Supreme Court and to inmates' attorneys, the Magistrate backed away, and said that "even if petitioner was granted equitable tolling until March 21, 1998 [the acknowledged date of his actual receipt of notice], the instant Petition would still have been due 34 days later, on April 24, 1998," 25 days before the petition was actually filed. ER.102. This is why we say that, in the end, the "*Schlup* questions" presented in the COA come down to whether non-frivolous claims of actual innocence and constitutional error at trial justify setting aside a procedural "default" of less than one month. They sure do.

REVIEWABILITY AND STANDARD OF REVIEW

Petitioner raised actual innocence, prosecutorial misconduct, and ineffective assistance of trial counsel in his petition. ER.10-19. He also argued that dismissing the petition would result in a fundamental miscarriage of justice. ER.55-61, 88-94.

This Court reviews de novo a grant of summary judgment denying a writ of habeas corpus. *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997) (citation omitted), *appeal after remand*, 207 F.3d 557 (9th Cir. 2000). A district court's decision denying an evidentiary hearing is reviewed for abuse of discretion, though questions of law, such as whether the AEDPA permits or requires a hearing, are reviewed de novo. *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). A district court's findings of fact are reviewed for clear error. *Id*.

SUMMARY OF ARGUMENT

This is petitioner's first federal habeas petition on any grounds. Petitioner has not "abused the writ" in any way. Instead, upon the discovery of new exculpatory evidence, he did all in his power to validate the evidence and file a habeas petition. Despite his best efforts, he missed the statutory deadline by 25 days. However, petitioner has made a strong and valid showing of actual innocence, prosecutorial misconduct and ineffective assistance of counsel. As the Court held in *Schlup*, the strong societal interest in finality and abuse of the writ must give way whenever non-frivolous claims of actual innocence and constitutional error are presented. In amending 28 U.S.C. §2244 in the AEDPA, Congress in no way altered the rule that a showing under *Schlup* would overcome a claim of delay. Therefore petitioner's claims are sufficient to overcome the AEDPA's one-year time bar.

The core principle of *Schlup* is that a claim of actual innocence goes to the very integrity of the criminal process, particularly when coupled with evidence that the prosecutor knew or reasonably should have known that the testimony he induced was false. Here, as we shall show, *all* the evidence at trial—save that of Ronald's now-recanted perjury, and testimony of his brother Derek, the *bona fides* of which Ronald now undermines—was either insufficient to convict, or positively exculpatory. Accordingly, the petition presents a very strong case of actual innocence, one which merits at least remand for an evidentiary hearing.

The petition below raises a strong case of prosecutorial misconduct—certainly one requiring an evidentiary hearing. A prosecutor who offers immunity to a "scaird" 13-year-old boy proceeds at his peril, and plainly crosses the line when immunity is tendered upon a mere suggestion—or worse—of the testimony that the witness must

provide in exchange for the proffered immunity. See, *e.g.*, *United States v. Bernal-Obeso*, 989 F. 2d 331, 333-34 (9th Cir. 1993). In addition, the petition demonstrates that counsel provided ineffective assistance by not introducing readily available evidence that Derek W., not petitioner, had a motive to kill Fred Wright and that Derek was the third person in the alley.

We address "*Schlup*" questions in Parts A and B of the Argument, *post*, and show that there is ample reason to reverse and remand for a plenary consideration of the merits of petitioner's claims. In Part C, we show that even if *Schlup* could be ignored, the decision below should be reversed, because the district court erred in concluding that the petition was barred by the AEDPA.

ARGUMENT

A. In a "First" Petition, the Combined Showing of Actual Innocence and Constitutional Error described in *Schlup v. Delo* is Sufficient to Overcome the AEDPA's One-Year Time Bar

Actual innocence occupies a singular place in the constellation of Anglo-American jurisprudence: it is the Polaris of "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." *Schlup v. Delo*, 513 U.S. 298, 325 (1995), quoting Harlan, J., concurring in *In re Winship*, 397 U.S. 358 (1970). Prior to the AEDPA, the Supreme Court held that actual innocence would excuse a broad range of procedural errors. In the AEDPA, Congress specifically addressed the showing of innocence that a petitioner must make to bring a "successive" petition, but *did not* in any way alter the longstanding rule that innocence will excuse a delayed "first" petition.

1. Prior to the Passage of the AEDPA, a Showing of Actual Innocence Would Excuse a Procedural Error

It has been settled for many years that a showing of actual innocence will excuse procedural errors that amount to defaults or abuses of the writ. A petitioner must generally show "cause and prejudice" to excuse a procedural default. Yet "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," the Supreme Court has held, "a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 494, 496 (1986). In *Kuhlman v. Wilson*, 477 U.S. 436 (1986), decided the same day as *Murray*, the Court addressed actual innocence in the narrower context of a "successive" petition, and held that it may be brought when the person "supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454. In *McClesky v. Zant*, 499 U.S. 467, 493 (1991), the Court held that "cause and prejudice" is generally required for a petitioner to overcome a claim of "abuse of the writ," but determined that actual innocence may excuse either. Because "abuse of the writ" encompasses a broad range of conduct that disentitles a petitioner to the relief he seeks, *Schlup*, 513 U.S. at 319 n.34 (citations omitted), including delayed petitions, these cases establish that a showing of actual innocence may generally excuse procedural bars to habeas relief.

These holdings were reiterated and given substance in *Schlup*. There the Court re-emphasized that habeas corpus is an equitable remedy, which serves the ends of justice. *Id.* at 319. So strong is society's aversion to the conviction of an innocent person that innocence alone—without any error at trial—is a ground for habeas relief, at least where innocence is shown by sufficiently high evidence. *See id*. at 313-17, discussing *Herrera v. Collins*, 506 U.S. 390 (1993), and *Sawyer v. Whitley*, 505 U.S.

333 (1992). But the Court held in *Schlup* that the *Herrera/Sawyer* "clear and convincing" standard of proof of actual innocence does not apply where constitutional error infected the trial, because in the latter setting, "a court's assumptions about the validity of the proceedings that resulted in the conviction are fundamentally different" than in the error-free setting of *Herrera* and *Sawyer*. *Id.* at 315-16. Accordingly, under *Schlup*, the lower civil standard of "more likely than not" governs cases where there is a combined showing of actual innocence and constitutional error. *Id.* at 326-27.

2. The AEDPA Does Not Alter the Application of *Schlup* to Late-Filed "First" Petitions

Section 101 of the AEDPA amended 28 U.S.C. §2244(d), to provide a one-year period in which a state prisoner should file a habeas corpus petition. Neither §101 nor any other part of the AEDPA seeks to limit the innocence exception—or otherwise alter the application of *Schlup*—when a first-time petitioner has missed the one-year deadline.

While the AEDPA represents a significant revision of some specific habeas corpus provisions, it does not supplant pre-existing habeas law. Decision after decision from the Supreme Court demonstrate that the AEDPA must be construed narrowly and in light of the traditional equitable purposes of the writ, at least unless specific language of the statute expressly indicates otherwise. Thus, in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), the justices refused to construe a claim for relief under *Ford v. Wainwright* as a second or successive petition, which would be procedurally barred under the amended 28 U.S.C. §2244(b). If the Court had con-

strued the *Ford* claim as such, "the implications for habeas practice would be far-reaching and seemingly perverse." *Id*. at 644.

Just this Term the Supreme Court refused to accept a narrow reading of the AEDPA's Certificate of Appealability provision, 28 U.S.C. §2253(c). The State had argued that a COA could not issue to review a procedural ruling. The Court soundly rejected this argument: "The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a COA under §2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Slack v. McDaniel*, 120 S.Ct. 1595, 1603 (2000). And in *Williams v. Taylor*, 120 S.Ct. 1479 (2000), the Court construed the amended 28 U.S.C. §2254(e)(2) in light of pre-AEDPA decisions. The justices found "no basis in the text of §2254(e)(2)" to believe that Congress used a term differently than under pre-AEDPA law. *Id*. at 1489. Writing for a unanimous Court, Justice Kennedy underscored the continuing significance of traditional "[f]ederal habeas corpus principles." *Id.* at 1490. *See also Calderon v. District Court (Kelly)*, 163 F.3d 530, 537-38 (9th Cir. 1998, *en banc*) (relying upon the settled principle that res judicata does not apply to habeas corpus cases, and noting that "it is quite fanciful to suggest that the AEDPA sub silentio introduced res judicata into habeas law.").

With these principles in mind, it is plain that §101 of the AEDPA works no revision to the settled rule that actual innocence may excuse a claim of delay, or to the application of *Schlup* to a late-filed "first" petition. The text of §101 does not expressly refer to miscarriages of justice nor does it otherwise indicate that the one-year bar will be maintained even in the face of the combined showing of actual

innocence and constitutional error described in *Schlup.* In the parlance of the *Williams* Court, there is "no basis in the text" of §106 to attribute to Congress the intent of silently overruling this doctrine. Nor would any such intent be consistent with traditional habeas corpus principles, which seek to provide meaningful review for those who may indeed be actually innocent of crime. Four points make this even clearer.

First, in §106(b) of the AEDPA, Congress amended §2244(b), to heighten the showing of innocence that one must make to bring a second or successive petition. That Congress altered the application of *Schlup* to successive petitions but did not, in the same statute, alter the showing of actual innocence when a "first" petition is delayed, indicates that Congress intended to leave existing law intact with respect to "first" petitions. In *Hohn v. United States*, 524 U.S. 236 (1998), the Court interpreted 28 U.S.C. §1254 to permit certiorari review of the denial of a COA. The Court expressly noted that in the AEDPA, Congress promulgated both the COA requirement and a provision barring certiorari review of the denial of motions to file second or successive petitions. Said the justices:

> The clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability ... [W]e think a Congress concerned enough to bar our jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention. *See, e.g., Bates v. United States*, 522 U.S. 23, 29 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

Id. at 250.

In *Calderon v. District Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997), *overruled on other grounds*, *Kelly*, 163 F.3d at 540, this Court applied exactly the same reasoning to hold that Congress did not mean to prohibit courts from equitably tolling the AEDPA's one-year statute of limitations. Pointing to a 30-day tolling limit contained in another part of the AEDPA, §107, this Court ruled that "[b]ecause section 101 contains no similar restriction, we can infer that Congress did not intend to upset the normal default rule allowing longer tolling periods." *Id*. at 1289. Likewise, had Congress intended to alter the applicability of *Schlup* to claims of delay, Congress would have said so, as it did in §106 of the AEDPA with respect to successive petitions.

Second, because the State's interest in defending against successive petitions is far greater than its interest in defending against a delayed "first" petition, it may have made a good deal of sense for Congress to alter the application of *Schlup* to successive petitions but not to "first" petitions that are filed after the AEDPA's one-year bar. In *Lonchar v. Thomas*, 517 U.S. 314 (1996), a pre-AEDPA case, the Court held that Habeas Corpus Rule 9(a) permitted dismissal of a first petition for delay only if the State was prejudiced in its ability to respond. "Dismissal of a *first* federal habeas corpus petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id*. at 324. The Court went on to note that second and successive petitions "pose a greater threat to the State's interests in 'finality' and are less likely to lead to the discovery of unconstitutional punishments." *Id.; cf. Martinez-Villareal*, 523 U.S. at 645 (adopting the State's interpretation of the AEDPA "would mean that a

dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review").

Third, construing the statute to permit innocence to excuse delay in bringing a first petition would avoid raising a serious constitutional questions under the Suspension Clause, the Due Process Clause, and the Eighth Amendment. This has long been the practice of the Supreme Court, as well as this Court. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1916); *United States v. Bulacan*, 156 F.3d 963, 974 (9th Cir. 1998); *Martinez-Villareal v. Stewart*, 118 F.3d 628, 632 (9th Cir. 1997), *aff'd on other grounds*, 523 U.S. 637 (1998). Other courts that have had an opportunity to address how an actual innocence claim operates in conjunction with the AEDPA's statute of limitations generally either avoid the matter altogether by ruling on an alternate ground (*see, e.g., United States v. Lloyd*, 188 F.3d 184, 187-89 (3d Cir. 1999); *In re Jones*, 137 F.3d 1271, 1273 & n. 3 (11th Cir. 1998); *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1997) , *cert. denied*, 523 U.S. 371 (1998); *In re Waldrop*, 105 F.3d 1337, 1338 (11th Cir. 1997)) or avoid the risk of constitutional implications by either permitting the prisoner to raise his otherwise barred claim under 28 U.S.C. §2241 or by assuming that the miscarriage of justice gateway would permit the barred claim to go forward. *See Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 113-14 (2d Cir. 2000); *United States v. Lorentsen* 106 F.3d 278, 279 (9th Cir. 1997); *Treistman v. United States*, 124 F.3d 361, 373-78 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248-52 (3d Cir. 1997).[5]

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[5] Although *Molo v. Johnson*, 207 F.3d 773, 775-76 (5th Cir. 2000), held that the statute of limitations did not violate the Suspension Clause, the court limited its holding to the specific facts of the case. Nothing in that petitioner's case prevented

This Court has followed suit by interpreting cases involving successive petitions in ways which avoid raising constitutional questions. In *United States v. Martinez-Villareal*, *supra*, petitioner moved to file a successive petition to include a claim regarding competency to be executed. This Court realized that petitioner's claim was premature when petitioner filed his first habeas proceeding and that petitioner's claim for incompetency did not fall within any of the gateways allowed by §2244. Acknowledging the constitutional implications of denying petitioner the right to raise his competency claim altogether, the Court treated the filing as a petition under §2241. *Id.*, 118 F.3d at 634-35.

Unlike the cases above, this is petitioner's *first* habeas petition. To deny petitioner the right to have his claim of actual innocence heard because he missed the statutory deadline by 25 days would deny him meaningful review of his constitutional claims.

Fourth, the AEDPA's one-year proviso is nothing other than a garden variety statute of limitations, *Beeler*, 128 F.3d at 1288, so it invokes no more than concern that, at some point, the State should not be put to defend a stale claim. But statutes of limitation have long and correctly been regarded as a disfavored defense. Hence, they are subject to numerous legal and equitable exceptions, chief among them late accrual, fraudulent concealment and relation-back. *See, e.g.*, *Westinghouse Electric Corp. v. Pacific Gas and Electric Co.*, 326 F.2d 575, 577-80 (9th Cir. 1964) (fraudulent concealment). Federal Rule of Civil Procedure 15(c)(2), for example, expressly provides that an amended pleading "relates back" whenever "the claim or defense in

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him from filing the habeas petition within one year; thus the statute of limitations did not render the habeas petition "inadequate or ineffective."

the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." Although Rule 15(c) does not technically apply in the context of a federal pleading that, as here, recycles a state-court pleading,[6] the underlying principles are the same. The Advisory Committee's Notes to the 1963 amendment to Rule 15(c) explain:

> Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the [government] would not have been offended by allowing relation back ... [f]or the government was put on notice of the claim within the stated period ...

The case at bench illustrates the reasons why the limitations defense is disfavored. Here the State was put on notice of Mr. Burton's claims—and had a full and fair opportunity to muster its defenses—when his original state habeas petition was filed with the California Supreme Court in March 1997. Indeed, when the Magistrate below refused to grant relief to petitioner on account of lack of access to the prison library, he trumpeted that *"the claims petitioner is seeking to raise in the instant Petition are the same claims petitioner raised before the California Supreme Court."* ER.102.

But sauce for goose and gander go together: The Magistrate's own words demonstrate that there is no conceivable basis on which the State could claim "prejudice," or the subversion of any societal value, by plenary consideration of claims that were re-presented in the federal court by a filing only 25 days "late" under the AEDPA.[7]

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[6] *See also Henry v. Lungren*, 164 F.3d 1240 (9th Cir. 1999) (no relation back of successive petitions to establish "custody.")

[7] Thus, this case is in many respects similar to *Mt. Hood Stages v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980). There, plaintiff was required to exhaust its

For all of these reasons, the answer to the first question in the COA is a resounding "yes." The combined showing of actual innocence and constitutional error described in *Schlup* is sufficient to overcome the one-year time bar. Whatever the rule with successive petitions, in first petition cases the federal courts must allow the truth to be heard.

B. Petitioner's Evidence Brings *Schlup* Into Play, and Opens the Gateway to Plenary Consideration of His Claims

The second question posed in the COA is, at bottom, one of whether petitioner can satisfy the burden of proof that *Schlup* establishes, *viz.:*

> [T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.… At the same time, the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard required under Sawyer.

Schlup, 513 U.S. at 327.

We discuss this standard as it relates to innocence, prosecutorial misconduct and ineffective assistance of counsel at trial *seriatim.* But before doing so, however, it is appropriate to note that, because this Court is not reviewing a judgment in which the

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administrative remedies before filing suit in federal court. The plaintiff filed its "exhaustion" petition within the statutory period of limitations (just as did petitioner here), but defendant Greyhound nonetheless argued that plaintiff was also required to file a "protective" suit, instead of waiting until the agency had acted upon plaintiff's petition. This Court rejected Greyhound's argument, saying:

> The only possible purpose that could have been served by filing a protective suit within the statutory period was to give Greyhound specific notice of the antitrust claim within that period. But Mt. Hood's claim before the Commission provided Greyhound with notice of Mt. Hood's antitrust claim, in all but the most technical sense. * * * *It is not simply that the two claims arose out of the same set of facts; the administrative petition was so framed as to raise essentially the same contested issues as did the later antitrust suit.*

(616 F.2d at 400-01; emphasis added).

district court assessed the evidence in light of *Schlup*, its role is to assess whether the strong evidence submitted to the district court is sufficient to require remand for an evidentiary hearing.

1. The Evidence of Petitioner's Actual Innocence

Here, the petitioner has made a strong showing of actual innocence. All the evidence presented at the trial—the golf cap, the gun, the red jacket, the haircut and the testimony of all the witnesses except Ronald and Derek—is either inconclusive or positively exculpatory. Only the Washington brothers' testimony, now negated by Ronald's recantation, placed petitioner at the end of the alley where and when the shooting of Fred Wright occurred.

As well, Ronald's false testimony was the keystone of the prosecution's case, not only because of its singularity in placing petitioner Burton at the scene of the shooting, but because it purported to contradict the eyewitness testimony of Quinola Arnold. Quinola Arnold was nearby because she was looking for her daughter who was late coming home from a party in the area. ER.399. Ms. Arnold testified that petitioner was standing with her at the opposite end of the alley—speaking face-to-face with her—when Wright was shot. ER.407-08. This "contradiction" in the trial testimony enabled the prosecutor to argue to the jury that Ms. Arnold was lying ("*I think what she was essentially doing, she was perjuring herself.*" ER.452). But absent Ronald and Derek's immunized testimony, the prosecutor could not offer the jury his own gratuitous "testimony" that "*I think*" Ms. Arnold was "*perjuring herself and trying to mislead you*" (*id*.), because it is unethical for an attorney to suggest that a witness is lying when no contradictory evidence is of record. Simply put, a trial *sans* Ronald and Derek's testimony—or a trial at which Ronald testified truthfully that

"When all this took place Anthony Burton was up the alley cause he really didn't no his way around. I most definely no Anthony Burton didn't do it" (ER.109)—would never have produced the conviction of Anthony Burton.

Ronald's belated confessions are all fully admissible. The original 1995 letter was acknowledged and republished by Ronald to Investigator Kurta on May 22, 1995, Ronald's written statement of that date was written and signed in the presence of Investigator Kurta, and the handwriting expert, Richard Fox, has confirmed that Ronald wrote and signed each of those documents. And, of course, Ronald's confessions are admissible as statements against interest. One need look no further on this than Ronald's "cold feet" letter of July 1996, in which he stated that he had been talking to attorneys, and realized that if he testified truthfully to all of this, "they say I can cross myself up … now I have to put myself first.... I don't want this situation to turn on me … I can't take that chance." ER.111-12. This admission also cements the credibility and reliability of Ronald's confessions, for there is no conceivable motive on his part to lie at this late stage of things. He had nothing whatever to gain by coming forward in the first instance, and plenty to lose.

Doubtless, respondents would like to argue credibility nonetheless, and attempt to impeach Investigator Kurta and handwriting expert Fox. But that is why this Court should remand for plenary proceedings in the district court.

2. Make Them an Offer They Can't Refuse: The Evidence of Prosecutorial Misconduct

Ronald was a "scaird" 13-year-old boy, who by his own admission, repeatedly lied to the police, and to the prosecutor, before trial, in order to save his own skin. ER.322, 325-35, 348-50. The offer of immunity was therefore pregnant with the

likelihood that Ronald would lie again on the witness stand, and the record is bereft of any suggestion that Ronald would depart from his pattern of prevarication. A prosecutor who offers immunity under these circumstances is engaged in a course of conduct much like what tort law calls an "ultrahazardous activity." Thus, in *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), this Court overturned a murder conviction where there was evidence that the chief prosecution witness may in fact have committed the crime. Said this full Court:

> We have previously recognized that criminals who are rewarded by the government for their testimony are inherently untrustworthy ... We said that informants granted immunity are "by definition ... cut from untrustworthy cloth[,] and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom."

Id. at 479, quoting *United States v. Bernal-Obeso, supra*.

There is now evidence from Ronald himself that the prosecutor told Ronald what to say. Indeed, Mary Burton overheard the angry prosecutor say to Ronald, after he testified at trial, that "you didn't say what I told you to say." ER.157.[8] On remand, an evidentiary hearing may establish that the prosecutor told Ronald what to say. Yet, whether or not the district court concludes that the prosecutor framed Ronald's testimony or just indicated what he might wish to hear, the prosecutor was proceeding at his peril. Surely this Court's admonitions in *Carriger* and *Bernal-Obeso* are doubly important when the immunized witness is a scared 13-year old boy. *A fortiori*, this Court should reverse the judgment, and remand for further proceedings on the merits

[8] Possibly the prosecutor was discouraged by an apparent contradiction between Derek and Ronald about their opportunities to meet in jail and get their stories straight.

of the question whether (as framed by Judges Kleinfeld and Hawkins in the COA) "an eyewitness to the crime was induced by the prosecutor to give false testimony."

We may anticipate a reply by respondents that this Court should disregard Ronald's own "eyewitness testimony" of prosecutorial misconduct, and affirm solely on the shopworn maxim that recantations are "untrustworthy." But it is difficult to imagine that a recantation is any more "untrustworthy" than the testimony of a juvenile who testifies under a grant of immunity to save his skin. Moreover, as we now briefly show, Ronald's confession has a remarkable aura of authenticity and reliability, because it is phrased in words whose importance even Ronald could not appreciate.

Several undisputed facts in the trial record are a very telling introduction. Three persons, and only three, were in the alley when Fred Wright was fatally shot. Two of the three were undeniably Anthony Sneed and Ronald W., because Ronald testified at trial that he was present with Sneed when the shots rang out. ER.312. The third participant therefore *had* to be *either* Ronald's brother Derek *or* petitioner Burton because—there being only three—it could not have been both. At least two of the three fired the shots, and one of those was Anthony Sneed. These facts created a dilemma for Ronald, for Derek, and for the prosecutor.

a. Ronald's Dilemma

Because Ronald was one of the three who assaulted Fred Wright, and because there were two shooters, Ronald *had* to identify the third person as the other shooter, lest he implicate himself as that shooter. Therefore, Ronald's chief motive in testifying that *he* was not the shooter was to portray himself as the innocent young bystander. But that was not enough, for in order to pull this off, Ronald *had* to

implicate someone else in the shooting. Ronald's implication of Derek, to save his own skin, was a Hobson's choice indeed, for it would have sent his own brother away. Hence, the prosecutor's offer of immunity if Ronald would implicate petitioner Burton was a deal no 13-year-old boy could refuse. He gave in.

Ronald testified that Derek stopped at the edge of the alley. ER.310. That got Derek off the hook as one of the shooters. Next, Ronald portrayed himself as the unarmed, innocent bystander in the group of three in the alley. ER.311.

But of course, Ronald's efforts to exculpate himself and his brother Derek necessitated naming someone else as the second shooter, so—as Ronald has now confessed—he then put the lie onto petitioner Burton. *"D.A. Solomon said if I put him Anthony Burton at the seen, he would drop charges on me."* And Ronald succumbed to this Faustian bargain, testifying that Anthony Meyers (Sneed) shot the sawed-off .22 , and petitioner fired the other weapon. ER.311-12.

Ronald admitted under cross-examination that he had lied on several occasions when questioned by the Pomona Police, and had lied still again when questioned under oath by the prosecutor, thereby to avoid implicating both himself and his brother Derek. ER.330-31. Yet, the record is bereft of any evidence that Ronald's trial testimony was anything more than a continuation of this pattern of prevarication. The only difference was that his immunized testimony at trial conveniently aided the prosecutor's efforts to convict the adult suspects—Sneed and Burton. The prosecutor *"wanted the two of you because you was older."*

b. Derek's Dilemma

Derek Washington—a boy of 15 but with a motive to kill Wright—*had* to place himself up the alley, and away from Wright, in order to save his own skin. Yet,

saying only that much would place his brother Ronald in jeopardy, for Ronald was at the scene. Therefore, Derek had to testify *not only* that he was not present, but that petitioner Burton *was* the third person, *and* that Sneed and Burton (but not Ronald) were the two shooters. Again, an offer that no 15-year-old could refuse. Thus, Derek claimed that petitioner fired a .22 handgun, Sneed fired a sawed-off .22, and Ronald merely watched. ER.363-64.

c. The Prosecutor's Dilemma

The prosecutor, for his part, also had several problems. The first was the absence of eyewitness evidence from anyone else identifying even Anthony Sneed — much less a second person — as the two shooters of Fred Wright. As the prosecutor explained in his summation to the jury, the case against Sneed was a "circumstantial case without the testimony of the Washington brothers" ER.447. However, because it is more difficult to convict with only circumstantial evidence, the prosecutor was quick to add that "there's also the direct evidence, the eyewitness testimony of Ronald Washington and Derek Washington that they actually saw the guns fired." ER.448.

The case against Sneed therefore required Ronald and Derek to testify against him, but as we have seen, the Washington brothers would have implicated themselves had they done so. No Washingtons, no Sneed, no conviction of anyone. So the only way out of that box was to induce the Washingtons to testify against *both* Sneed *and* Burton, because this was the only way they could exonerate themselves. It is just that simple, and this is why there is so remarkable a ring of truth to Ronald's confession 15 years later: *"He tol me he wanted the two of you, because you was older."*

"Because you was older" is also a telling admission in another sense. This case was tried as a gang-related shooting, replete with testimony about "Crips" and

"Bloods," e.g., ER.204, 207, 209-10, 451. Little imagination is required to understand why a prosecutor would much prefer convicting two adults of first-degree murder than to any other — and decidedly less-attractive — alternative. Yet public prosecutors have a special obligation, phrased thus by this Court in *Bernal-Obeso, supra*, 989 F.2d at 333-34:

> As Justice Jackson said forty years ago, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747 (1952). A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. *See United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (convictions reversed because government should have known witness was committing perjury). Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, government can either contribute to or eliminate the problem. *Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery*.

The prosecutor in this case simply failed to discharge this obligation and, indeed, actively undertook a pattern of behavior designed to fortify jurors' everyday belief that the defendant would not be prosecuted unless guilty.

- Immunizing the Washingtons enabled the prosecutor to attack the credibility of Quinola Arnold, worse yet by improperly attesting to his own belief that she was a perjurer. ER.452.

- Ronald had lied repeatedly, yet on his own direct examination of Ronald and Derek, the prosecutor effectively attested through them that he had not influenced their testimony. It may be one thing to grant immunity and let the chips fall where they may, and quite another to engage in examination asking Ronald to confirm that no one told him what to say on the stand. ER.325. This method of examination had

no purpose other than to suggest to the jury the prosecutor's own vouchsafe of Ronald's trial testimony about petitioner Burton.

- On cross-examination, Ronald admitted that he had numerous post-arrest opportunities to speak with his brother Derek, thereby to get their stories straight. ER.328. The prosecutor then called upon Derek to attest that he and Ronald had been kept separated by the authorities. ER.368. In addition to suggesting to the jury that all proper protocols had been observed by officialdom, this exchange manifests recognition by the prosecutor that one or the other Washington *was still lying at the trial.* (Which is probably why an angry prosecutor was overheard admonishing Ronald that "you didn't say what I told you to say." ER.157.)

There was additional evidence that Ronald was lying about his own role as the innocent bystander, lying about Burton's being the shooter, and the "government should have known" it. *Bernal-Obeso, supra*, 989 F.2d at 333. At trial, Leon Moore identified one of the assailants as wearing a "jacket, kind of rust color, like orange or reddish colored jacket." ER.266. And, in a police photo-lineup, Mr. Moore identified Ronald as the one wearing "the reddish-brown jacket." ER.281-82.

Next came the witness Hal Spring, who reiterated that one of the assailants "had an orange jacket on." ER.242. But Hal Spring remembered even more: The person he saw in the alley that night, the person wearing the orange jacket, *had a gun in his hand*. ER.251. Yet, the prosecutor placed Ronald on the stand following Spring, and Ronald testified that he was just the unarmed bystander, and that the person with the gun in his hand was petitioner Burton. ER.311-12. This is what is so telling about Ronald's 1995 letter of confession: "Cause in the alley I was their. *Howl Spring seen me their at the seen.*" ER.109. You bet Hal saw Ronald, and saw him with the

murder weapon in his hand. And the prosecutor nevertheless let the probable shooter both lie and skate, because "*he wanted the both of you. Cause you was older*." ER.109. Justice Robert Jackson was dead right labeling this as "dirty business" by the government. It ought not be tolerated.

3. Ineffective Assistance of Petitioner's Trial Counsel

Petitioner also sought relief in the district court due to the ineffective assistance of trial counsel. Counsel failed Burton in at least several critical respects. It is useful to review the most significant evidence of ineffective assistance, because the facts establish that petitioner has substantial claims that should be addressed on remand and because these claims are closely related to the showing of actual innocence and prosecutorial misconduct. In particular, as described here, counsel failed his client by neglecting to introduce evidence from two witnesses that Derek Washington had a hostile relationship with the victim, Fred Wright, from which the jury could have inferred that the two brothers and not petitioner had a motive to kill. Counsel also failed to cross-examine trial witnesses with relevant police reports that would have made it clear that Derek Washington, not petitioner, was the third person in the alley.

a. The Evidence of Motive

At the preliminary hearing, two witnesses testified about Derek's animosity towards Fred Wright. Astonishingly, petitioner's counsel failed to elicit this evidence at trial.

Lisa Griffin testified at the preliminary hearing that she saw Derek Washington and Fred Wright arguing with each other in the front yard at her party, just an hour

and a half before the shooting. ER.182-83, 187. They referred to each other as "blood" and "cuz." ER.183.

At trial, Griffin testified on direct examination that she heard somebody yelling "Cuz and Blood." ER.390. The prosecutor did not ask her *who* used those terms. Sneed's counsel elicited from Griffin on cross-examination that she saw Derek and Fred in an argument (ER.394), but he did not establish that they argued using the terms "Cuz" and "Blood." Petitioner's counsel asked no questions at all about the argument or Fred and Derek's challenges to each other. ER.394-95.

More significantly, Harry Wilson was a prosecution witness who testified at the preliminary hearing that he left Griffin's party at 12:00 with Fred Wright and several others. ER.193. He separated from the group and while walking alone, saw Ronald, Derek, Sneed and petitioner. ER.195-96. He saw them running into a back yard. ER.198. Wilson started running too. ER.203. He was asked by the prosecutor:

> Q.: Why did you run?
>
> A.: Cause it was cold and plus, they started running, so I had — and I had a feeling they was gonna do something, so I just ran down the street. (ER.198-99).

He further explained:

> Q.: You say you ran because it was cold?
>
> A.: Uh-huh.
>
> Q.: Why else did you run, any other reason?
>
> A.: Yes, cause I figured that they was gonna do something after I seen them run through the alley and I seen Fred walking and I noticed Fred was walking down the street, so –
>
> Q.: Did you have some reason to believe that somebody might be after Fred?

A.: No.

Q.: In other words, I mean, well, you mentioned Fred, why did you think somebody would be after Fred?

A.: *I just know Derrick didn't get along with Fred*, you know, that's all I know. (ER.202-03).

Yet, by the time trial came around, Wilson changed his testimony and, instead, claimed that he feared for the safety of the group because of *petitioner's* argument with Duwan Franklin, rather than because of *Derek's* animosity towards Fred Wright.

Wilson testified on direct examination at trial that he ran because he "figured that something was going to happen." ER.225. He also claimed that he whistled to warn his friends in the alley. ER.227. When asked by the prosecutor why he was warning them, Wilson said: "Because something had happened at the party, so I figured they would try to take it out on them or something." ER.227-28. Wilson testified on cross-examination by petitioner's counsel as follows:

Q.: Why did you think something was going to happen?

A.: Because I know they was arguing at the party?

Q.: Who was arguing at the party?

A.: *The – Duwan and one of the Anthonies. I don't know which one it was, but –*

Q.: Was Duwan with the group that was over on Larchmont?

A.: No. No, he wasn't.

Q.: Well, if Duwan wasn't with the group over on Larchmont, why would you think that the four individuals going over that way there would be some kind of problem?

A.: Because they might think one of them was Duwan. (ER.231-32).

Petitioner's counsel failed to cross-examine Wilson with Wilson's own prior sworn testimony from the preliminary hearing. Thus, he let Wilson leave the false

impression that petitioner might harm Fred Wright, rather than have the jury understand Wilson's palpable fear that because Derek and Fred had a bad relationship, Derek might harm Wright. Counsel failed to establish that Derek and not petitioner had the motive for the shooting. This was ineffective assistance of trial counsel.

Claims of ineffective assistance are measured by the familiar two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner must establish that counsel's performance fell below "an objective standard of reasonableness" (*id.* at 688) and that the errors were prejudicial. *Id.* at 694. Proof of prejudice is not by even a preponderance; rather, petitioner must only establish "a probability sufficient to undermine confidence in the outcome." *Id*. Both prongs are met here.

Counsel's performance was not objectively reasonable for there could be no tactical reason for counsel's failures. The cross-examination of both Griffin and Wilson was risk-free; both witnesses had already testified under oath to the facts that should have been elicited. And their evidence was essential to the defense, particularly because in California even out-of-court statements admitted for impeachment are also admitted for the truth of the matters asserted. *See Henry v. Kernan*, 197 F.3d 1021, 1029 (9th Cir. 1999) (citing Cal.Evid.Code §§1220, 1235), *cert. denied*, 120 S.Ct. 1262 (2000). Nor can there be any claim that this evidence would have contradicted other parts of the defense. Petitioner's defense at trial was that Derek and Ronald had done the killing. Evidence giving one or both brothers a motive for the shooting could only have bolstered the defense. Indeed, petitioner's counsel weakly stated in closing, without much support in the record, that Derek and Fred had argued so Derek "might have had a motive to do some shooting." ER.453.

Counsel's performance prejudiced the defense. Inasmuch as counsel failed to link the argument to the challenges ("blood" and "cuz") and counsel failed to cross-examine Wilson with his prior sworn testimony of animosity between Derek and Fred, the claim of motive was wholly unpersuasive. Counsel's failure to introduce this evidence undermined confidence in the outcome of the trial.

b. The Clothing and Identification Evidence

Just four hours after the shooting, Pomona police interviewed Leon Moore, one of the few non-participant witnesses. Moore heard several shots, looked out his window, and saw three males running. Moore described suspect #1 as a male Negro, 5'1", wearing "a leather type jacket," "kind of a reddish color," a "dark colored golf hat" and "holding what appeared to be ... a gun." ER.149. Suspect #2 was also approximately 5'1" with dark clothing, and the third suspect was taller than the other two, with flare bottom pants. Inasmuch as the undisputed evidence was that Ronald was wearing a rust-colored leather jacket and was short (4'10", ER.154), this statement indicated that Ronald, not petitioner, was wearing a golf hat and—critically—had a gun in the alley.

By the time of the trial, however, Moore testified that he heard shots, went to the window, and actually saw shooting. ER.261, 264. He claims that one of the three wearing dark clothing was crouched and had a gun. ER.265. He placed the golf hat on somebody other than the suspect with the reddish jacket. ER.266-67. On cross by counsel for petitioner's co-defendant, Moore admitted that the person with the reddish jacket appeared to be holding "something." ER.283. However, petitioner's counsel never pursued the discrepancies with Moore (ER.286-88) and thus never established

that that something was a gun. Nor did he make clear that the person wearing the golf hat was Ronald.

In addition, Duwan Franklin testified at the preliminary hearing that Derek was wearing a black jacket while petitioner's jacket was tan or brown. ER.189-90, 191.[9] At trial, Franklin could not remember or describe petitioner's jacket. ER.213. Petitioner's counsel did not attempt to refresh his recollection or ask what Derek was wearing. ER.214-21. Because the other two in the alley besides Ronald were wearing dark clothing, it was critical to introduce this evidence. Counsel failed to do so.

Under the test set forth in *Strickland*, *supra*, this was ineffective assistance of counsel. This evidence was readily available. These witnesses testified at trial and could easily have been asked these questions. A reasonably competent attorney would have asked them, and counsel's failures surely undermine confidence in the outcome of the trial. These constitutional errors should be explored on remand, particularly since they mesh with the evidence of Ronald's recantation. Ronald was indeed the person in the alley with the rust-colored jacket and the gun.

4. This Court Must Remand for an Evidentiary Hearing

The case must be remanded for an evidentiary hearing on petitioner's actual innocence and his claims of prosecutorial misconduct and ineffective assistance of counsel. Petitioner attempted to develop all of the relevant facts in state court, and thus the AEDPA is no barrier to an evidentiary hearing in federal court. And this is precisely the sort of case in which an evidentiary hearing must be held.

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[9] Franklin was shown a jacket that was tan or light brown, and said that "[i]t might have been a little darker, but that looks just like it." ER.191.

As initial matter, this Court must conclude that the AEDPA does not preclude the federal courts from holding an evidentiary hearing. Under 28 U.S.C. §2254(e)(2), as amended by the AEDPA, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing on the claim" unless certain exceptions are met. In *Williams v. Taylor*, 120 S.Ct. 1479 (2000), the Supreme Court held that this provision only requires an applicant to exercise diligence in seeking to develop the relevant facts. *Id.* at 1490-91. The *Williams* Court determined that a federal hearing could be held to develop the facts on the petitioner's claims of juror bias and prosecutorial misconduct where his federal counsel sought investigative funds but that request was denied. *Id.* at 1493-94. In the usual case, a habeas corpus petitioner will not have "failed to develop" his claims where he has sought (but has been denied) an evidentiary hearing in state court. *Id.* at 1490. This Circuit's rulings, which pre-date *Williams*, are in accord.[10]

In the case at bench, the petitioner presented all of his evidence of Ronald's perjury, prosecutorial misconduct and ineffective assistance of counsel to the California Supreme Court. His state petition asked for relief or, alternatively, that the State be required to show "at a hearing" why relief should not be granted. ER.160. In his Memorandum accompanying the Supreme Court petition, counsel wrote:

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[10] *See Weaver v. Thompson*, 197 F.3d 359, 362-63 & n.3 (9th Cir. 1999) (federal hearing properly convened; no failure to develop facts where evidence was presented to state courts, but no state evidentiary hearing was conducted); *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999) (federal hearing properly denied where petitioner failed to come forward with evidence of ineffective assistance of counsel or explain why such evidence could not be developed in state court); *Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir. 1997) (Jones "did not develop the facts on this claim in the state court because he was never given the opportunity to do so: the Washington Court of Appeals dismissed his ... petition ... without a hearing."), *appeal after remand*, 207 F.3d 557 (9th Cir. 2000).

"petitioner prays this Court will give him something he has yet to experience in our judicial system – a fair hearing which will be based on all the facts of the case and issues in this case. That this court will over turn petitioner's conviction; or at least grant him an evidentiary hearing and hold to answer those who so carelessly and negligently used/abused their respective appointments and obligations to the people of this State and to petitioner by considering all of the evidence in this case in its proper light." ER.163. Under the standard described in *Williams*, petitioner in no way "failed to develop" his claims in state court. The AEDPA thus provides no barrier to a federal hearing.

While the AEDPA does not foreclose a hearing, the law of this Circuit affirmatively requires one. A federal habeas petitioner

> is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) the petitioner's allegations would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.

Jones v. Wood, 114 F.3d 1002, 1010 (9th Cir. 1997) (citation omitted), *appeal after remand*, 207 F.3d 557 (9th Cir. 2000). *See Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999) (same); *see also Rhoden v. Rowland*, 10 F.3d 1457, 1460 (9th Cir. 1993) (remand to determine whether petitioner was unconstitutionally shackled, where state courts did not allow him to develop the relevant facts), *appeal after remand*, 172 F.3d 633 (9th Cir. 1999).

Here, of course, the State may wish to concede the petitioner's actual innocence and the merits of his legal claims. Should the State decide to dispute them, however, a hearing is required.

A hearing must be held on the evidence of actual innocence because, under *Schlup*, the allegations would, if proved, establish a gateway to plenary consideration of the merits. The evidence of actual innocence is strong and the state courts have neither held a "full and fair hearing" nor, indeed, found the relevant facts at all. The California Supreme Court summarily dismissed the state habeas corpus petition and made no findings of fact whatsoever. Under these circumstances, a federal hearing is required. *See United States v. Jones*, 172 F.3d 381, 384-85 (5th Cir. 1999) (remand for district court to consider claim of actual innocence on §2255 motion, which lower court had dismissed as untimely without assessing claim of innocence).

Assuming that there is a sufficient showing of actual innocence, an evidentiary hearing must also be held on the merits claims. The petitioner has alleged that the trial prosecutor induced Ronald Washington to give perjured testimony, and that the prosecutor failed to disclose his conversations with Ronald, which would have undermined Ronald's testimony. This allegation, if proved, would entitle petitioner to relief. *See United States v. Agurs*, 427 U.S. 97, 103 (1976), discussing *Mooney v. Holohan*, 294 U.S. 103 (1935) (due process violation to introduce material evidence that prosecutor knew, or should have known, was perjured); *United States v. Shaffer*, 789 F. 3d 682, 687 (9th Cir. 1986) (same)**;** *Kyles v. Whitley*, 514 U.S. 419 (1995) (granting petition because failure to disclose exculpatory evidence undermined confidence in the outcome of the trial); *Carriger, supra*, 132 F.3d at 479-82 (granting petition because prosecution did not disclose evidence of main witness' history of lying to police and blaming his crimes on others). As with the showing of petitioner's factual innocence, the state courts have neither held any hearings nor found any of the relevant facts. Thus, the cause should be remanded for a hearing in district court. *See*

Paradis v. Arave, 130 F.3d 385, 400 (9th Cir. 1997) (remand for an evidentiary hearing on claim of *Brady* violation due to non-disclosure of post-autopsy notes).

The claim of ineffective assistance of counsel is, likewise, ready for a federal evidentiary hearing. The petitioner has asserted that counsel failed to elicit critical evidence that would have given Derek and, by implication, Ronald a motive to kill Fred Wright, and that counsel failed to show that the evidence in fact implicated Ronald and Derek. If proved, these allegations would entitle him to relief, particularly when coupled with the recently-surfaced evidence of Ronald's falsehoods. The claims of ineffective assistance of counsel here are closely tied to the claims of prosecutorial misconduct, for the evidence that counsel failed to introduce coheres with Ronald's recent confession. *Jones v. Wood* is directly on point and demonstrates why a hearing is required. In *Jones*, this Court remanded for an evidentiary hearing to explore allegations that counsel failed to investigate the likelihood that another person, Busby, committed the murder. *Id.*, 114 F.3d at 1010-11. The state had a circumstantial case against Jones and "failing to investigate Busby's potential involvement to exhaustion was a grave error." *Id*. at 1011.

C. Even Absent Consideration of *Schlup*, the Decision Below Was Incorrect, and Should be Reversed[11]

In addition to its failure to undertake the inquiry mandated by *Schlup*, the district court erred in its procedural ruling that the petition was barred by the one-year proviso of AEDPA. Recall that the Magistrate held that AEDPA's one-year prescriptive period began to run on April 24, 1996, and that this holding was, in turn, based upon the finding that the limitations period began to run when Ronald's letter was received, not when Ronald was interviewed or his letter authenticated. ER.103 (fn. 5).

Respectfully, this reasoning is erroneous, because it fails to deal with realities under §2244(d)(1)(D), which provides that the AEDPA period of limitations does not begin to run "until the date on which the factual predicate of the claims or claims presented could have been discovered in the exercise of reasonable diligence." When the letter was received, petitioner was on notice that he had a claim to investigate. But he did not yet have the "factual predicate" for his petition.

In its Informal Response to petitioner's California Supreme Court petition, the State trashed Ronald's 1995 letter of confession as "an undated, unaddressed, unsworn, almost unintelligible letter, purportedly written by Ronald," and therefore utterly unworthy of belief. ER.169. The Magistrate for his part aped his disdain ("This letter was not addressed to anyone, and was signed by 'Ronald W.' "), but then

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[11] Petitioner's current counsel was appointed long after the COA issued. Counsel would, ordinarily, now move to amend the COA to include this argument. However, under *United States v. Zuno-Arce*, 209 F.3d 1095 (9th Cir. 2000), such a motion would be untimely. Counsel is, nevertheless, including this argument in this brief because a petition for rehearing and suggestion for rehearing en banc is pending in *Zuno-Arce* and a ruling on this issue might obviate the need for addressing the *Schlup* questions. Moreover, should this case be remanded to the district court on other grounds, this argument might be raised in the district court and also avoid the need for an evidentiary hearing on factual innocence.

turned 'round and held that the receipt of a wholly unreliable letter triggered the running of the statute. ER.103. This *volte face* enabled the State to have and eat cake. And not for the first time, we may add, for the Informal Response also draws attention to a post-trial motion made in 1982, in which petitioner sought a new trial in the Superior Court on the basis of a third-hand report that Ronald had bragged in the jailyard about his own involvement in the murder of Fred Wright. The Superior Court denied the motion precisely because the "evidence" supporting it was uncorroborated and inadmissible. ER.168-69. Surely, had petitioner filed a federal habeas petition when his wife received "Ronald W.'s" first letter, he would have been rebuffed on the same ground: "This almost unintelligible letter was not addressed to anyone, and was signed by 'Ronald W.' Petition denied." And if petitioner had sought to refile *after* conducting a full investigation, that effort would have been dismissed as a successive petition.

If the statute's requirement of "discovery" means anything at all, then some account must be taken of the realities of the circumstances of those in petitioner's shoes. After receipt of Ronald's first letter, petitioner and his wife spent many months trying to find an attorney willing to take the case on a pro bono basis. Attorney Farley, who finally accepted the task, then had to find an investigator willing to serve, and thence to locate and interview Ronald, who was in the Tehachapi prison. This is so because no court would have given petitioner the time of day, had he filed a petition based solely on Ronald's original letter.[12] Authentication and corroboration

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[12] This is well-illustrated by a letter that petitioner's wife received in August 1995 from Los Angeles Superior Court Judge Theodore Piatt, one of the many persons to whom Robin Burton wrote in her desperate search to find someone willing and able to assist her husband. Judge Piatt replied:

were absolutely required in this setting, and there is and cannot be any contention that petitioner acted with less than diligence in his efforts to pursue those goals. Investigator Kurta interviewed Ronald on May 22, 1996: Ronald acknowledged authorship of the original letter, republished its truth, and provided a handwriting sample. Then, a handwriting expert had to be found, especially after Ronald's "cold feet" letter of July 1996, and the expert's report was, in turn, received only on November 19, 1996. (ER.120)[13] If, as the Magistrate appeared to acknowledge, the remaining time under AEDPA resumed running on March 21, 1997 (the acknowledged date of petitioner's actual receipt of notice that the Supreme Court of California had denied his exhaustion petition), then the petition was timely filed in the

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> I appreciate your bringing this recent discovery to my attention. **** It would be appropriate for you to *seek counsel* and have counsel *begin an investigation* with a view to *determining if it would be appropriate* to seek some relief either in a trial court or at the appellate level. A judge would simply not have the jurisdiction to act on your request without the assistance of attorneys.

ER.180. We do not suggest that Judge Piatt's recommendations are somehow "binding" on the State in a res judicata sense. Rather, we offer them as a practical, common-sense observation that lawyer assistance, investigation and the marshalling of admissible evidence are important to screen-out frivolous claims, and to "alleviate the increasing burdens on the federal courts" by focusing their attention on meritorious claims supported by credible evidence, *Schlup v. Delo, supra,* 513 U.S. at 318, 324.

[13] Attorney Farley's efforts to obtain the services of an investigator to interview Ronald were commendable, for had the attorney interviewed Ronald himself, any testimony he might offer could be subject to disapproval under the principles that inform California Rules of Professional Conduct Rule 5-210, which look with disfavor upon an attorney's testifying on behalf of his client in contested matters.

Similarly, Attorney Farley's engagement of a handwriting expert was also commendable, as it reduced the possibility that a judge would have to determine the authenticity and veracity of Ronald's confessions on the basis of nothing but a "swearing contest" between Investigator Kurta and Ronald, who as we know had by now developed the coldest of feet. Courts should not penalize petitioners whose counsel behaved in so ethical a fashion.

district court if "discovery" of the "factual predicate" under §2244(d)(1)(D) is deemed to have occurred on May 21, 1996, the day on which Investigator Kurta interviewed Ronald in prison. And the petition was timely beyond peradventure if the "discovery" of the "factual predicate" is deemed to be November 19, 1996, the date of receipt of the handwriting expert's report.

Finally, holding that the "factual predicate" was discovered on either date would do no violence to the statute, and would indeed be desirable, because the Court faces two choices:

1. Many claims of "newly discovered evidence of innocence" will be based on nothing more than third-hand, uncorroborated "evidence" that often will amount to no more than jailhouse braggadocio. A holding that "evidence" of this character triggers the running of the statute will simply lead to the filing of petitions that have little merit, yet will occupy district courts *ad infinitum*. Prisoners reading advance sheets telling them that they must file upon rumor, surmise, or threadbare suspicion will do just that.

2. On the other hand, "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup v. Delo, supra*, 513 U.S. at 324. Accordingly:

> 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.

Id.

Under these circumstances, courts cannot insist on a high order of proof without cutting petitioners some slack under §2244(d)(1)(D), in order to permit them to obtain the evidence they need to satisfy this burden. Here, the Magistrate's crabbed interpretation of the statute does just the reverse, penalizing the rare petitioner who can and does come up with the very caliber of evidence demanded. There is no merit to this approach, least of all in this case. If Ronald's authenticated, corroborated statements concerning his Faustian bargain are properly credited, there was not only prosecutorial misbehavior, but fraudulent concealment of it to boot, and "suspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred," *Mt. Hood Stages, supra,* 555 F.2d. at 699, quoting *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

CONCLUSION

The judgment below, dismissing the petition with prejudice, should be reversed, and the case remanded for a hearing on factual innocence and the merits of the claims presented in the petition.

DATED: June 20, 2000

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 32(E)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Opening Brief is proportionately spaced, using a typeface of Times Roman 14 points, and contains 13,779 words, excluding cover page, tables, certifications, statutory addendum, and proof of service.

Charles D. Weisselberg
June 20, 2000

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am unaware of any related cases pending in this Court.

Charles D. Weisselberg
June 20, 2000

STATUTORY ADDENDUM
(28 U.S.C. §2244)

28 U.S.C. §2244, as amended by the AEDPA, provides:

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is Brobeck, Phleger & Harrison LLP, Spear Street Tower, One Market Plaza, San Francisco, California 94105.

On June 20, 2000, I served two copies of the **OPENING BRIEF FOR PETITIONER-APPELLANT** and one copy of **EXCERPTS OF RECORD** on the parties in this action by placing a true copy thereof in sealed envelopes, addressed as follows:

William H. Davis, Jr., Esq.
Deputy Attorney General
State of California
300 South Spring Street
Los Angeles, CA 90013

I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at Brobeck, Phleger & Harrison LLP, San Francisco, California, following ordinary business practices. I am readily familiar with Brobeck, Phleger & Harrison LLP's practice for collecting and processing of correspondence, said practice being that in the ordinary course of business, correspondence (with postage thereon fully prepaid) is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 20, 2000, at San Francisco, California.

_____
Lynda Rosenblatt