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.

REPLY 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

Anthony Burton was sentenced to life in prison because the prosecution induced a "scaird" 13-year old boy—Ronald Washington—to give false testimony. In 1995, that boy, now a man, finally permitted the better angels of his nature to speak out and to try to set things right—"I no I can't change the pass. But I can do right by it now." ER.109. Yet when Mr. Burton brought this new evidence to the federal court, his habeas corpus petition was summarily dismissed. It was not dismissed on the basis of any finding that he was, in fact, guilty, or that Ronald's recantation was in any way unreliable. Rather, the district court insisted that Mr. Burton had missed a filing deadline by less than a month.

The core question presented under the Certificate of Appealability is whether the Anti-Terrorism and Effective Death Penalty Act (AEDPA) obliges this Court to stand on ceremony, ignore strong evidence of actual innocence and thereby force an innocent man to serve out the rest of his life in prison simply because he came to federal court a few days late. The answer is, as it ought to be, no.

It is within the power of the federal courts to reach the merits of Mr. Burton's habeas corpus petition. Congress did not intend the AEDPA to supplant all pre-existing habeas corpus law. In passing the one-year statute of limitations set forth in §101 of the AEDPA, 28 U.S.C. §2244(d), Congress did not intend to displace the actual innocence exception described in *Schlup v. Delo*, 513 U.S. 298 (1995). The exception applies, there is strong evidence of Mr. Burton's innocence, and this case should be remanded for a hearing on his innocence and the merits of his petition.[1]

[1] In his opening brief, Mr. Burton addressed two of his merits claims, those of prosecutorial misconduct and ineffective assistance of counsel. The State decided not to address the merits, arguing that they are outside the scope of the COA. Mr. Burton submits that the merits are bound up with the second question in the COA and are

REPLY ARGUMENT

A. The AEDPA Does Not Eliminate the Actual Innocence Exception for "First" Petitions

In the opening brief, Mr. Burton explained that the AEDPA does not wholly displace existing habeas corpus doctrines; indeed, "the development of habeas corpus jurisprudence" is marked by "the interplay between statutory language and judicially managed equitable considerations." *Schlup*, 513 U.S. at 319 n.35. Both the Supreme Court and this Court have emphasized the continued relevance of traditional principles to habeas corpus practice under the AEDPA. *See, e.g., Williams v. Taylor*, 120 S.Ct. 1479, 1490-91 (2000) (considering traditional notions of exhaustion and comity in interpreting the AEDPA's standards for an evidentiary hearing); *Calderon v. District Court (Kelly)*, 163 F.3d 530, 537-38 (9th Cir. 1998, *en banc*) (rejecting a claim that the AEDPA silently introduced res judicata into habeas law).

Both Courts have also construed specific AEDPA provisions narrowly, noting that when Congress has enacted new habeas corpus procedures in some sections of the Act but not in others, we may presume that the legislature did not intend to alter existing doctrine. *See, e.g., Hohn v. United States*, 524 U.S. 236, 250 (1998) (finding no Congressional intent to bar Supreme Court review of denial of certificates of appealability, where Congress expressly barred certiorari review of denials of motions to file successive petitions, but was silent regarding certificates of appealability); *Calderon v. District Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997), overruled on other grounds, *Calderon v. District Court (Kelly)*, 163 F.3d. 530 (inferring that Congress did not upset the normal rule allowing longer tolling of the AEDPA's statute of limitations, where a 30-day limit was placed on tolling in a different part of the

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properly before the Court for consideration. However, because the State has not disputed Mr. Burton's merits claims, they will not be reiterated here.

AEDPA but not on the one-year statute of limitations). As Judge Kozinski explained in *Beeler*, "[t]he Supreme Court has cautioned against using this kind of negative inferential reasoning." *Id.* at 1289 (citing *Cort v. Ash*, 422 U.S. 66, 83 n.14 (1975)).

Applying these holdings to the statute at issue here, Congress did not alter the application of the *Schlup v. Delo* innocence exception to a late-filed "first" petition when it increased the quantum of proof required to show actual innocence and allow a *successive* petition to be filed (AEDPA §107), but was silent on the application of *Schlup* to a late-filed *first* petition. *See* AOB 16-20.[2]

Nevertheless, the State contends—remarkably—that there are no exceptions *at all* to the AEDPA's one-year statute of limitations. *See* SB 14-15. In doing so, the State fails to address the holdings of *Williams v. Taylor*, *Hohn v. United States* and the like cases from this Court. The State has made a raw and unsupported assertion that the statute of limitations is absolute, but has put forth no theory which would permit this Court to overlook traditional federal habeas corpus doctrines, such as the longstanding actual innocence exception to procedural defaults. Nor has the State provided any explanation as to why a Congress concerned enough to heighten the showing of actual innocence required to excuse a successive petition would not have been concerned enough to address the application of *Schlup v. Delo* to a late-filed "first" petition, had Congress intended to change the law. Unable to answer these cases and points, the State has taken the extreme position that the one-year statute of limitations contained in §2244(d) was meant to wholly supplant existing doctrine, and that the limitations period admits of no exceptions at all. But that argument has already been rejected by this Court, sitting *en banc* in *Kelly*, *supra*.

[2] We cite the Opening Brief for Petitioner-Appellant as "AOB," the State's Brief as "SB," and Appellant's Excerpts of Record as "ER.__." Unless otherwise stated, emphasis in quoted materials has been supplied, and internal citations omitted.

If, as the State contends, Congress did not contemplate any exceptions to the one-year time bar, then the limitations period may not even be equitably tolled. Indeed, the State argues "that equitable tolling is clearly inconsistent with the text of §2244(d)." SB 15. However, in *Beeler*, this Court ruled that §2244(d) does not establish a jurisdictional bar, and that the requirement is subject to equitable exceptions (in that case, tolling). *Beeler*, 128 F.3d at 1289. In *Kelly*, this Court—sitting *en banc*—followed *Beeler*. *Kelly*, 163 F.3d at 541. Thus, the argument that §2244(d) admits of no exception has already been authoritatively rejected by this Court.

Further, the State's twist on this argument, that no exceptions can apply because §2244(d) is a statute, rather than a judicially-created procedural bar, is wholly circular and does not advance the State's cause. *See* SB 20-21. The simple observation that §2244(d) is a statute does not help us to determine the reach of that statute. More specifically, acknowledging that the one-year limit was established by statute does not, in and of itself, assist in assessing whether Congress meant to displace the *Schlup* exception. The question still boils down to simply what Congress intended the statute to do.

Finally, the State contends that this Court has thus far only permitted equitable tolling in certain limited circumstances. But Mr. Burton has never claimed that the *Schlup* exception is a sub-category of equitable tolling. That this Court has found equitable tolling to apply in only some circumstances does not mean that other equitable exceptions can never apply. In *Schlup*, the Court made it abundantly clear that "habeas corpus is, at its core, an equitable remedy" (*id.* at 319), and restrictions on habeas must be subject to a panoply of exceptions designed to protect against fundamental miscarriages of justice. *Id.* at 319-22.

Thus, the short answer to the first question posed in the COA is that 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 in a first petition case.

B. This Court Should Construe the AEDPA to Permit Innocence to Excuse Delay and Avoid a Serious Constitutional Question

In the opening brief, we added that this Court should construe §2244(d) to include *Schlup's* actual innocence gateway, and thus avoid addressing whether a contrary interpretation would violate the Suspension Clause or the Fourteenth Amendment. *See* AOB 20. "The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions." *Ma v. Reno*, 208 F.3d 815, 822 (9th Cir. 2000). In *Ma*, this Court called this rule "a 'paramount principle of judicial restraint.'" *Id.* (quoting *United States v. Restrepo*, 946 F.2d 654, 673 (9th Cir. 1991)). The State argues that its construction of the AEDPA—allowing absolutely no exceptions whatever—would not constitute a suspension of the writ, because habeas jurisdiction is purely a matter of statutory grace, and that even at common law the federal writ did not extend to state prisoners or permit post-conviction review. *See* SB 21-33.

This approach misses the mark entirely, for it is this Court's obligation to *avoid* reaching substantial constitutional questions if it can possibly do so. Accordingly, it is quite sufficient to show that the State's view of the Suspension Clause is seriously flawed, and that any effort to resolve the debate would sidetrack the Court into the very quagmire that the Court is obliged to avoid. We therefore respond only briefly on three points. *First*, the Suspension Clause protects the writ as it exists today, not as it existed in 1789. *Second*, even so, inquiries under the writ have historically extended beyond jurisdictional issues, and to review of state convictions. *Third*, statutory

restrictions ought not to bar meritorious first petitions for technical, procedural reasons.

1. The Suspension Clause Protects The Writ of Habeas Corpus As It Exists Today

Habeas corpus is a right guaranteed by the Constitution. *See The Slaughterhouse Cases*, 83 U.S. 36, 79 (1872). There is strong historic evidence that the framers and ratifiers of the Constitution believed habeas corpus was within the inherent power of courts, and that the Suspension Clause so well protected habeas that no provision was necessary in the Bill of Rights. *See* E. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 543-58 (2000).

That right embraces common law habeas practice as it has developed to the present day. *See McNally v. Hill*, 293 U.S. 131, 135-136 (1934) (describing habeas corpus as an "incident" of the federal judicial power, recognized by the Suspension Clause); *Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (explaining that "development of the writ of habeas corpus did not end in 1789"); *Jones v. Cunningham*, 371 U.S. 236, 243 (1962) (the writ "never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.") Two points make this even clearer. The Supreme Court has interpreted the AEDPA in light of current doctrine, avoiding conflict with the Suspension Clause, and thus indicating that the scope of the present-day writ truly does matter. Moreover, there is a fair claim that the Suspension Clause may be incorporated within the Fourteenth Amendment, establishing that the writ may be interpreted expansively.

For example, in *Felker v. Turpin*, 518 U.S. 651, 664 (1996), the Court assumed "for purposes of decision… [that] the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." The justices then determined that §2244(b), which restricts Supreme Court review of successive petitions, does not violate the Suspension Clause because the statute fits within contemporary doctrine:

> "The doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, §9. *Id*. at 664 (quoting *McCleskey v. Zant*, 499 U.S. 467 (1991)).

In sum, current-day practice does matter.

Further, in *Stewart v. Martinez*-Villareal, 523 U.S. 637 (1998), the Court again interpreted a portion of the AEDPA so as to fit within current habeas doctrine. There, the district court had dismissed the prisoner's *Ford v. Wainwright* claim in a first petition as not ripe; when his execution was imminent he re-petitioned the district court. The State claimed that the *Ford* claim was barred by §2244's prohibition on successive petitions. Though the statute provided for dismissal of a claim previously "presented," the Court rejected this meaning of "presented" because it would lead to a "perverse" result. The justices construed "presented" as "adjudicated" and decried a construction of the statute that would "bar the prisoner from ever obtaining federal habeas review" for "technical procedural reasons." *Id*. at 644-45.

These constructions, which locate provisions of the AEDPA within the "compass" of the constitutionally-protected writ, indicate that the basic contours of habeas corpus doctrine—as it has evolved—are of constitutional stature. Accordingly,

statutes that seek to alter fundamental aspects of the writ of habeas corpus may raise separation-of-powers issues. Compare *Dickerson v. United States*, 120 S.Ct. 2326 (2000) (Congressional enactment cannot abrogate *Miranda's* constitutional rule) with *Felker, supra*, 518 U.S. at 666 (Souter, Stevens and Breyer, JJ. concurring) (narrowing the scope of habeas corpus jurisdiction might exceed Congress' Exceptions Clause power if the Court could not review divergent appellate interpretations of gatekeeping mechanism).

There is also a fair claim that the Suspension Clause may be incorporated within the Fourteenth Amendment. Habeas corpus is one of the national rights available to citizens. *See The Slaughterhouse Cases*, *supra*, 83 U.S. at 79. This view seems to have been shared by the drafters and ratifiers of the Amendment. *See* J. Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 889-890 (1994) (habeas a "privilege" as contemplated by §1 of the Fourteenth Amendment). In that case, the writ protected by the "incorporated" Clause of the Amendment is at least as powerful as that known in 1868. *See id.* at 909.

2. The Eighteenth-Century Writ Permitted Post-Conviction Review

Attempting to "prove" that federal habeas corpus was originally limited to review of federal pre-trial detentions, the State cites a few commentators (SB 28-30), but has ignored a more considerable, authoritative body of research indicating that the writ of habeas corpus was much more far-reaching than the crabbed view portrayed by the State.

This scholarship demonstrates three critical points. First, as discussed above, habeas was understood in 1789 to be a protected right, and a common law power.

Additionally, if the Suspension Clause is incorporated by the Fourteenth Amendment, then the inquiry as to "original intent" must include that of the framers and ratifiers of the Fourteenth Amendment. As Steiker notes, by the time the Amendment was ratified, the scope of the writ was far wider and more penetrating than a simple inquiry to jurisdiction or legality of detention. *See generally* Steiker, *supra*, 92 MICH. L. REV. at 878-86.

Second, habeas corpus review was not limited to simple inquiries into competency of jurisdiction or legality of detention, in the sense urged by the State. *See* J. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2060-2064 (1992) (on issues of "national importance," some inquiry into state detentions was had by federal courts.

Freedman, *supra*, 51 ALA. L. REV. at 572-73 (the early 19th-century federal courts conducted occasional evidentiary hearings and reached the merits of habeas corpus claims). Habeas courts went "behind" federal convictions on "substantial constitutional claims." *Steiker*, *supra*, 92 MICH. L. REV. at 879-86. For example, between 1789 and 1874, four of the nine Supreme Court decisions reviewing federal habeas corpus issues went "behind" detention under competent jurisdiction, and two overturned criminal convictions. The Court "granted relief on the basis of legal claims of national importance" including lack of probable cause, conviction without jury or Article III judge, conviction on double jeopardy, conviction under unconstitutional statute, and denied relief only when it was satisfied that no constitutional violation had occurred. *See* Liebman, *supra*, 92 COLUM. L. REV. at 2059-2060.

Third, some early federal courts did indeed decide habeas petitions for State prisoners. Freedman, *supra*, 51 ALA. L. REV. at 595-600 (describing early cases in

which federal courts reviewed detention of state prisoners). As Freedman argues, the fact that early federal judges asserted habeas corpus power over state prisoners is powerful evidence that the Suspension Clause was understood to protect the ability of federal judges to act on those prisoners' behalf.

3. Barring A First, Meritorious Petition On Technical Procedural Grounds Would Violate The Suspension Clause

The "gravest constitutional doubts" are raised when procedural bars endanger the "swift and imperative" remedies of habeas corpus. *Sanders v. United States*, 373 U.S. 1, 14 (1963). Congress may amend habeas corpus procedures, but may not go too far. As *Felker* indicates, courts ought to determine whether a statute has stayed "within the compass" of judicially-evolved doctrine (*Felker*, 518 U.S. at 664); because "if construed to derogate from the traditional liberality of the writ… [§]2244 might raise serious constitutional questions." *Sanders*, 373 U.S. at 11-12. Further, a statute that establishes a procedure intended to restrict or replace habeas corpus will not "suspend" the writ provided it still affords an adequate and effective means to test the legality of a person's detention. *See Swain v. Pressley*, 430 U.S. 372, 381-382 (1977).

Vindication of actual innocence is at the core of habeas corpus, especially when an innocent man is imprisoned due to the misconduct of agents of the State. The Supreme Court has maintained a gateway for habeas corpus to remedy a "fundamental miscarriage of justice" even when a person cannot show "cause and prejudice" to excuse a procedural default or an abuse of the writ. *See Murray v. Carrier*, 477 U.S. 478, 495-496 (1986) (citing *Engle v. Isaac*, 456 U.S. 107, 135 (1982)), and *McCleskey v. Zant*, 499 U.S. 467, 494-495 (1991). A statute which purports to remove that gateway for a meritorious first petition on technical procedural grounds, falls outside

the compass of judicially-created doctrine and fails to provide an adequate and effective remedy. It thus violates the Suspension Clause.

However, again, this Court need not reach the Suspension Clause question. But the existence of the question provides yet another reason to interpret the statute to maintain the actual innocence exception for a late-filed first petition.

C. Ronald's Recantations Comfortably Support a Remand to the District Court for an Evidentiary Hearing

We now address the lack of merit in the State's attack upon Ronald's recantations, which the Court is told are "almost unintelligible," lack "credibility" and are "particularly suspect" because they "contain hearsay." SB 36, 40.[3]

To recapitulate, Ronald recanted his trial testimony twice, the first time in the so-called "almost unintelligible" letter. ER.109. Expert analysis now shows this letter was penned and signed by Ronald himself. ER.118-46. Ronald's second recantation was made to Investigator Kurta, who interviewed Ronald at Tehachapi on May 22, 1996,[4] and in whose presence Ronald then wrote and signed this statement:

> 5-22-96
>
> Anthony Burton
>
> D.A. Solomon said if I put him Uat the seen, he would drop charges on me. /s/ Ronald Washington. ER.117.

The State hectors Ronald's original letter, but ignores altogether the recantation and handwriting evidence presented by Investigator Kurta and expert Fox. The

[3] This portion of State's Brief is taken largely from its "Informal Response" to Mr. Burton's petition in the Supreme Court of California. *Compare, e.g.*, Informal Response at 17 (ER.169) *with* SB 36: "*Petitioner now presents an undated, unaddressed, unsworn, almost unintelligible letter, purportedly written by Ronald W.*" It is precisely for this reason that any 25-day "delay" in filing the federal petition neither prejudiced the State, nor implicated any legitimate societal interests reflected in the limitations proviso of the AEDPA. *See* AOB 21-22.

[4] *See* ER.114-16 (Kurta's written report of that date).

simplest answer, therefore, is that this evidence is quite sufficient to justify remand for an evidentiary hearing, under the second of the two questions posed in this Court's COA. Nevertheless, there is also no merit to the attack upon Ronald's first letter of recantation, as we now show.

1. "Almost Unintelligible" Ronald

The Court is told that Ronald's letter lacks credibility because it is "undated, unaddressed, unsworn and almost unintelligible." SB 36. But "undated and unaddressed" are red-herrings; they became insignificant when Ronald fessed-up to Investigator Kurta (ER.115-17) and when Ronald's authorship of the letter was confirmed by handwriting expert Fox's report of November 12, 1996. ER.118-33.

As for the "almost unintelligible" Ronald, here and elsewhere the State wants to have it both ways. It seems that Ronald was intelligible enough at trial (albeit disingenuous, as we now know), when his testimony was guided by the leading and scripted questions of the prosecutor. Yet, this same Ronald is suddenly "unintelligible" when his testimony does not suit the State's interest. Moreover, a simple reading of Ronald's letter suffices to show both intelligibility and credibility, and most district judges should be able to understand it. The letter begins:

> I am writing to let you know, I know it has been along time ago in you know I was scaird even though Mr. Solomon told me he didn't wont me he wanted the both of you [Sneed and Burton]. Cause you was older. That why I put you at the seen. ER.109.

There is nothing "unintelligible" about any of this. What 13-year old boy, charged with murder, would not be "scaird" and frightened enough to succumb to the blandishments of the prosecutor? In fact, Ronald's statements regarding the prosecutor's words to him are especially credible because they reveal a dilemma that

no layman could understand and therefore fabricate. The prosecutor portrayed this case as a gang-related shooting, yet had no evidence beyond juvenile crimes by the two Washington brothers, Ronald and Derek. "Turning" the juveniles was the only way to send the two adults—Sneed and Burton—away for life.

Next in his letter, Ronald expresses understandable remorse, in words that—though perhaps a bit unschooled—are still quite intelligible:

> If I can I would like to clean it up now if I can. I know it has been a long time in 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. ER.109.

This privately-expressed remorse also lends credibility, for it is the antithesis of jailyard *braggadocio*. The State also insists that credibility requires an "eyewitness account" (SB 35), but who better than Ronald could (and did) supply it? *"Cause in the alley I was their."* ER.109. Unintelligible? Of course Ronald was there, as the prosecutor himself was at pains to show at trial:

Q. [By Mr. Sullivan] They continued up the alley?

A. [By Ronald Washington] Yes.

Q. Did you go with them?

A. Yes. . . .

Q. And then what did they do?

A. Then they says—I just seen fire from the guns.

Q. They started shooting?

A. Yes. ER.311-12.

And Ronald was not the only eyewitness, for as he next wrote in his letter: "*Howl Spring seen me their at the seen.*" ER.109. This is also both intelligible and credible, for as Hal Springs testified, he not only saw the orange-jacketed Ronald at the scene (ER.242), but he also saw Ronald fleeing the scene with a gun in his hand:

> Q. [By Mr. Uhalley] There was only the one person wearing the orange jacket?
>
> A. [By Hal Springs] Yes.
>
> Q. Did you see anything in that person's hand?
>
> A. A gun. ER.251. . . .
>
> Q. [By DDA Sullivan] You say the person you saw running by had on an orange coat?
>
> A. Yes.
>
> Q. And it was similar to the one I showed you earlier?
>
> A. Yes. ER.254.

This evidence is also particularly telling of the credibility of Ronald's letter, for as the State reminds us, "at the time of the trial, he [Ronald] was in custody at a juvenile camp for committing a burglary" (SB 38), and he left the courtroom after giving his own testimony.[5] Hal Springs testified after Ronald departed, and thus Ronald did not hear the damning testimony. Yet, many years later, Ronald nevertheless knew what Hal had seen. He knew it because it was a truth only Ronald and Hal could know.

All of these statements are also credible for another and independent reason: they are statements against Ronald's own interest. As Wigmore reminds us, the

[5] Indeed, it was in the hallway outside the courtroom that the angry prosecutor was overheard saying to Ronald, "you didn't say what I told you to say." ER.157.

venerable hearsay exception for such statements "is founded on a knowledge of human nature," for "we can *safely trust a man* when he speaks against his own interest," thereby "substituting for the sanction of the judicial oath the *more powerful sanction* of a sacrifice of self-interest."[6]

And, as the "almost unintelligible" Ronald concluded his letter:

> 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.

Well, who better than Ronald would most definitely know that appellant Burton was "up the alley," and that, accordingly, Burton did not shoot Fred Wright? To borrow Chief Baron Pollock's famous phrase, "there are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them." *Byrne v. Boadle*, 159 Eng. Rep. 299 (Exchequer, 1863).

For all these reasons, we therefore submit that the State's "almost unintelligible Ronald" response is not well-taken, and provides no basis to deny Mr. Burton's request for a remand for an evidentiary hearing by the district court.

2. Ronald's Recantations Are Not Inadmissible Under the Hearsay Rule

The State also contends that Ronald's two recantations are "particularly suspect" because they "contain hearsay." SB 40, citing *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Nothing could be farther from the truth. Ronald was both an eyewitness and a declarant whose statements against interest are admissible under F.R.Ev. 804(b)(3), and *"we trust a man"* in these circumstances. 5J. Wigmore,

[6] 5 J. Wigmore, EVIDENCE (Chadbourne rev. 1974) (citations omitted).

supra. This is poles apart from *Herrera*, and the State's reliance upon that decision is therefore misplaced.[7]

As well, the record comfortably satisfies Rule 803(b)(3)'s requirement of corroboration for statements against one's penal interest. *See, generally*, *United States v. Nazemian*, 948 F.2d 522, 530-31 (9th Cir. 1991). Thus, for example:

- As already shown, substantial corroboration exists in the trial court testimony of Hal Springs and indeed that of Ronald himself, together with Investigator Kurta's report and the handwriting analysis of expert Fox.
- Quinola Arnold's trial testimony also corroborates Ronald's recantation. In the State's own words, Ms. Arnold "saw petitioner walking in the alley" and "as she was walking toward him, she heard two gunshots." SB 9, 45.[8]
- Nothing in Ronald's two recantations is "self-exculpatory" and therefore inadmissible under *Williamson v. United States*, 512 U.S. 594, 601 (1994) (declarant had a "strong motivation to implicate the defendant and to exonerate himself;" thus his statements were "less credible than ordinary hearsay").[9]

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[7] *Herrera* involved multiple hearsay—statements by others that someone else had confessed—rather than eyewitness testimony admissible under Rule 803(b)(3); *see* 506 U.S. at 396-97. Also, no issue of any hearsay exception was tendered to or decided by the Court, and *Herrera* therefore is not authority on undecided questions that merely lurked in the record, *e.g., Webster v. Fall*, 266 U.S. 507, 511 (1925); *United States v. More*, 3 Cranch. (7 U.S.) 159, 172 (1805) (Marshall, C.J.: "The question passed *sub silentio*, and the Court does not consider itself bound by that case.")

[8] In light of all the evidence, the State's argument about differences in phrasing ("up the alley" versus "top of the alley" versus "middle of the alley" SB. 41) is just pettifogging. The same is true of the argument that there is some inconsistency in the evidence about "Ronald's own involvement in the shooting." *Id.* Ronald has now clearly exonerated Mr. Burton, and Ronald's own ultimate culpability is not in issue in this case.

[9] Indeed, there is rich irony in the State's feasting upon Ronald's later cold-feet letter, which contains a few self-exculpatory statements (SB 41), for it is only these

- Nor was Ronald a police informant when he recanted his trial testimony. Hence, he had no "illusions of immunity" that he would "receive absolution for prosecution from his confessed crime in return for his statement." *United States v. Harris*, 403 U.S. 573, 595 (1971; Harlan, J., dissenting).
- *Per contra*, Justice Harlan's observation shrewdly appraises the situation here: Ronald's recantations are *more credible* than his trial testimony, which he gave because "D.A. Solomon said if I put him Anthony Burton at the seen, he would drop charges on me." ER.117.

In sum, the State's attack upon Ronald's supposed "hearsay" is meritless, and again does not detract from the request for a remand and an evidentiary hearing below.[10]

D. The "Other Evidence" at Trial Will Not Sustain the Conviction of First Degree Murder

The State's final argument is that there is "substantial evidence other than the testimony of Ronald W. which identified petitioner as one of the participants in the shooting that night." SB 42. Yet the "evidence" cited by the State simply fortifies the conclusion that the *only* evidence placing Mr. Burton at the scene of the crime was the

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statements that are inadmissible under *Williamson*. But even these statements do not detract from Ronald's original recantations, for they in no way implicate Mr. Burton in the shooting; they are simply efforts by Ronald to avoid implicating himself.

[10] We may add for the sake of completeness—although the State does not argue the point—that it is of course true that the evidence presented by Investigator Kurta and handwriting expert Fox is hearsay, but only on the present record. But this also argues for an evidentiary hearing, where both will testify, and the State will have the opportunity to cross-examine them, if it wishes. The State may also examine Ronald about his cold-feet letter, which it seems to think was written by someone else (probably Ronald's attorney), and only signed by Ronald. SB 39, n.15. Given the numbers of affidavits and declarations that are written by attorneys and signed by clients, this all seems to be a labor to no purpose, but an evidentiary hearing will certainly settle the matter.

testimony of the immunized juveniles, Ronald and Derek Washington. We address this evidence briefly below.

- *Mr. Burton attended a party with the victims of the shooting where he was involved in an altercation with Duwan Franklin.* SB 42.

Mr. Burton has never based his petition upon a dispute of the evidence of events at the party he attended earlier on the evening of the death of Fred Wright, but that "evidence" does not establish that appellant fired the fatal shot. Indeed, the prosecutor himself cautioned the jury that:

> … It's not a, 'well, he shot up the party, therefore he is guilty of murder.' That's not what you're asked to do. Trial Trans. 639 (filed as Exhibit 4(d) to the Petition).

The State therefore cannot cite "evidence" both eschewed by the prosecutor and ignored by the jury.

Nor does this "evidence" take the State where it would like to go, for the State neglects to mention the crucial point that it was Derek, not Mr. Burton, who had a known adversarial relationship with Wright. ER.202-03. And it was Derek, not Mr. Burton, who fought with Fred Wright at the party. ER.375. Even though the prosecutor at trial stated that he was not attempting to gain a murder conviction based upon the events preceding the shooting, the State now points to this evidence to claim that Mr. Burton shot and killed Fred Wright. Of course, this evidence does nothing more than establish that Derek, not Mr. Burton, had a motive to shoot Fred Wright.

- *"According to Derek….."* SB 43.

The State lists facts recited by Derek Washington as if they prove Mr. Burton's guilt in place and stead of the testimony of Ronald Washington. This is bootstrapping,

for Ronald's recantations infect the immunized testimony of his brother Derek every bit as much as they do of Ronald's own. Both juveniles had the same motive to fabricate their testimony, and were under the same pressures to capitulate to the entreaties of the prosecutor.

- *When Harry W. left the party with Elizabeth W., Fred. W., Renee P., and Terry G., he saw petitioner with Anthony Sneed, Ronald Washington and Derek Washington jog behind a house and toward the alley.* SB 43.

True. But, again, the State ignores a vital piece of the puzzle. When Ronald Washington, Derek and Anthony Sneed ran towards Fred Wright, Mr. Burton headed towards the other end of the alley. Quinola Arnold's testimony corroborates this fact. She saw Mr. Burton at the *opposite* end of the alley when the shots were fired. ER.418.

- *Leon Moore's Testimony* SB 43-44.

As Mr. Burton pointed out in his opening brief, when Leon Moore first gave his statement to the police just hours after the shooting, he described suspect #1 as a male Negro 5'1" wearing a rust colored jacket and a golf hat holding what appeared to be a gun. ER.149; *see* AOB 36. Suspect #2 was wearing dark clothing and the third suspect was taller than the other two and wearing bell bottom pants. Ronald W., who was 4'10" at the time (ER.154), was described by several witnesses as, and admitted to wearing a rust colored leather jacket. ER.281, 321. Therefore, it was Ronald, not Mr. Burton, who was wearing the golf hat in the alley that night.

By trial, Mr. Moore changed his testimony to describe the three suspects differently. Mr. Moore stated that one of the boys wore a striped sweatshirt (which numerous witnesses testified was Anthony Sneed), one had a rust colored jacket and was holding "something" (ER.283), and one was taller than the other three, had a very

dark complexion (ER.242) and long hair (ER.242). Mr. Burton, who has a light complexion, had short hair that night. ER.612. This fact is verified by his arrest photo. But the difficulty with the State's argument is that Leon Moore explicitly stated that he *did not* see Mr. Burton in the alley that night.

> Q: That night you looked out your window after you heard the shots and you say the street light was shining in the faces, you could see them very well?
>
> A: Yes.
>
> Q: Did you see [Anthony Burton's] face in that alley?
>
> A: No. ER.287.

- *"Other" Evidence* SB 44.

The State concludes its brief with a recitation of "other" evidence, that supposedly proves the guilt of Anthony Burton beyond a reasonable doubt, but which once again is wholly unconvincing. Thus, for example, the State claims that Mr. Burton was the "instigator" of conflict at the party, and that his gang related motive was clear." SB 44. But again, this just blinks reality, for it was the immunized juvenile witness, Derek, who fought with the murder victim at the party, and the prosecutor himself admitted to the jury that this evidence would not sustain a conviction.

The State also cites the police recovery of a golf cap and handgun from Petitioner's house (SB 44), but again, that is all a far cry from evidence that would sustain a conviction for first degree murder, *sans* the tainted testimony of Ronald and Derek. Thus, for example, there was ample testimony that golf caps were incredibly popular at that time in that area **(**Trial Trans. 67 (filed as Exhibit 4(a) to the Petition); ER.219); and the firearms expert mustered by the prosecutor testified that he was not

certain the gun recovered was the one that had been used in the shooting. Trial Trans. 423, 429 (filed as Exhibit 4(a) to the Petition).

E. Petitioner-Appellant is Entitled to an Evidentiary Hearing

The State next claims that Mr. Burton has failed to make a "truly extraordinary" showing of actual innocence. The Supreme Court has held that when "a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of his trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to argue the merits of his underlying claim." *Schlup*, 513 U.S. at 316. Mr. Burton has presented ample evidence of his innocence. He has also sufficiently addressed the violation of two constitutional errors; the knowing use of perjured testimony and ineffective assistance of counsel, which "probably resulted in the conviction of one that is actually innocent." *Id.* at 327. Just as in *Schlup*, Ronald Washington's statements "may, of course, be unreliable. But if they are true...it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Id.* at 331.

Mr. Burton is entitled to an evidentiary hearing. An evidentiary hearing is required when "(1) [a petitioner] has alleged facts that, if proved, would 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." *Schell v. Witek*, 218 F.3d 1017, 1028 (9th Cir. 2000, *en banc*) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999)). Mr. Burton sufficiently raised facts proving his actual innocence in his state. Instead of referring the case for an evidentiary hearing as it should have, the Supreme Court of California mailed him a postcard denial. When a state court simply fails to conduct an

evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims.

When facts are disputed, a hearing is required "unless, viewing the petition against the record, its allegations do not state a claim for relief or are so palpably incredible or so patently frivolous or false as to warrant summary dismissal." *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982) (citing *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (§2254 petition)). An evidentiary hearing is especially appropriate where the defendant raises an ineffective assistance of counsel claim based on facts outside the trial court record. *See Schell*, 218 F.3d at 1028-29. The State complains that the ineffective assistance of counsel claim is beyond the scope of the COA (SB 34), but it is inextricably bound-up with the claim of actual innocence, and there is no reason that the district court cannot or should not consider them together.

Finally, the State has chosen neither to challenge nor rebut the evidence of prosecutorial misconduct. Because rebuttal evidence lies exclusively in the State's hand, it may well be that the State's own evidence, if revealed, would undermine the State's position. At the very least, while the State would prefer to present its evidence in the district court, it cannot have it both ways. The State's avoidance of the issue cannot be the basis for denial of an evidentiary hearing.

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: September 5, 2000

Respectfully submitted,

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CERTIFICATION PURSUANT TO CIRCUIT RULE 32(E)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Reply Brief is proportionately spaced, using a typeface of Times Roman 14 points, and contains 6,035 words, excluding cover page, tables, certifications, and proof of service.

Kirstin E. Wolf
September 5, 2000

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 September 5, 2000, I served two copies of the **REPLY BRIEF FOR PETITIONER-APPELLANT** on the parties in this action by placing true copies 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 September 5, 2000, at San Francisco, California.

_____
Laurie C. Meyer