Docket No. 10-4133

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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HAN TAK LEE,
Petitioner-Appellant,
v.
STEVE GLUNT, Superintendent,
etc., et al.,
Respondents-Appellees**.**

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On Appeal from Order Denying Petition for Writ of Habeas Corpus
Dated and Entered September 22, 2010,
Under Docket No. 4:08:cv-1972-MM (Malcom Muir, Sr.U.S.D.J.)
in the United States District Court for the Middle District of Pennsylvania

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BRIEF FOR *AMICUS CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT IN SUPPORT OF APPELLANT HAN TAK LEE AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit Rule 26.1, *Amicus Curiae* the Pennsylvania Innocence Project ("the Project") makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations:

N/A. The Project has no parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A: The Project is a non-profit organization and does not issue stock.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A: The Project knows of no such party.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: (1) the debtor, if not identified in the case caption; (2) the members of the creditors' committee or the top 20 unsecured creditors; and (3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A.

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INTEREST OF *AMICUS CURIAE*
THE PENNSYLVANIA INNOCENCE PROJECT

The Pennsylvania Innocence Project ("the Project") is a nonprofit legal clinic and resource center founded in 2008, housed at Temple University's Beasley School of Law, and a member of the Innocence Network, an international association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The Project's board of directors and advisory committee include practicing lawyers, law professors, former United States Attorneys, former state court prosecutors, and the deans of the law schools of Temple University, Villanova University, Drexel University, the University of Pennsylvania, and Rutgers-Camden. The Project provides *pro bono* investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other, powerfully exculpatory evidence or whose claims, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Project works to remedy the underlying causes of wrongful convictions better to ensure that no one will be convicted and imprisoned for a crime they did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in their stead. Ensuring that the convicted innocent have a means by which to attempt to secure their freedom is a core value to both the Project and the Innocence Network as a means of ensuring the correct administration of justice.

Amicus presents this brief to the Court in support of the proposition that the federal Constitution provides an avenue through with the truly innocent may obtain their freedom, notwithstanding the lack of any underlying constitutional violations. As this is an emerging area of law, the matters discussed herein are relevant to the disposition of this particular case.

AUTHORITY TO FILE *AMICUS BRIEF*

All parties, through their counsel, have consented to the filing of an *Amicus Curiae* brief by the Pennsylvania Innocence Project in support of Appellant in this matter. Peter Goldberger, counsel on behalf of Petitioner/Appellant, granted consent to Marissa Boyers Bluestine, Legal Director of the Pennsylvania Innocence Project, in a telephone conversation with her on July 13, 2011. Mark S. Matthews, an attorney with the District Attorney's Office of Monroe County, granted consent to Marissa Boyers Bluestine in a telephone conversation with her on August 5, 2011.

Although Petitioner/Appellant's counsel Peter Goldberger is one of the 31members of the Board of Advisors for *amicus*, Mr. Goldberger played no part in the Project's decision to file an *amicus* brief in this matter, nor did he provide any financial or other assistance in its preparation.

STATEMENT OF THE CASE

Amiccus Curiae adopts and incorporates the Statement of the Case as presented by Petitioner/Appellant in his Brief to this Court.

ARGUMENT

I. A FREESTANDING CLAIM OF ACTUAL INNOCENCE IS FULLY COGNIZABLE IN A HABEAS CORPUS PETITION FILED PURSUANT TO 28 U.S.C. §2254

A. The Supreme Court Has Repeatedly Acknowledged That a Fully Cognizable Freestanding Claim of Actual Innocence May Exist

For over 20 years, the United States Supreme Court has grappled with what should be a simple issue: whether a person incarcerated for a crime he did not commit is entitled to be released from his incarceration even where there is no underlying constitutional violation from his trial or appeal. In other words, does the Constitution tolerate the incarceration of a truly innocent person? The right not to be incarcerated for a crime one did not commit may not yet be explicitly recognized, but even a cursory review of the Court's treatment of this issue reveals that its intention is to ultimately recognize that the claim is cognizable. The Court has delayed in elaborating the claim further, as it must weigh competing interests of judicial economy, finality and deterrence. *See Herrera v. Collins,* 506 U.S. 390, 401 (1992), *Id.*

at 420 (O'Connor and Kennedy, J.J., concurring). However, it is clear that, given a sufficiently convincing set of facts, the court will conclusively recognize a free standing claim of actual innocence rooted in the protections of the Eighth and/or Fourteenth Amendments.

A freestanding claim of actual innocence was first raised before the Supreme Court in *Herrera v. Collins*, 506 U.S. 390 (1992). The claimant in that case argued that because he was actually innocent his continued imprisonment was (and ultimate execution would be unconstitutional under both the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process. *Id.* at 390. If the Court considered this type of claim meritless, it would have been reasonable to promptly dismiss the argument as such. Instead, the Court took the first step in outlining what such a claim would be, evaluating petitioner Herrera's claim of actual innocence on its merits. *Id.* at 417. It is understandable that the Court would choose to reserve the issue until it was presented with a case that met the "extraordinarily high threshold" required. *Id.* However, while declining to rule definitively, these first steps by the Court were not tentative steps. Although Justice Rehnquist's majority opinion only held *arguendo* that a freestanding actual innocence claim

existed, five Justices affirmatively indicated that, had Herrera presented sufficiently compelling facts, they would have recognized the freestanding claim. *Id.* at 419-20 (O'Connor and Kennedy, J.J., concurring); *Id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

The issue of freestanding actual innocence was further elaborated by the Court three years later in *Schlup v. Delo*, 513 U.S. 298 (1995). The central discussion in *Schlup* focused on the threshold standard that an actual innocence claim must meet in order to serve as a gateway to otherwise barred constitutional claims. *Id.* at 314-15. Additionally, the Court engaged in a critical distinction of the threshold of proof required for a procedural "gateway" claim of actual innocenceversus a substantive freestanding claim. *Id.* at 316. It would be illogical—as well as in direct conflict with interests in economy, finality and clarity—for the Court to distinguish those claims of innocence which meet the "gateway" but not the "*Herrera*" threshold if the Court did not believe that such a freestanding claim was cognizable. *Id.* The inescapable conclusion must be that the Court envisioned the possibility of a cognizable freestanding innocence claim, and that such a claim would be rooted in substantive constitutional rights.

Since 1996, the Supreme Court has remained in a holding pattern, apparently waiting for a freestanding claim of actual innocence convincing enough to meet the "extraordinarily high" threshold laid down in *Herrera*. Most recently, the court declined in *House v. Bell* to rule on whether freestanding innocence claims are cognizable. 547 U.S. 518, 555 (2006). Like in *Schlup*, the Court in *House* avoided ruling decisively on this issue when faced with an innocence claim sufficient for the lower gateway threshold but not convincing enough for a hypothetical threshold for a free standing innocence claim. 547 U.S. at 554-55; *see also Schlup*, 513 U.S. at 316. While declining to decide the issue, the Court did establish that it had never held that federal courts are precluded from considering freestanding claims of actual innocence. *House*, 547 U.S. at 555. At the very least, the possibility of a cognizable freestanding innocence claim remains an open question. *See Herrera*, 506 U.S. at 421 (O'Connor, J., concurring) ("[W]hat the Court does *not* hold [is that] [n]owhere does the Court state that the Constitution permits the execution of an actually innocent person." (emphasis added)). This was recently reinforced by the Court in the *Osborne* decision, which declined to recognize a right for a convicted person

to gain access to biological material for DNA testing under Section 1983, when it noted in *dicta* that

> As a fallback, Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of "actual innocence." Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, *arguendo*, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet.

District Attorney's Office for Third Judicial District v. Osborne, 129 S.Ct 2308, 2321 (2009).

In the lower courts, treatment of free standing innocence claims has been mixed. Some circuits have followed the lead of the Supreme Court, recognizing that a free standing claim of actual innocence may be possible, though the threshold requirements for such a claim would be so demanding that no set of facts has yet appeared which meet them. *See Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003) ("It is not clear whether a habeas claim could be based on new evidence proving actual innocence, but Conley is not close to such a showing.") (citations omitted); *Albrecht v. Horn*, 485 F.3d 103 (3rd Cir. 2007) (accepting the existence of a freestanding innocence claim but finding petitioner fell below applicable standard); *Noel v. Norris*, 322 F.3d 500, 504 (8th Cir. 2003) (acknowledging existence of

exception but denying relief as all evidence went to mitigation not innocence); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (acknowledging existence of exception by denying relief as the quantum of evidence did not establish innocence but "cast a shadow" over evidence of guilt).[1] However, other federal circuits have construed *Herrera* as denying any possibility of a cognizable habeas petition based on a freestanding claim of actual innocence. *See United States v. Quinones*, 313 F.3d 49 (2nd Cir. 2002)*; Zuern v. Tate*, 336 F.3d 478 (6th Cir. 2003); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (8th Cir. 2001) (that 'few rulings would be more disruptive…than to provide for federal habeas review of freestanding claims of actual innocence.'") (*citing Herrera*, 506 U.S. at 401); *Sellers v. Ward*, 135 F.3d 1333, 1338 (10th Cir. 1998) (that "claims of actual innocence...have never been held to state a ground for federal habeas relief absent an independent constitutional violation."). These dismissals of a *Herrera*-style claim mistake a summary of past jurisprudence and a calculated choice to reserve judgment on a legal premise for a firm rejection. Even more significantly, these circuit court rulings seem to ignore the

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[1] Some state courts have even granted relief on such freestanding innocence claims. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (en banc).

logical explanation for why the Supreme Court would choose to preserve such a critical issue for nearly twenty years at the expense of judicial economy and clarity.

Recognizing the Supreme Court's duty to clarify issues of federal law and to promote efficiency and finality throughout the federal judiciary, the most obvious reason for the Court to engage in ongoing analysis of freestanding actual innocence claims would be a belief that such claims are,indeed, cognizable. If federal courts could not, under any set of facts, consider a freestanding claim of actual innocence, it is reasonable to assume the Court would have said so rather than leave the issue open to a debate.

This Court properly followed the pattern set by the Supreme Court in its most recent consideration of a claim of freestanding actual innocence. Much like the Supreme Court in *Schlup* and *House*, this Court recognized that *Herrera* reserved the issue of freestanding actual innocence but implied that both the "extraordinarily high" threshold for *Herrera* and the "lower *Schlup* gateway standard" were potentially cognizable claims in federal habeas. *Albrecht v.Horn*, 485 F.3d 103, 122 (3rd Cir. 2007). Ultimately Albrecht's newly discovered evidence discrediting the incendiary evidence at trial failed to meet even the lower *Schlup* threshold. *Id.* at 125. Because

the petitioner failed to refute other inculpating evidence—regarding his prior abuse of, and threats to burn, his wife, the victim, or his statements following the fire that he was glad that it had occurred—this Court avoided definitively ruling on whether freestanding innocence claims are cognizable. *Id.* at 110-11.

However, Petitioner in the instant case presents no such dilemma, as the only evidence used to establish his guilt was the now-discredited opinion that the fire which killed Lee's daughter was incendiary. Thus, this case presents this Court with the ideal opportunity to definitively recognize that the Constitution does not accept the imprisonment of one who is factually innocent, notwithstanding a lack of constitutional errors at his trial.

B. Fourteenth Amendment Substantive Due Process is the Proper Constitutional Basis for Recognizing Cognizable Freestanding Innocence claims

When a claim of free standing innocence was first considered in *Herrera*, Justice Rehnquist's majority opinion primarily analyzed the issue under the Eighth Amendment doctrine of cruel and unusual punishment. 506 U.S. at 405-06. An Eighth Amendment analysis also appeared in the Justice Blackmun's assertion that it would have recognized a freestanding innocence claim if the petitioner's evidence had been sufficiently

convincing. *Id.* at 431-33. (Blackmun, J., dissenting). The doctrine of cruel and unusual punishment, running contrary to prevailing standards of decency, may yet provide a feasible constitutional basis for freestanding *Herrera* claims. However, *Herrera* also raised the possibility that substantive due process, as protected under the Fourteenth Amendment, may also supply the constitutional basis for a freestanding claim of actual innocence. *Id.* at 419 (O'Connor, J., concurring)

Substantive due process is intended to prevent the state from engaging in conduct that "shocks the conscience" or interferes with rights and liberty interests that are "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Rochin v. California*, 342 U.S. 165, 172 (1952); *Palko v. Connecticut*, 302 U.S. 318, 325-26 (1937). It is difficult to imagine a situation which would more "shock the conscience" that the willful continued incarceration of one known to be actually innocent of a crime. Justices O'Connor and Kennedy recognized that such a liberty interest would be at stake in the context of a cognizable freestanding innocence claim. *Herrera*, 506 U.S. at 419 (concurring). Admittedly, an individual's due process protections become more limited following a fair trial and conviction. *See Id.* at 399 (once a

defendant has been convicted in a fair trial, he is no longer guaranteed the same range of liberties by substantive due process); *See also Connecticut Bd. Of Pardons v. Dumscht*, 452 U.S. 458, 464 (1981) ("Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty"). However, the principles of due process in a civilized and humane society demand also that some fundamental liberties be retained even by those who are fairly convicted. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (convicted person has a liberty interest in avoiding confinement to a mental institution); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (convicted person has a liberty interest in avoiding administration of psychotropic drugs).

The right of a convicted individual to an avenue for presenting convincing new evidence of innocence must be among those fundamental interests that cannot be stripped away even by a fair trial. *See Kuhlman v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion) (even a person convicted in an error free trial "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he is incarcerated."). Denying the right to raise freestanding innocence claims even after a fair trial ignores the basic precepts of substantive due

process. Because the state has no interest in detaining a person who can conclusively establish his innocence, the continued detention of such a person amounts to "arbitrary" abridgement of the "[f]reedom from bodily restraint" that "has always been at the core of the liberty protected by the Due Process clause." *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992).

C. Freestanding Actual Innocence Claims, Based on Substantive Due Process, Are Equally Cognizable in Capital and Noncapital Cases

In *Herrera* and *House*, the Supreme Court framed the constitutional issue in terms of whether it would be a manifest injustice to execute someone who could show conclusive new evidence of innocence. *See Herrera* 506 U.S. at 417 ("We may assume…that in a *capital* case a truly persuasive demonstration of 'actual innocence' made after trial would render the *execution* of a defendant unconstitutional.") (emphasis added); *Id.* at 419 (O'Connor, J., concurring) ("[T]he *execution* of a legally and factually innocent person would be a constitutionally intolerable event") (emphasis added); *See also In re Davis*, 130 S. Ct. 1, 2 (2009) (it would be an "atrocious" violation of constitutional principles to execute an innocent person). However, if substantive due process is the basis for a cognizable freestanding innocence claim, there is no reason why such protections

should be limited to capital cases. After all, the Due Process clause mentions protection both of life and liberty. U.S. CONST. AMEND. XIV, § 1.

Several circuit courts have drawn on this specific language to definitively rule that freestanding innocence claims are never cognizable in noncapital cases. *See, e.g., Cress v. Palmer*, 484 F.3d 844, 855 (6th Cir. 2007); *Cunningham v. Dist. Attorney's Office for Escambia County*, 592 F.3d 1237, 1272 (11th Cir. 2010); *Jordan v. Sec'y. Dept. of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007). Those circuits that drawn this distinction by noting that the Supreme Court has never considered the cognizablity of freestanding innocence in a noncapital case and that in *Herrera* and *House* used language specific to capital sentences. *See Cress*, 484 F.3d at 854-55 (that petitioner's *Herrera*-claim is "ostensibl[y] limit[ed]" by its noncapital status). What these Circuits overlook is the determination in *Herrera* itself that it would be inconsistent to provide relief on a convincing showing of actual innocence to a prisoner sentenced to death but not to a prisoner with a life sentence. 506 U.S. at 405 (the Court has "refused to hold that the

[imposition of a death sentence] requires a different standard of review on federal habeas corpus." (internal citations omitted)).[2]

Even more importantly, however, the Supreme Court itself indicated no distinction between a capital and noncapital case with regard to the actual innocence exception. In *Osborne*, which involved a noncapital defendant, the Court made no mention of the inapplicability of an actual innocence exception to the case. Indeed, the Court continued to recognize the matter to be "an open question." *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S.Ct. at 2322 ("In this case too we can assume without deciding that such a claim exists, because even if so there is no due process problem."). Had the Court meant to carve out the actual innocence exception only for capital defendants, there would have been no need to mention the matter as "open." Because the Court continued to "assume without deciding that such a claim exists" in the context of a noncapital case, there is no basis to assume a distinction between the two innocent defendants.

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[2] Justice Rehnquist goes on to opine that "it would be a rather strange jurisprudence…which held that under our Constitution [a convict who presents a satisfactory showing of actual innocence] could not be executed, but that he could spend the rest of his life in prison." *Id*.

While the irreversible act of executing one who is actually innocent necessarily causes a particular trepidation, the unimaginable ordeal of lengthy imprisonment for a crime that one did not commit is no less violative of due process's core prohibition against arbitrary infringement of liberty. If that constitutional protection is to carry any weight, the law must provide relief to factually innocent people in noncapital cases.

D. The Availability of Post Conviction Relief in State Court Does Not Provide Adequate Protection of the Fundamental Liberty Interests Underlying Freestanding Claims of Actual Innocence

It is true that many states now offer some sort of post conviction relief, including petitions to introduce new exculpatory evidence not raised at trial. In some states these provisions allow inmates an even wider berth to raise post conviction claims than that allowed under federal law. *See State ex rel. Amrine*, 102 S.W.3d at 546-47. Nonetheless, it would be a mistake by the federal courts to not recognize cognizable freestanding claims of actual innocence on the theory that state prisoners possess sufficient avenues of relief in state court. The federal court system is ultimately responsible for providing relief when individual states fail to adequately protect citizens' federal substantive due process rights, including the right to freedom from arbitrary bodily restraint.

Unreasonably short time limits for filing are one way in which states may restrict the ability of pro se litigants to raise post convictions actual innocence claims. Under federal law a habeas petition must generally be raised within one year of trial, or of when new discovered material evidence could have been discovered through reasonable due diligence. 28 U.S.C. §2244(d)(1). By comparison, in Pennsylvania the discovery of new evidence after trial triggers a strict 60-day window in which a petition for post conviction relief may be filed. 42 Pa.C.S. § 9545(b)(2). While two months to file may seem like a generous allowance to state prisoners, in reality this time limit is extremely difficult for *pro se* litigants, possessing few resources or legal expertise, to meet. Consequently, this procedural provision effectively limits the availability of post conviction relief at the state level.

Executive clemency is supposed to serve as an additional state protection against the continued imprisonment of the convicted innocent. However, the wide discretion allowed to states in defining the availability of this remedy, as well as the political status of those entrusted with applying it, prevents clemency from becoming a meaningful safeguard against the long-term imprisonment or execution of the actually innocent.

An obvious deficiency in clemency's power to protect the actually innocent is the fact that there is no provision in the United States Constitution of a right to clemency in state court. Immediately then, the an individual's substantive due process rights—to protection from arbitrary bodily restraint—will be dependent on the state where the individual is convicted. *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992). The tradition of clemency, tracing back to the age of absolute rulers, has been included into state constitutions in a variety of forms.[3] A state governor might grant clemency based on a finding of actual innocence, along with other reasons, but there is no requirement that the governor do so.[4]

Clemency proceedings vary wildly among the states between sole power in the governor, to a board decision to a combination of the two. In some states the board's decision is merely advisory; in other states,

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[3] Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?,* 24 Crim. Just. 26, 29 (2009).

[4] *See* Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J. L. & Politics 669, 677-78 (2001) (Contrasting generally recognized grounds for clemency, such as rehabilitation or mitigating conditions, with George W. Bush's practice, while serving as Governor of Texas, of providing clemency based on the criteria of "actual innocence" and that a petitioner was denied a "full and fair access to the courts").

including Pennsylvania, the governor may only grant clemency in cases where the board has given a unanimous positive recommendation.[5]

Clemency proceedings in states which require the consideration of an advisory board may be particularly incapable of adequately protecting against wrongful imprisonment or execution. Some scholars have suggested that by bifurcating the decision-making process, clemency is more likely to be denied in cases of actual innocence. This is because the governor and the board of pardons may each rely upon the other to be ultimately responsible for correcting any manifest injustices.[6] As a result of the bifurcated clemency procedure in states like Pennsylvania, prisoners claiming actual innocence in these states are particularly unlikely to prevail in clemency proceedings. So long as executive clemency remains a discretionary tool wielded for the political benefit of an elected official, such procedures

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[5] Pa. Const. Art. IV, § 9 (a) (that the Governor of Pennsylvania shall grant no pardon nor commute a sentence, "except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons."). Of course, it must be noted that in Pennsylvania an inmate may not even make an application for clemency until *after* the exhaustion or abandonment of all state and federal habeas proceedings; it cannot be, then, that applying for clemency can be treated as a sort of "exhaustion" of a potential state remedy before a federal court could 'intervene.'

[6] *See* Gershowitz, *supra* note 4, at 700-01.

cannot effectively safeguard of the substantive due process rights of actually innocent state prisoners. [7]

Supreme Court precedent has failed to mold executive clemency into an adequate and reliable safeguard for the due process rights of the factually innocent. Chief Justice Rehnquist, in his *Herrera* opinion, characterized executive clemency as the appropriate "fail safe" within the criminal justice system for protecting the actually innocent. 506 U.S. at 415. However, the more persistent view in recent years has been that executive clemency is not an extension of the criminal justice system and that consequently prisoners have few, if any, due process rights in a clemency proceeding. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998) (Rehnquist, J., plurality opinion).[8] Instead, the overriding view of executive clemency has

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[7] *See* Daniel T. Kobil *The Quality of Mercy Strained: Wresting the Pardoning Power From the King*, 69 Tex. L. Rev. 569, 610 (1991) (citing Edward Hammock, the former chairman for the New York Board of Parole, as stating that the governor selects a "few eligible individuals" petitioning for clemency, based on the "political statement he wants to make.") and 608 (*citing* former California Governor Edmund (Pat) Brown's description about how his decision to grant clemency in particular instances was influenced by knowledge that his choice would affect political support for unrelated legislation; *See also* Richard A. Rosen, *Innocence and Death*, 82 N.C.L. Rev. 61, 87 (2003).

[8] *See also* Gershowitz, supra note 4, at 696 ("Only eight death-penalty states statutorily permit or require the clemency applicant's presence. Only nine death-penalty states govern clemency proceedings with formal rules of evidence, and

been that it is an "act of grace" which a governor may grant at his discretion. *Woodard*, 523 U.S. at 285; *but see Biddle v. Perovich*, 275 U.S. 480 (1927).

Noting the ability of states to so narrowly define post conviction relief as to effectively deny it entirely, as well as the inconsistent and unreliable nature of state clemency relief, the Third Circuit must recognize the necessity of recognizing cognizable freestanding innocence claims in federal court.

II. NEWLY DISCOVERED EVIDENCE OF A SEA CHANGE IN SCIENTIFIC DEVELOPMENTS IS NOT EVIDENCE WHICH "MERELY IMPEACHES" BUT IS EVIDENCE SUFFICIENT TO PROVE THAT THOSE CONVICTED SOLELY ON THE BASIS OF A FUNDAMENTAL SCIENTIFIC ERROR MAY, IN FACT, BE INNOCENT

The trial court in this case rejected Petitioner's PCRA petition because, as the court found, the information John Lentini presented would merely "impeach" the Commonwealth's witnesses at trial. Criminal courts around the world are witnessing revolutions in scientific evidence. DNA has replaced serology. Forensic testing of fibers has replaced visual comparisons. Conclusions thought once to be "scientific" are now known to

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only a handful of state statutes list specific due process guarantees.") (Citing Clifford Dorne & Kenneth Gewerth, Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures, 25 New Eng. J. on Crim. & Civ. Confinement 413 (1999)).

be nothing more than "old wives' tales." When an individual is convicted based almost entirely upon an 'expert' opinion and where that opinion later comes under scrutiny (or even derision), to the point that it becomes questionable whether a crime ever occurred at all, surely courts should answer the call of injustice.

A. In Criminal Cases Around the Globe Courts Are Grappling With How to Address Changes in Underlying Science Upon Which Criminal Convictions Were Based

Over the past several years, courts around the country and around the world have been presented with challenges to convictions that were predicated upon some type of scientific conclusion which later research and scientific developments have shown to be unreliable or even simply untrue. In Texas, for example, a man named Cameron Todd Willingham was executed on February 17, 2004, having been convicted of setting fire to his home which caused a fire in which 3 of his own children were killed.[9] Although an expert report had been presented to Governor Rick Perry called into question the scientific basis for Willingham's conviction, neither the governor nor the state board of pardons considered the report sufficient to

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[9] *See generally*, David Grann, *Trial By Fire*, THE NEW YORKER, September 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

stop the execution. Later, in 2007, Texas convened a statewide Forensic Science Commission, tasked with evaluating the use of forensic science in the courtroom and investigating claims of prosecutorial or scientific misconduct which may have led to wrongful convictions.[10] Although the Commission will not investigate the specifics of the Willingham conviction,[11] an expert hired by the Commission concluded in a published report that the fire marshall's testimony at trial had "no scientific basis," was "inconsistent with modern techniques" and even termed some of the testimony

> hardly consistent with a scientific mindset and is more characteristic of mystics or psychics. The quotes separate the findings from his own judgment and seek to make him not responsible for his own interpretation. It seems to deny the role of rational reasoning. It is an expression of fire investigation as a mystical art rather than an application of science and reason.[12]

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10 *See* Texas Forensic Science Commission, http://www.fsc.state.tx.us/.

11 Yamil Berard, *Texas Attorney General Blocks Forensic Panel From Continuing Willingham Case*, Fort Worth Star-Telegram, July 29, 2011, http://www.star-telegram.com/2011/07/29/3257122/texas-attorney-general-blocks.html#ixzz1Tz21dfAr.

12 Craig L. Beyler, Ph.D., *Methods and Procedures Used in the Criminal Arson Cases Against Ernest Ray Willis and Cameron Todd Willingham*, submitted to Texas Forensic Science Commission, at 49, http://alt.coxnewsweb.com/shared-blogs/austin/investigative/upload/2009/08/execution_based_on_bad_investi/D_Beyler%20FINAL%20REPORT%20082509.pdf

Other cases, to be sure, have called into question forensic testimony at trial which later appeared questionable in light of scientific developments. This Court has grappled with this issue before in the matter of *Albrecht v. Horn*, 485 F.3d 103 (3rd Cir. 2007). In *Albrecht*, the petitioner challenged his conviction and death sentence, in part, on the basis that the testimony of the Commonwealth's expert at trial was belied by modern scientific understandings of fire development and progression. *Albrecht*, 485 F.3d at 121. At the District Court level, the judge concluded that the petitioner

> had conclusively shown that the fire science presented by the Commonwealth at his trial has since been discredited to the extent it provided an unreliable basis for the conclusion that a liquid accelerant had definitely been used and that the fire could only have been arson.

Id. This Court upheld the decision to deny the petition for habeas corpus under the *Herrera* actual innocence standard, however, because the expert's conclusion could not definitively rule out arson as a cause of the fire and because "there was ample other evidence of guilt." *Id*. at 125. In addition, in *Albrecht*, the defense had used an expert of their own at trial to dispute some

of the government's conclusion related to the arson but that testimony had been rejected by the jury. *Id*.

The case presented by Petitioner in this case is of a more pristine nature than that from *Albrecht*. First, there was no countervailing expert presented at trial. Nor was there additional evidence to establish motive, intent, or any other incriminating aspect of a crime as opposed to an accidental incident. Finally, because the lower court denied Petitioner access to the very information which could help Mr. Lentini make a definitive determination that the fire was not intentionally set, that there may be some equivocation in the conclusion cannot be compared to the *Albrect* situation. What this case presents is a conclusion based upon modern scientific knowledge that the trial testimony presented was unreliable, and that Petitioner's conviction is based upon nothing more than old wives' tales. Such cannot possibly be a standard to allow a life imprisonment term to continue.

But arson convictions are not the only areas in which sea changes in science have caused concern with relation to criminal convictions. Indeed, convictions based entirely upon a medical 'diagnosis' of "shaken baby syndrome" are being re-examined quite literally in courts all over the world.

In Ontario, Canada, for example, an unknown number of people were convicted of homicide charges for having shaken their children to death, although there had never been any prior signs of child abuse or violence in the home. An investigation by the Ontario government that determined a renowned pediatric forensic pathologist made "questionable" findings in 20 out of 45 cases of infant deaths. A later investigation led by the Attorney General determined that 4 cases should be re-examined, as there was a possibility that miscarriages of justice had occurred. [13]

Far from being an issue regarding individual practitioners, the entire diagnosis of "shaken baby syndrome" (SBS), once thought to be advanced and unquestionable science, has come under increasing scrutiny as the medical community itself now debates whether such a diagnosis even exists.[14] In a fascinating series of events, the doctor who first coined the phrase "shaken baby syndrome" to account for the appearance of a particular

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13 *Committee Report to the Attorney General: Shaken Baby Death Review*, March 4, 2011, http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/sbdrt/sbdrt.pdf.

14 *See generally*, Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, THE NEW YORK TIMES MAGAZINE, February 2, 2011, http://www.nytimes.com/2011/02/06/magazine/06baby-t.html?pagewanted=all/; Mark Anderson, *Does Shaken Baby Syndrome Really Exist?*, DISCOVER MAGAZINE, December 2, 2008, http://discovermagazine.com/2008/dec/02-does-shaken-baby-syndrome-really-exist.

trilogy of medical conditions found in some infants who had physical injuries or who had died—intracranial bleeding, detached retinas and subdural hematomas—now believes that the diagnosis has become overused and is particularly concerned that doctors are making SBS diagnoses without considering and eliminating other possibilities to explain an injury or death.[15]

The question, then, is what courts can or should do when faced with such a conundrum. While it is early to tell what the national consensus will be, courts have already granted new trials on the basis of "newly discovered evidence" which calls into question a scientific conclusion which led to a criminal conviction. For example, in *State v. Edmunds*, 746 N.W.2d 590 (Wis. App. 2008), the Court of Appeals of Wisconsin granted the petitioner a new trial, finding that "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone." 746 N.W.2d 590, 596 (Wis. App. 2008). Even though the defendant had presented expert testimony at her

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[15] *See* Joshua Shapiro, *Rethinking Shaken Baby Syndrome*, http://www.npr.org/2011/06/29/137471992/rethinking-shaken-baby-syndrome

1995 trial to counter the state's evidence that she killed her child, the appellate court ruled that

> [t]he newly discovered evidence in this case shows that there has been a shift in mainstream medical opinion since the time of Edmunds's trial as to the causes of the types of trauma Natalie exhibited. We recognize, as did the circuit court, that there are now competing medical opinions as to how Natalie's injuries arose and that the new evidence does not completely dispel the old evidence.

Id. at 599. Faced with a fundamental change in the science upon which the petitioner had been convicted, the court correctly opted to allow a jury to consider all of the evidence, rather than continue to incarcerate someone who could very likely be innocent.[16]

B. When Scientific Conclusions Which Formed the Entire Basis of a Criminal Conviction Come Under Scrutiny and are Debunked, It is Not a Matter of Impeachment But New Evidence of Innocence Which Courts Must Consider.

Here, the trial court denied petitioner's claim of newly discovered evidence, in part, because he found that Mr. Lentini's proposed testimony "essentially challenges the creditability of the witnesses who testified at

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[16] The state declined to re-prosecute, noting that Edmunds had nearly completed the sentence she would have received anyway. *See* Melanie Radzicki McManus, Oh Baby*: Audrey Edmunds Is Rebuilding Her Life After Her Murder Conviction Was Overturned*, Madison Magazine, July, 2009.

trial." Trial Court opinion, November 1, 2005, p. 12. The Superior Court echoed this determination, finding that the "'after-discovered evidence' would be used solely for impeaching the credibility and reliability of the Commonwealth's experts." Superior Court opinion, August 17, 2006, at 9. To the contrary, of course; Lentini's affidavit and the information he provided to the court indicated that the entire basis of the Commonwealth's evidence that the fire was intentionally set is no longer considered scientifically valid. This information has nothing to do with "impeachment" but everything to do with scientific validity and the integrity of Petitioner's conviction.

Following the logic of the state courts in denying Petitioner's request for a new trial, there would never be a reason to call into question a conviction. By a strict understanding of the term, *any* evidence that a defendant offers at trial or in the post-conviction context is "impeachment" evidence. Alibi witnesses "impeach" an eyewitness' testimony that the defendant was present at a crime scene. DNA evidence indicating that a male other than the defendant contributed to an intimate biological sample "impeaches" the rape victim who identifies the defendant as the man who raped her. The evidence at issue here demonstrates a sea change in the

scientific community which now rejects much of what the Commonwealth's expert testified to at Petitioner's trial to establish his guilt. The principles which were generally accepted at the time of Petitioner's trial are no longer considered valid by the scientific community.

CONCLUSION

For the foregoing reasons, this Court is urged to acknowledge that "actual innocence" is a freestanding basis for relief under the Due Process Clause from a wrongful incarceration and reverse the District Court's denial of Petitioner's writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Charlotte Haldeman Whitmore, attorney employed by *amicus curiae* The Pennsylvania Innocence Project, hereby certifies that she is a member of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Charlotte Haldeman Whitmore
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Dated: August 5, 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Microsoft Word 2007), that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), in that the brief contains 6,281 words of text excluding the parts of the Brief exempted by Rule 32(a)(7)(B)(iii) and was prepared in 14-point Times New Roman font.

I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the Brief of *Amicus Curiae* in Support of Appellant Han Tak Lee And Urging Reversal as filed with the Clerk.

I hereby certify that an antivirus program, Smantech Endpoint Protection, has been run against the electronic (PDF) version of the Brief of *Amicus Curiae* in Support of Appellant Han Tak Lee And Urging Reversal before filing, and no virus was detected.

/s/ Charlotte Haldeman Whitmore
Charlotte Haldeman Whitmore

Dated: August 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I electronically filed the foregoing Brief of *Amicus Curiae* the Pennsylvania Innocence Project in Support of Appellant and Urging Reversal with the Clerk of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that 10 hard copies of the foregoing Brief of *AmicusCuriae* the Pennsylvania Innocence Project in Support of Appellee and Urging Reversal shall be mailed this date to the Office of the Clerk, United States Court of Appeals for the Third Circuit, and further that hard copies will be served via United States mail, first class, to the following:

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