No_____

IN THE
SUPREME COURT OF THE UNITED STATES

NOAH RICHARD LOVELL, III,

Petitioner,

v.

NOAH NAGY, Warden,

Respondent

PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. SHOULD THE SIXTH CIRCUIT HAVE GRANTED A CERTIFICATE OF APPEALABILITY ON THE QUESTION OF WHETHER A FREE STANDING CLAIM OF INNOCENCE IS A CONSTITUTIONAL VIOLATION?

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner a Certificate of Appealability is dated January 2, 2019. This Petition is filed within ninety days of that order.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which provides that the United States Supreme Court has jurisdiction to review, on certiorari, cases from the federal courts of appeal. This includes denials of Certificates of Appealability by inferior courts.[1]

In *Hohn v. United States*,[2] this Court examined in detail the question of whether a denial of an application for a Certificate of Appealability is a judicial or an administrative act and whether it constituted a "case" for purposes of 28 U.S.C. § 1254(1). The Court held that ". . . this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals."[3]

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[1] *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)

[2] *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

[3] *Id.* at 253.

STATEMENT OF CASE

Petitioner Noah Lovell III filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 in the District Court for the Eastern District of Michigan, challenging his Michigan state court convictions for armed robbery,[4] unlawful imprisonment,[5] first-degree home invasion,[6] and torture.[7]

The facts of this case were described by the U.S. District Court as follows:[8]

> Petitioner was originally tried with his co-defendant, Harry Riley. The facts surrounding the original trial were summarized by the Michigan Court of Appeals as follows: This case arises out of the armed robbery, unlawful imprisonment, torture, and home invasion of an 84-year-old victim. On the day of the incident, Riley went to the victim's back door wearing a work vest and a hard hat under the guise that he worked for a utility company and wanted to look at the victim's property. The victim walked his property with Riley for approximately 45 minutes. Riley was talking on his cellular telephone during a substantial portion of that time. Cellular telephone call logs showed that Lovell's telephone was in the vicinity of the victim's house and that numerous calls were made to Riley at the time of the crime. Riley's vehicle was rented by Lovell.

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[4] Mich. Comp. Laws § 750.529

[5] Mich. Comp. Laws § 750.529

[6] Mich. Comp. Laws § 750.110a (2)

[7] Mich. Comp. Laws § 750.85.

[8] *Lovell v. Klee*, No. 15-11541, 2018 WL 4001458, at *1 (E.D. Mich. Aug. 21, 2018).

> Riley followed the victim into his house; at that point, the victim noticed a pry bar on the table in his dinette. As the victim reached for the pry bar, Riley punched the victim in the face so hard that it knocked his dentures out of his mouth and knocked his glasses off of his face. Riley then grabbed the victim and pushed him down the stairs. At the bottom of the stairs, Riley continued to beat the victim, punching and kicking his face and body. Riley repeatedly demanded to know where the victim kept his money, and threatened to kill him. Riley also repeatedly poked the victim's arms, chest, and neck with a knife. The victim lost consciousness several times during the beating. Riley then sat the victim in a chair and bound his wrists and ankles with duct tape. Riley kicked the victim's face with such force that if [sic] left a shoe print. During the incident, the victim heard a second individual come halfway down the stairs; from his vantage point, the victim could only see the second individual, a white male, from the waist down. The second individual threatened to kill the victim if he did not reveal the location of the money. Meanwhile, Riley took the victim's coin collection. The victim had a broken jaw, broken nose, cracked eye sockets, three broken ribs, and blood on the brain. The victim stayed in the hospital for over a week, and then spent nearly two months in a rehabilitation center.

The state trial court sentenced Petitioner, as a fourth habitual offender, fourth offense, to concurrent terms of imprisonment of 36 years and 8 months to 75 years for his armed robbery and torture convictions and 10 to 15 years for his unlawful imprisonment conviction, and a consecutive term of imprisonment of 13 years and 4 months to 20 years for the first-degree home invasion conviction. Petitioner's convictions and sentence were affirmed on direct appeal.[9] Petitioner's direct appeals

[9] *People v. Riley*, No. 295838, 2011 WL 4501765 (Mich. Ct. App. Sept. 29, 2011). See also *Lovell*, 2018 WL 4001458, at *1

are not relevant to this petition. The date of the Michigan Supreme Court's denial of leave to appeal was April 23, 2012.

On April 11, 2013, Petitioner filed a post-conviction motion for relief from judgment in the state trial court (ECF No. 5-20), which the court denied. (ECF No. 5-21.) Attached to that Petition was the Affidavit of Harry T. Riley which stated that Mr. Lovell was not involved the crime at bar. He was also not involved in the planning in any way. Also attached was the sworn statement of George Wilson. Mr. Wilson recanted his trial testimony inculpating this Petitioner. He apologized for his statements and made it clear that they were the product of police coercion.

Relying on these affidavits, that petitioner argued:

(A) The declaration of co-defendant Riley, attached to the motion, provided newly discovered evidence of Mr. Lovell's innocence and requires that a new trial be granted under the Due Process Clauses of the state and federal constitutions.

(B) The declaration of Mr. Wilson, attached to the motion, in which he recants his trial testimony implicating Mr. Lovell in the crimes, also provides the basis for a new trial under the Due Process Clauses of the state and federal constitutions, either standing alone or in conjunction with the other issues raised in the motion.

The trial court denied the petition on June 6, 2013. The trial court's opinion set forth the state standards for post-conviction relief under Mich. Ct. R. 6.501 et seq. The trial court found that the evidence was not "newly discovered evidence," but "newly available evidence." The fact that the co-defendant could not have been compelled to testify at the joint trial did not make his testimony "newly discovered." The trial judge

stated that there is no evidence less reliable than recanting testimony. The Court denied the motion.

The Michigan appellate courts denied Petitioner leave to appeal and his motion to remand.[10] No evidentiary hearings were held in state court.

Petitioner filed a timely habeas corpus petition in the United States District Court for the Eastern District of Michigan raising the following issues:

I. Mr. Lovell is entitled to a new trial under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where newly discovered evidence after trial—co-defendant Riley's affidavit exonerating him and prosecution witness Mr. Wilson's affidavit recanting his trial testimony against him—show a fair probability that a different result would be rendered on retrial.

II. Mr. Lovell was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution when his trial counsel, before testimony was given, failed to renew his motion for separate trials or juries when co-defendant Riley offered to testify at trial to exonerate Mr. Lovell.

III. Prosecutorial misconduct in rebuttal closing argument deprived Mr. Lovell of his right to a fair trial under the Fourteenth Amendment to the U.S. Constitution when the prosecutor shifted the burden of proof and commented on his silence in violation of his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the U.S. Constitution.

IV. Mr. Lovell was denied his right to due process under the Fourteenth Amendment to the U.S. Constitution because the evidence was insufficient to sustain the convictions.

V. Mr. Lovell was denied due process under the Fourteenth Amendment to the U.S. Constitution when he was sentenced on the basis of inaccurate information in the presentence report that was

[10] *People v. Lovell*, No. 319508 (Mich. Ct. App. June 3, 2014) (ECF No. 5-22); lv. den. 858 N.W.2d 53 (Mich. 2015).

improperly used to support an upward departure in his sentences.

VI. Mr. Lovell was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution when his appellate counsel failed to raise the issues presented in the motion for relief from judgment under MCR 6.500 *et al.*, which were also presented to the Michigan Court of Appeals and the Michigan Supreme Court on appeal and raised in the present habeas petition.

The District Court, the Honorable Linda Parker presiding, entered an Opinion and Order entered on August 21, 2018 denying his Petition with prejudice and also denying a Certificate of Appealability (Opinion and Order, Page ID # 2916-294). In Section II of her opinion, Judge Parker stated that she was required to uphold the state court rulings unless they were "contrary to 'clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. [11] Judge Parker went on to write:[12]

> "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). In order to obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law

[11] *Lovell*, 2018 WL 4001458, at *3.

[12] *Lovell*, 2018 WL 4001458, at *3

> beyond any possibility for fairminded disagreement." *Id.* at 103, 131 S.Ct. 770. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton*, 136 S. Ct. 1149, 1152, 194 L. Ed. 2d 333 (2016).

Judge Parker wrote:

> Petitioner claims that he is entitled to habeas relief because he is actually innocent of the charges. Petitioner submits two affidavits in support of this claim. In one affidavit, Petitioner's co-defendant, Mr. Riley, asserts that Petitioner was not involved in the planning or commission of the crimes. (See ECF No. 5.20 at Page ID 2646.) Mr. Riley's affidavit was signed and dated January 3, 2013, over three years after Petitioner was convicted. (*Id.*) The other affidavit is a declaration from prosecution witness, George Wilson, in which Wilson claims that he testified falsely at Petitioner's criminal proceedings (i.e., the evidentiary and preliminary hearings and trial) about Petitioner's involvement in the crimes. (*Id.* at Page ID 2649.) Mr. Wilson blames his false testimony on undescribed police coercion. (*Id.*) Mr. Wilson's declaration is dated June 30, 2010. (*Id.*). [Opinion and Order, Pg 7 at Page ID 2922].

A judgment to this effect was entered on the same date. Plaintiff timely filed his Notice of Appeal from the District Court's Judgment on September 13, 2018.

Incorporating by reference Petitioner's Brief in support of his Petition for a Writ of habeas (Page ID #10-62) and his Reply brief (Page ID #2902-2916), and what is stated therein, Mr. Lovell maintains that the District Court wrongly denied him Certificate of Appealability because "reasonable jurists" would debate, if not disagree, with the District Court regarding the following constitutional issues arising under the Due Process Clause of the Fourteenth Amendment: (1) Mr. Lovell's entitlement to a new trial based upon

newly discovered evidence post-trial establishing his innocence: co-defendant Riley's affidavit exonerating him from any involvement in the crimes and key prosecution witness Mr. Wilson's affidavit recanting his trial testimony; (2) the insufficiency of the evidence to sustain the conviction for torture under M.C.L. § 750.85 based upon an aiding and abetting theory; and (3) Mr. Lovell's right to individualized sentencing based upon accurate information. For the reason set forth, Mr. Lovell therefore requests that this Court grant him a Certificate of Appealability as to these issues preliminary to granting a writ of habeas corpus.

Disagreeing with these positions, Petitioner brings this Petition.

SUMMARY OF ARGUMENTS

This Court should agree to hear this case because it presents several important questions concerning federal habeas corpus adjudication of state based convictions.

The first issue is whether the Sixth Circuit has improperly "raised the bar" for the granting of a certificate of appealability. In this case (and many others) the Sixth Circuit has undertaken comprehensive reviews of habeas corpus petitions and effectively denied the Certificate because it agrees with the results below rather than look at the question of whether a reasonable jurist could accept the petition. The substantive issue in this case (whether a self-standing claim of actual innocence is a viable constitutional claim) has been accepted by a number of state courts, legal commentators, and some federal jurists. The fact that the Sixth Circuit has previously rejected the claim is not the question which the Court should be considering. The standards for granting a Certificate of Appealability are much lower than that. Because the issue is within the zone where a reasonable jurist could disagree, the Court should have granted the Certificate.

The second issue concerns deference under Section § 2254(d), the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Here, the state court resolved the matter using state based newly discovered evidence standards and ignored the due process argument presented by counsel. While there may be a presumption of a merit determination in some cases, the presumption should not apply where the state court completely ignored the issue. Should the presumption apply, then this Court should follow former President Clinton's signing statement declaring this provision an

unconstitutional infringement on the power of the judiciary to say what the law is. Signing statements are powerful evidence of unconstitutionality and key part of our tripartite form of government. A President's determination of unconstitutionality of some portions of legislation before him or her is entitled to significant respect. Here, the determination is correct and the lower courts should have applied the de novo standard of review.

The third issue is one which this Court has struggled with and the time has come to decide, viz. whether the constitution recognizes a self-standing claim of innocence.

Lastly, should this Court be inclined to recognize this claim, the Court's ruling in *Teague v. Lane* is no impediment to review.

For these reasons, Petitioner requests this Court grant certiorari.

ARGUMENT

I. **THE SIXTH CIRCUIT INCORRECTLY DENIED A CERTIFICATE OF APPEALABILITY ON THE QUESTION OF WHETHER A FREE STANDING CLAIM OF INNOCENCE IS A CONSTITUTIONAL VIOLATION. WHERE NUMEROUS STATE COURTS AND COMMENTATORS RECOGNIZE THE CLAIM, THE PETITIONER CLEARS THE LOW BAR FOR A CERTIFICATE OF APEALABILITY. THIS IS PARTICULARLY TRUE SINCE FORMER PRESIDENT CLINTON DECLARED WITH HIS SIGNING STATEMENT THAT THIS PORTION OF AEDPA WAS UNCONSTITUTIONAL. SIGNING STATEMENTS MATTER AND ARE AN IMPORTANT PART OF THE CONSTIUTIONAL PROCESS WHICH HAS BEEN HERETOFORE BEEN NOT ADDRESSED BY THIS COURT.**

This Court should grant certiorari or remand this matter to the Court of Appeals with instructions to grant certiorari on the question of whether a free standing claim of innocence is a cognizable constitutional claim. Despite numerous state courts and commentators arguing the answer to this question is "yes," the Sixth Circuit summarily found that established Sixth Circuit law was to the contrary and ended its discussion at this point. This argument misconstrues the low threshold needed for a Certificate of Appealability. The Sixth Circuit's decision was understandably impacted by the notion that it must defer to state court decisions which reasonably but erroneously interpret federal constitutional law. While the Anti-Terrorism and Effective Death Penalty Act of

1996 ("AEDPA") does provide for such deference, when President Clinton signed the law into effective, his signing statement made clear that this provision was unconstitutional. As several justices of this Court have previously acknowledged, this signing statement is entitled to respect.

A. *The Standard for Issuing a Certificate of Appealability in Habeas Corpus is a Low Bar Which is Easily Met When a Number of State Courts and Legal Commentators Agree with the Petitioner's Assertion that the Constitution Recognizes a Free Standing Claim of Actual Innocence.*

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides that, in order to take an appeal from a final order denying habeas corpus, a Certificate of Appealability must be obtained from a circuit justice or from the district court judge.[13]

In order to obtain a Certificate of Appealability ("COA"), the petitioner must make a "substantial showing of the denial of a constitutional right."[14] The threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong.[15] "A petitioner satisfies this standard by demonstrating that ... jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."[16] The petitioner is merely

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[13] 28 U.S.C. § 2253, subd. (c)(1).

[14] 28 U.S.C. § 2253(c)(2).

[15] *See Slack*, 529 U.S. at 484–85.

[16] *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc) ("... [O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor").

required to make the "modest"[17] showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[18] As explained by the Ninth Circuit the substantial showing standard required for this COA is "relatively low."[19]

In applying this standard, a district court may not conduct a full merits' review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims.[20] The Court is required to set forth in this Order each of the issues that Petitioner raised in his habeas petition and state with specificity which issues it certifies for appeal.[21]

Hence, a COA must issue if any of the following apply: (1) the issues are debatable among reasonable jurists; (2) another court could resolve the issues differently; or (3) the questions raised are adequate enough to encourage the petitioner to proceed further. Finally, "The court must resolve doubts about the propriety of a COA in the petitioner's favor."[22]

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[17] *Lambright*, 220 F.3d 1022.

[18] *Slack*, 529 U.S. at 484.

[19] *Jennings v. Woodford*, 290 F.3d 1006, 1011 (9th Cir. 2002) citing *Slack*, 529 U.S. 473.

[20] *Id.* at 336–37.

[21] *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

[22] *Jennings*, 290 F.3d 1006, citing *Lambright*, 220 F.3d 1022.

The fact that different jurisdictions are applying the doctrine differently and the overwhelming number of commentators agree with the Petitioner, is strong evidence that a reasonable jurist could reach a different conclusion in this matter.[23] Justices Sotomayer, Ginsburg, and Kagan dissented from the denial of certiorari in a challenge to the Fifth Circuit's refusal to issue a Certificate of Appealability. Even though all parties agreed that the Petitioner's habeas corpus decision conflicted with a Ninth Circuit decision, the Fifth Circuit denied the Certificate finding that its own precedent tied the Court's hands on whether the Petitioner could gain relief. Under these circumstances, a certificate should issue. A habeas petitioner is not required to show that his "appeal will succeed." Instead, "[a] prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part."[24]

Justice Sotomayor writing for the three justices stated criticizing the Fifth Circuit for its overdemanding standard. The Justice wrote:[25]

> In any event, Jordan's reading of the Fifth Circuit's case law need not be the best one to allow him to obtain further review. "[M]eritorious appeals are a subset of those in which a certificate should issue," 28 U.S.C. § 2253 not the full universe of such cases. "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty

[23] *Jordan v. Fisher*, 135 S. Ct. 2647, 2650, 192 L. Ed. 2d 948 (2015).

[24] *Jordan*, 135 S. Ct. at 2650 (Sotomayer, J.) (quoting *Miller-El*, 537 U.S. at 337).

[25] *Jordan*, 135 S. Ct. at 2651–52

of ultimate relief." *Miller–El,* 537 U.S., at 337, 123 S.Ct. 1029. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that the petitioner will not prevail." *Id.,* at 338, 123 S.Ct. 1029. The possibility that Jordan's claim may falter down the stretch should not necessarily bar it from leaving the starting gate.

The Fifth Circuit's second, and more fundamental, mistake was failing to "limit its examination to a threshold inquiry." *Id.,* at 327, 123 S.Ct. 1029. "[A] COA ruling is not the occasion for a ruling on the merit of [a] petitioner's claim." *Id.,* at 331, 123 S.Ct. 1029. It requires only "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.,* at 336, 123 S.Ct. 1029.

Here, the Fifth Circuit engaged in precisely the analysis *Miller–El* and the COA statute forbid: conducting, across more than five full pages of the Federal Reporter, a detailed evaluation of the merits and then concluding that because Jordan had "fail[ed] to prove" his constitutional claim, *Jordan v. Epps*, 756 F.3d 395, 407 (5th Cir. 2014) a COA was not warranted. But proving his claim was not Jordan's burden. When a court decides whether a COA should issue, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller–El,* 537 U.S., at 342, 123 S.Ct. 1029. Where, as here, "a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. 322

The barrier the COA requirement erects is important, but not insurmountable. In cases where a habeas petitioner makes a threshold showing that his constitutional rights were violated, a COA should issue. I believe Jordan has plainly made that showing. For that reason, I would grant Jordan's petition and summarily reverse the Fifth Circuit's judgment. I respectfully dissent from the denial of certiorari.

By definition, if the Petitioner could prevail on this issue in a different circuit, a reasonable jurist could debate the ruling of the District Judge. As dissenting Fifth Circuit Judge Dennis and Graves noted: "proving his claim was not the Petitioner's burden." A proper, threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions."[26] In fact, even a dissenting opinion which superficially supports the Petitioner is enough to clear this threshold.[27]

B. The District Court and the Sixth Circuit Improperly Relied on AEDPA Deference Provisions Where: (a) the State Court Did Not Address the Petitioner's Actual Innocence Claim and Decided the Matter Under State Newly Discovered Evidence Standards; and, (b) Former President Clinton's Signing Statement Declared these Provisions Unconstitutional. An Article III Court Has a Constitutional Obligation to Say What the Law is and this Function May Not be Delegated to State Courts.

AEDPA deference is a theme consistently repeated in the lower court record even though there is no state court opinion which takes up or addresses the Petitioner's claim. The Michigan trial court is the last court to have rendered an opinion on the merits. That court addressed the issue an opinion which addressed the state newly discovered evidence issue. The federal courts which have reviewed the issue applied AEDPA deference and said that this Court has never recognized a free standing actual innocence claim.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and in particular, 28 U.S.C. § 2254(d), requires federal courts to give considerable deference to

[26] *Buck v. Stephens*, 630 F. App'x 251, 253 (5th Cir. 2015) (Dennis, J. dissenting).

[27] *Buck*, 630 F. App'x at 254.

state-court adjudications of claims subsequently presented to a federal court as a basis for habeas relief.[28] AEDPA deference only applies where the state court adjudicates a matter on the merits.[29] Because Michigan Courts treated the Petitioner's petition as raising only a newly discovered evidence claim and did not address his due process issue, the standard of review should be *de novo*.[30] While AEDPA deference under 28 U.S.C. § 2254(d) can sometimes apply to an unexplained state court denial of a state post-conviction pleading,[31] it is illogical to presume that the state court ruling is on the merits where the state court addressed the substantive newly discovered evidence issue and ignored the related due process argument.[32]

Should this Court disagree and find an implicit merits determination in the Michigan court rulings, the standard of review is still *de novo*. The AEDPA provides for

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[28] *See Harrington*, 562 U.S. at 96–97.

[29] "The language of 28 U.S.C. § 2254(d) makes it clear that this provision applies only when a federal claim was 'adjudicated on the merits in State court.' " *Johnson v. Williams*, 568 U.S. 289, ––––, 133 S. Ct. 1088, 1097, 185 L. Ed. 2d 105 (2013) (quoting 28 U.S.C. § 2254(d)) (emphasis in original);

[30] *Johnson*, 133 S. Ct. at 1091 ("Because the requirements of 28 U.S.C. § 2254(d) are difficult to meet, it is important whether a federal claim was 'adjudicated on the merits in State court'....").

[31] *Harrington*, 562 U.S. at 96–97.

[32] *Harrington*'s presumption of a merit determination is not cast in stone. The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)." *Harrington*, 131 S. Ct. at 785.

a high measure of deference to state court decisions,[33] but President Clinton's signing statement stated that this provision was unconstitutional. While virtually all courts enforce the deference provision, these decisions do so without regard to President Clinton's signing statement stating that this provision was unconstitutional and did not constrain the power of the judiciary. Applying de novo review to this important constitutional question this Court should find that there is a right to not convict an innocent person.

The relevant language is contained in 28 U.S.C. § 2254(d)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

[33] The AEDPA applies to all petitions for habeas corpus which was filed after the AEDPA became effective. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir. 1997), *as amended* (Mar. 20, 1997), *as amended* (Mar. 20, 1997). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

Soon after its passage, a number of lower courts considered the import of the signing statement,[34] but that argument seems to have been lost on the pages of history even though two members of this Court believe that that a President's signing statement is entitled significant constitutional respect.[35] Additionally, the late Justice Scalia noted: "In appropriately limited circumstances, [presidential signing statements] represent an exercise of the President's constitutional obligation to take care that the laws be faithfully executed, and they promote a healthy dialogue between the executive branch and the Congress."[36]

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[34] *E.g., Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1067 n.6 (6th Cir. 1997) (the portion of the decision for which the signing statement was cited was effectively overruled by *Lindh*, 521 U.S. 320); *Hill v. Butterworth*, 133 F.3d 783, 784 (11th Cir. 1997), *opinion vacated on reh'g*, 147 F.3d 1333 (11th Cir. 1998); *Stewart v. Gillmore*, No. 97 C 6672 (N.D. Ill. Nov. 5, 1997).

[34] *Love v. Morton*, 112 F.3d 131, 137 (3d Cir. 1997).

[35] In 2013, Justice Kavanaugh stated in a lecture at Case Western Reserve Law School that presidential signing statements were an important part of the constitutional process and that the President had the ability to opine in the first instance that a portion of a statute was unconstitutional. "Trump Supreme Court picks: Presidents can ignore laws they think are unconstitutional," CNN Politics, August 7th, 2018 available at: https://edition.cnn.com/2018/08/06/politics/brett-kavanaugh-president-ignore-laws-unconstitutional/index.html (last visited Feb. 6, 2019). Memorandum, Samuel A. Alito, Jr., Deputy Assistant Attorney General, to the Litigation Strategy Working Group, U.S. Department of Justice, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (1986) available at https://www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf (last visited Feb. 6, 2019).

[36] *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006) (Scalia dissenting).

Instead, decisions of this Court have strengthened the level of deference given to the state court without regard to constitutional issue raised herein. The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. [37] Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. *Id.* An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred.[38] Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts.[39]

When the Act was signed into law, President Bill Clinton wrote, "If ... [Section 104] were read to deny litigants a meaningful opportunity to prove the facts necessary to vindicate Federal rights, it would raise serious constitutional questions."[40] President Clinton, however, further stated: ""I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of

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[37] *Early v. Packer*, 537 U.S. 3, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

[38] *Lockyer v. Andrade*, 538 U.S. 63, 75–76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003).

[39] *Early*, 537 U.S. at 9.

[40] President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 29, 1996), *available at* http://www.presidency.ucsb.edu/ws/?pid=52713

Federal legal claims. .. ." [41] As presently implemented, AEDPA delegates to state courts the ability to say what federal law means.[42]

As presently interpreted, AEDPA clearly undercuts the inherent power of the judiciary to state what the law is.[43] A law which places the ultimate authority to determine what federal law is to state government outside the judiciary is unconstitutional.[44]

The President is second only to the judiciary in saying what the Constitution requires. President Clinton was plainly within his constitutional rights in declaring this provision in operative and this Court should hear this issue. Presidents are sworn to "preserve, protect, and defend the Constitution," and thus are responsible for ensuring

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[41] Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. Doc. 719, 720 (April 24, 1996).

[42] Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. 85, 87 n.1 (2012); Judith L. Ritter, *The Voice of Reason-Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Corpus Are Wrong*, 37 Seattle U. L. Rev. 55 (2013).

[43] *See, e.g., Brown v. Payton*, 544 U.S. 133, 125 S. Ct. 1432, 1442, 161 L. Ed. 2d 334 (2005) (Breyer, J., concurring) ("In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference."); see also *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (en banc) (per curiam) (finding that petitioner's claim of ineffective assistance of counsel was meritorious, but that § 2254(d) precluded the court from granting the writ of habeas corpus); *Sellan v. Kuhlman*, 261 F.3d 303, 310 (2d Cir. 2001) (noting that "whether AEDPA deference applies ...is all but outcome-determinative").

[44] *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803); *United States v. Klein*, 80 U.S. 128, 20 L. Ed. 519 (1871); *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). *See also* James S. Liebman & William F. Ryan, James S. Liebman & William F. Ryan, "*Some Effectual Power:" The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998).

that the manner in which they enforce acts of Congress is consistent with America's founding document. Presidents have long used signing statements for the purpose of "informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications,"[45], or for stating that the President will interpret or execute provisions of a law in a manner that would avoid constitutional infirmities. As Assistant Attorney General Walter Dellinger noted early during the Clinton Administration, "[s]igning statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality)."[46]

As the first Justice Marshall has recognized, while the Constitution grants Congress some authority to proscribe for the rules of habeas corpus. Congress may not pass legislation which effectively denies this Court the ability to grant the writ. "Marshall stressed that "[t]his opinion is not to be considered as abridging the power of courts ... to protect themselves … from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals,

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[45] Office of Legal Counsel, *The Legal Significance of Presidential Signing Statements*, 17 U.S. Op. Off. Legal Counsel 131, 131 (1993) (available at http://www.usdoj.gov/olc/signing.htm); Office of Legal Counsel, *Presidential Auth. to Decline to Execute Unconstitutional Statutes*, 18 U.S. Op. Off. Legal Counsel 199, 202 (1994) ("[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions") (available at http://www.usdoj.gov/olc/nonexcut.htm)

[46] *The Legal Significance of Presidential Signing Statements*, 17 U.S. Op. Off. Legal Counsel at 132 (emphasis added).

or between the government and individuals."[47] The holding in *Bollman* also supports the position argued for herein. Samuel Swartwout and Erick Bollman had been committed without trial by the D.C. Circuit Court of Appeals on charges of treason for aiding Aaron Burr's failed revolutionary campaign. After Justice Marshall found that the Court had the power to issue the writ, the Court examined the merits of the petition and ruled that the evidence against the petitioners was insufficient to support an indictment for treason, and the prisoners were discharged.[48] *Bollman* supports a federal court's jurisdiction, authority, and duty to *independently* review the state court judgment and grant the writ in cases where it is warranted. As Professor Eric Freeman has noted, the contrary reading of *Bollman* has only been accomplished by "truncating the relevant passages of Bollman."[49]

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[47] *Ex parte Bollman*, 8 U.S. 75, 94, 2 L. Ed. 554 (1807). *See also Irons v. Carey*, 479 F.3d 658, 667 (9th Cir.), *opinion amended and superseded on denial of reh'g,* 505 F.3d 846 (9th Cir. 2007) (Noonan, J., concurring) ("AEDPA does not address jurisdiction: it addresses the materials for judging. It deprives a whole class of cases of their normal value as governing authority for the circuit which has decided them."); *Davis v. Straub*, 430 F.3d 281, 291–99 (6th Cir. 2005) (Merritt, J., dissenting) (observing that the majority's interpretation of 28 U.S.C. § 2254(d)(1) "unconstitutionally obstructs Article Ill's mandate to exercise the judicial power in cases over which the court properly has jurisdiction"); *Gibbs v. Frank*, 387 F.3d 268, 278 (3d Cir. 2004) (Nygaard, J., concurring) ("[T]o the extent AEDPA was actually intended by Congress to deny access by habeas petitioners to the protections of the Bill of Rights subject to a condition precedent, in my view this preclusion should be considered a suspension of the writ.").

[48] *Ex parte Bollman*, 8 U.S. at 114–37.

[49]Eric M. Freeman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 4 (2001). Further, as Professor Freeman argues, the Framers' unanimous agreement of the writ's importance as a safeguard against government overreaching expressly contradicts Bollman's reasoning that the writ was subject to jurisdictional authorization by Congress. The Framers modeled the Suspension Clause after the texts of various state

A case is not precedent for an issue which was never decided.[50] The problem is that after the numerous statements by this Court invoking AEDPA deference, it is highly unlikely that any court will now address this issue even though it hasn't been decided.[51] It is the inherent power of this Court and lower *federal* courts to say what the constitution means. Even if a state court writes a technically excellent opinion reaching the wrong question of federal constitutional law, a federal court has the absolute right and duty to declare the ruling invalid. This is an important issue which this Court should agree to hear.

C. A Freestanding Claim of Innocence is a Substantive Constitutional Violation.

Nominally this Petition asks this Court to rectify the error of the United States Court of Appeals for the Sixth Circuit in failing to grant a certificate of appealability and allow an appeal of the District Court decision denying the Petitioner a certificate of appealability on the question on whether a free standing claim of innocence is grounds

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constitutions, all of which functioned to preserve habeas as a pre-existing right conferred on the courts at common law. *Id.* at 26, 164 n.46 (citing Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, in FREEDOM AND REFORM 55, 75 (Harold M. Hyman & Leonard W. Levy eds., 1967)).

[50]*Cohens v. State of Virginia*, 19 U.S. 264, 5 L. Ed. 257, 290 (1821).

[51] *See, e.g., Crater v. Galaza*, 491 F.3d 1119, 1129 (9th Cir. 2007) ("We consider the Court's longstanding application of the rules set forth in AEDPA to be strong evidence of the Act's constitutionality"); *Duhaime v. Ducharme*, 200 F.3d 597, 601 (9th Cir. 2000) ("[T]he Supreme Court... has refused to reverse decisions from other circuits on the ground that upholding § 2254(d)(1) would unconstitutionally prohibit Article III courts from determining how they should function and from executing their responsibilities.").

for prevailing on habeas corpus, but the underlying question is whether this Court should hold that such a claim constitutes grounds for relief.

The question of whether a freestanding claim of innocence has never been definitively decided.[52] This Court has stated in dicta that it is not a constitutional question, but a number of courts have held that it is a constitutional claim.[53] Additionally numerous legal commentators have argued that this Court should recognize such a claim.[54]

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[52]As the District court observed, this Court in *House v. Bell*, 547 U.S. 518, 554–55, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) and also in *McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013) both declined to answer a question left open in *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) whether a habeas petitioner may bring a freestanding claim of actual innocence. (*Id*. at Page ID 2923). Notwithstanding the Supreme Court's decisions leaving this precise question open, the District Court concluded that "[f]reestanding claims of actual innocence are thus not cognizable on federal habeas review, absent independent allegations of constitutional error at trial." (*Id*.) (citing *Cress v. Palmer*, 484 F.3d 844, 854–55 (6th Cir. 2007) (collecting cases)). This Court has, however, held that actual innocence forgives numerous procedural defaults. See Annotation, *Actual Innocence Exception to Procedural Bars in Federal Habeas Corpus Cases*, 23 A.L.R. Fed. 2d 93 (2007).

[53] *People v. Washington*, 171 Ill. 2d 475, 665 N.E.2d 1330 (1996); *Lewis v. Comm'r of Correction*, 116 Conn. App. 400, 975 A.2d 740, 750 (2009) ("First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence--both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial--he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime."); *State v. Gallegos*, 2009-NMSC-017, 146 N.M. 88, 206 P.3d 993, 1003 proceedings based on the discovery or availability of new evidence.").

[54]Jonathan M. Kirshbaum, *Actual Innocence After Friedman V Rehal: The Second Circuit Pursues A New Mechanism For Seeking Justice In Actual Innocence Cases*, 31 Pace L. Rev. 627 (2011); Kathleen Callahan, *In Limbo: In Re Davis And The Future Of Herrera*

Although the Court has acknowledged that innocence should be relevant to habeas proceedings, it refuses to answer whether a petitioner without an underlying procedural violation could obtain relief solely on a showing of actual innocence. When the Court first addressed the question in 1993 in *Herrera*, [55] it was more "for the sake of argument" than anything else.

In 2006, Justice Kennedy, in an opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, found that the petitioner satisfied the *Schlup* gateway standard and allowed him to proceed with his procedurally defaulted constitutional claims, but refused to answer the question left open in Herrera, noting "whatever burden a hypothetical freestanding innocence claim would require, [the] petitioner has not satisfied it.."[56]

In 2009, the Court avoided the question again, acknowledging:

> 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 … In this case

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Innocence Claims In Federal Habeas Proceedings, 53 Ariz L Rev 629 (2011); Lee Kovarsky, Death Ineligibility and Habeas Corpus, 95 Cornell L. Rev. 329 (2010) (arguing that the Court should entertain freestanding death-ineligibility claim); Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 Wash. L. Rev. 139, 204 (2012); Eric Seinsheimer, *Dretke v. Haley and the Still Unknown Limits of the Actual Innocence Exception*, 95 J. Crim. L. & Criminology 905 (2005); Ryan Edward Shaw, *Avoiding A Manifest Injustice: Missouri Decides Not to Execute the "Actually Innocent" State Ex Rel. Amrine v. Roper*, 69 Mo. L. Rev. 569, 588 (2004);

[55] *Herrera*, 506 U.S. at 431 (Blackmun, Stevens, Souter, J., dissenting).

[56] *Herrera*, 506 U.S. 390

> too we can assume without deciding that such a claim exists
> …

Most recently in Troy Davis's case, rather than answering whether a freestanding innocence claim exists, the Court sent the petition back to the district court to determine "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."[114] Justice Scalia criticized the Court's action, arguing:

> If this Court thinks it possible that capital convictions obtained in full compliance with law can never be final, but are always subject to being set aside by federal courts for the reason of "actual innocence," it should set this case on our own docket so that we can (if necessary) resolve that question. Sending it to a district court that "might" be authorized to provide relief, but then again "might" be reversed if it did so, is not a sensible way to proceed.

The Late Justice Scalia seems to be the only member of the Court who has thus answered whether a freestanding innocence claim exists. Protecting from conviction those who are factually innocent38 of the crime charged is an "axiomatic and elementary" value infused throughout constitutional criminal procedure.[57] In Berger v. United States, the Court emphasized that the "twofold aims" of the criminal justice system are "that guilt shall not escape or innocence suffer." 58 Protection of the innocent is at the core of our

[57] *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

[58] *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Constitution.[59] This Court has noted that this principle underlies the reasonable doubt standard and the presumption of innocence.[60]

Here, the legal basis on which Mr. Lovell asserts his claim of innocence rests upon the only person who could provide evidence establishing beyond any reasonable doubt that Mr. Lovell was in the house with him – Mr. Riley himself. Thus, co-defendant Riley's testimony exonerating Mr. Lovell is absolutely critical to the latter's claim of innocence. Given that achieving justice and fairness are fundamental matters of due process, it is necessary, as a basic question of law, for a state court to conduct at least an evidentiary hearing, heretofore denied, to determine the truth of the matter and find out whether Mr.

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[59] Akhil Reed Amar, Sixth Amendment First Principles, 84 Geo. L.J. 641, 642-643 (1996) ("Many parts of the Amendment, rightly read, do not protect only innocents, but they do protect only innocence; they protect the guilty only as an incidental by-product of protecting the innocent because of their innocence. Put another way, although the guilty will often have the same rights as the innocent, they should never have more, and never because they are guilty." (emphasis in original)). See also *Oregon v. Hass*, 420 U.S. 714, 723, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards") *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (noting that the Due Process Clause requires "fundamental fairness" including the right to present a defense and the right to access exculpatory and material evidence, and highlighting that "[t]aken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system").

[60] See *California*, 467 U.S. at 485 (noting that the Due Process Clause requires "fundamental fairness" including the right to present a defense and the right to access exculpatory and material evidence, and highlighting that "[t]aken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system"); *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure")

Lovell was indeed in the house at the time the crimes were committed, where there is only challenged circumstantial evidence that placed him there. As a matter of the search for truth pursuant to due process, it is necessary that a court conduct an evidentiary hearing in which the new evidence offering a "persuasive demonstration of his innocence" could be considered. [61]

As for Mr. Wilson, he was questioned repeatedly by the original officer assigned to the case immediately after the crimes without ever mentioning that he saw Mr. Lovell together with co-defendant Riley on October 30, 2008. However, nine months after the crimes were committed, upon being threatened by the police with prosecution for selling marijuana and money laundering, and serving least a four-year prison sentence, Mr. Wilson came forward with information implicating Mr. Lovell in the crimes (Petitioner's Br. at Page ID #42-44). At trial, Mr. Wilson thus testified under a grant of immunity. However, immediately after the trial, Mr. Wilson recanted his testimony in a sworn affidavit, which was presented to the Michigan Court of Appeals on direct appeal.

Undoubtedly, Mr. Wilson's recantation of his trial testimony against Mr. Lovell, if believed to be true, would have materially affected the jury's verdict, as his recantation greatly undermined the factual bases for the verdict against Mr. Lovell. As the factual record shows, there was no physical or direct evidence establishing that Mr. Lovell was in the house when the crimes were committed, and he was convicted almost exclusively on the strength of tenuous circumstantial evidence. In fact, the only evidence placing Mr.

[61] *Herrera*, 506 U.S. at 417.

Lovell in the house was testimony given by Mr. Wilson. Yet Mr. Lovell never received a hearing in state court to test the validity of Mr. Wilson's recantation in which he repudiated that testimony, even though an evidentiary hearing is ordinarily required to determine the credibility of a witness' recantation.

Contrary to the District Court's conclusion, simply because many recantations are false does not preclude the possibility that some recantations are true, especially when certain factors are present that lend credence to a particular recantation.[62] First, as was the case here, recanting witnesses are often those who had an incentive to testify against the defendant in the first place (e.g., testifying in exchange for dropping charges or a reduced sentence). Given that such testimony is unreliable in the first place, it hardly makes sense to presume that the recantation is equally unreliable. Indeed, there are often just as many reasons to trust a recantation as there are to mistrust one. [63]

In this case, Mr. Wilsons's recantation bears the indicia of reliability, since his recantation exposes him to perjury charge by admitting that he lied at trial. And just as courts presume that individuals will not make damaging statements about themselves

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[62] See Adam Heder and Paul Godsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, Utah L. Rev. 99 (2012).

[63] Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75 (2008) (studying various exonerations involving which involved recantations and concluding that recanting testimony is more reliable than originally thought). See also Janice J. Repka, Comment, Janice J. Repka, *Rethinking the Standard For New Trial Motions Based Upon Recantations as Newly Discovered Evidence*, 134 U Pa L Rev 1433, 1454-58 (1986) (arguing for a more relaxed "reasonable probability approach" for judging the credibility of recantation.

"unless satisfied for good reason that they are true," one could similarly conclude that Mr. Wilson did not recant and expose himself to a perjury charge unless his recantations were true. Further, unlike his trial testimony, which was a product of police coercion, there is nothing to indicate that Mr. Wilson's recantation resulted from any coercion or was not freely made.

At issue here is whether the reliability of given prosecution witness should be virtually determinative of guilt or innocence. However, given evidence of perjured testimony by such prosecution witness, as is the case here, an evidentiary hearing should be conducted.[64] Given that the Michigan Court of Appeals on direct appeal did not properly consider Mr. Wilson's affidavit recanting his trial testimony, and the trial judge refused to conduct an evidentiary hearing on this matter, there was a complete failure of the state courts to consider in a legal proper manner the recanting evidence discrediting the trial testimony, which Mr. Wilson admitted was a product of police coercion.

For these foregoing reasons, Mr. Lovell thus requests that this Court grant a Certificate of Appealability on this issue so that he can establish his innocence of all the crimes with which he was charged and convicted.

D. Teague v Lane Would Not Preclude Retroactive Application of an Actual Innocence Rule to this Case.

[64] *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

Retroactive application of the proposed actual innocence rule would not be precluded by this Court's precedent. In *Teague v. Lane*,[65] this Court set forth the federal standard for determining whether a rule regarding criminal procedure should be applied retroactively to cases in which a defendant's conviction has become final. Teague established the "general rule" that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[66]

However, *Teague* laid down two exceptions to this general rule: first, a new rule should be applied retroactively if it places " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' "[67] and second, a new rule should be applied retroactively "if it requires the observance of those procedures that ... are implicit in the concept of ordered liberty." Id.

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[65] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). While *Teague* was a plurality opinion, it was ultimately adopted by a majority of this Court in . *Teague* was later adopted by a majority of the Court in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[66] *Teague*, 489 U.S. 288; *Danforth v. Minnesota*, 552 U.S. 264, 274, 128 S. Ct. 1029, 1037–38, 169 L. Ed. 2d 859, 867–68 (2008). Later cases has defined this prong as applying to substantive changes in criminal law. t recognized that courts must give retroactive effect to new watershed procedural rules and to substantive rules of constitutional law. Substantive constitutional rules include "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Penry*, 492 U.S. at 330.

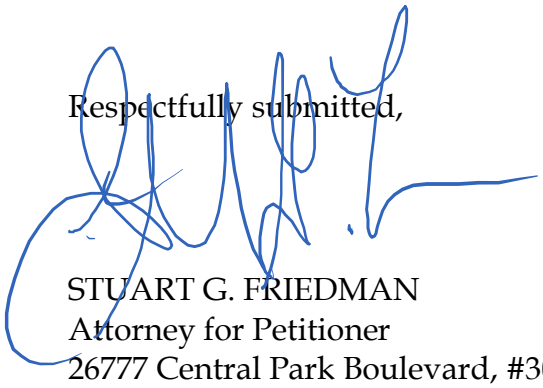
[67] *Teague*, 489 U.S. 288 (citation omitted).

(citations and internal quotation marks omitted). The second group applies to "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' "[68] A substantive ruling prohibiting the conviction of actually innocent individuals would clearly fall within these boundaries.

CONCLUSION

For these reasons, the Petitioner urges this Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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[68] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004); see also *Teague*, 489 U.S. at 312–313; *Montgomery v. Louisiana*, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016), as revised (Jan. 27, 2016)