

ARTICLE I, SECTION 9, CLAUSE 2 — SUSPENSION CLAUSE — A SUCCESSIVE FEDERAL PETITION FOR A WRIT OF *HABEAS CORPUS* MUST BE HEARD ON THE MERITS WHERE A PETITIONER SHOWS THAT A CONSTITUTIONAL VIOLATION AT TRIAL “PROBABLY” HAS RESULTED IN AN ACTUALLY INNOCENT DEFENDANT’S CONVICTION — *Schlup v. Delo*, 63 U.S.L.W. 4089 (U.S. Jan. 23, 1995).

The Supreme Court of the United States recently held that a petitioner filing a second or subsequent *habeas corpus* petition need only show that a constitutional violation “probably” has resulted in the conviction of an innocent defendant to have the successive petition reviewed on the merits. *Schlup v. Delo*, 63 U.S.L.W. 4089, 4094 (U.S. Jan. 23, 1995). The Court determined that this standard, originally announced in *Murray v. Carrier*, struck the proper balance between society’s interest in the preservation of judicial resources and the interest of justice. *Id.* at 4096 (citing *Carrier*, 477 U.S. 478, 496 (1986)). In so holding, the Court rejected the standard applied in *Sawyer v. Whitley*, which required a *habeas* petitioner to demonstrate by “clear and convincing evidence” that absent constitutional error, a reasonable juror would have found the petitioner innocent. *Id.* at 4097 (citing *Sawyer*, 112 S. Ct. 2514, 2517 (1992)).

Petitioner Lloyd Schlup, an inmate of the Missouri State Penitentiary, was convicted and sentenced to death for assisting in the murder of a fellow inmate. *Id.* at 4090. The prosecution offered no physical evidence linking Schlup to the crime. *Id.* The State’s sole evidence consisted of testimony from two correction officers who witnessed the murder. *Id.* Petitioner maintained his innocence throughout the trial and subsequent appeals. *Id.* Petitioner introduced into evidence a videotape from a security camera in the dining area of the prison that showed him entering the dining area sixty-five seconds before the distress call alerted the prison guards to the murder. *Id.* Petitioner contended that the distress call went out immediately after the incident, and therefore, he could not have participated in the incident because he walked into the dining room sixty-five seconds before the distress call went out. *Id.* at 4090-91.

Based on the evidence presented at trial, the jury found Schlup guilty of murder and recommended a sentence of death. *Id.* at 4091. The Missouri Supreme Court affirmed Schlup’s murder conviction and sentence, *id.* (citing *State v. Schlup*, 724 S.W.2d 236 (Mo. 1987)), and the United States Supreme Court denied *certiorari*. *Id.* (*State v. Schlup*, 482 U.S. 920 (1987)).

Petitioner then moved for and was denied post-conviction relief in the Missouri state court. *Id.* The Missouri Supreme Court affirmed the lower court. *Id.* (citing *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988)).

Following this exhaustion of collateral state remedies, Schlup filed a *pro se* federal *habeas corpus* petition in the United States District Court for the Eastern District of Missouri, claiming that his trial counsel was ineffective for failing to interview and call witnesses who could have established his innocence. *Id.* Without conducting an evidentiary hearing, the district court denied relief because the ineffective counsel claim was procedurally barred. *Id.*

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court. *Id.* (citing *State v. Schlup*, 941 F.2d 631 (CA8 1991)). The Eighth Circuit held that the record failed to reveal that trial counsel was constitutionally deficient. *Id.* (citation omitted). The Eighth Circuit then denied Petitioner's motion for rehearing along with his suggestion for rehearing *en banc*. *Id.* (citing *State v. Schlup*, 945 F.2d 1062 (1991)). The United States Supreme Court denied Schlup's *certiorari* petition. *Id.* (citation omitted).

Schlup, represented by counsel, then filed a second federal *habeas corpus* petition. *Id.* Schlup's second petition included three claims. *Id.* First, Petitioner claimed that because of his innocence, carrying out his death sentence would constitute a violation of his Eighth and Fourteenth Amendment rights. *Id.* Second, Petitioner claimed that his trial counsel was ineffective because counsel failed to interview potential witnesses. *Id.* Third, Petitioner claimed that the State failed to disclose important evidence tending to demonstrate his innocence. *Id.* at 4091-92.

Attached to the State's response were the transcripts of several inmate interviews. *Id.* at 4092. One of these transcripts was a statement by the inmate housing clerk who sent out the distress call at the time of the murder. *Id.* The housing clerk stated that the call was sent out shortly after the disturbance began. *Id.* Petitioner claimed that the affidavit proved that the distress call was sent out immediately after the murder, and thus, he could not have participated in the murder because he was in the dining room sixty-five seconds before the distress call was signaled. *Id.* In addition to the housing clerk's affidavit, Petitioner also produced two affidavits of inmates who had witnessed the incident and confirmed that Petitioner was not the actual assailant. *Id.*

Nonetheless, the United States District Court for the Eastern District of Missouri dismissed Schlup's petition without a hearing and vacated the stay of execution. *Id.* The district court reasoned that Petitioner did not provide adequate reasons for his failure to raise his new claims more promptly and had not met the *Sawyer* standard, which required that a petitioner's innocence be shown by "clear and convincing evidence." *Id.*

The United States Court of Appeals for the Eighth Circuit subsequently denied Petitioner's request for a stay of execution. *Id.* at 4093. The Eighth Circuit concluded that the *Sawyer* standard governed and, under that

standard, evidence of Petitioner's guilt presented at the trial prevented consideration of his constitutional claims. *Id.* (citation omitted). In a dissenting opinion, Judge Heaney disagreed with the majority's conclusion, maintaining that Petitioner had satisfied the *Sawyer* and *Kuhlmann* standards because Petitioner had made a colorable showing of actual innocence. *Id.* (referring to *Sawyer*, 112 S. Ct. 2514 (1992); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)).

In November 1993, the Eighth Circuit vacated its previous decision, supplanting it with a more extensive opinion. *Id.* (citing *State v. Schlup*, 11 F.3d 738 (8th Cir. 1993)). While the Eighth Circuit still maintained that the *Sawyer* standard applied, the court extensively examined Petitioner's new evidence and concluded that the evidence was insufficient to permit retrial. *Id.* (citing *Schlup*, 11 F.3d at 740). Again dissenting, Judge Heaney contended that the district court should have considered Schlup's constitutional claims because Schlup had presented sufficient evidence that he was innocent of the murder. *Id.* (citation omitted). Judge Heaney further stated that Petitioner's claim of ineffective trial counsel was substantial considering the attorney's failure to interview witnesses to the murder. *Id.*

The Eighth Circuit denied Schlup's request for a rehearing *en banc*. *Id.* Three justices dissented from that opinion and questioned whether the court should have applied the *Sawyer* standard instead of the *Kuhlmann* standard. *Id.* The United States Supreme Court granted *certiorari* to determine the appropriate standard. *Id.*

Writing for the majority, Justice Stevens first addressed Petitioner's claim of actual innocence and how the claim should be reviewed. *Id.* Justice Stevens distinguished the present case from *Herrera v. Collins*, where the defendant claimed that it would be a constitutional violation to execute him because he was actually innocent, even though the trial was fairly conducted. *Id.* (citing *Herrera*, 113 S. Ct. 2325 (1993)). Conversely, the majority noted, Schlup was arguing that it would be a constitutional violation to execute him because he was denied specific constitutional protections, which included a denial of effective assistance of counsel and the prosecution's withholding of exculpatory evidence, during trial. *Id.* The majority determined that Petitioner's claims were procedural rather than substantive because his claims were not based solely on his actual innocence but on specific constitutional violations and, thus, *Herrera* did not apply. *Id.*

The Court further explained that Schlup claimed he was actually innocent because he was procedurally barred from raising his other constitutional claims and he was unable to establish cause or prejudice for his failure to raise them on his first petition. *Id.* Only by claiming his innocence, the Court noted, would Petitioner have his specific constitutional claims considered on the merits. *Id.* Therefore, the majority determined that

unlike the petitioner in *Herrera*, Schlup claimed that he was not only innocent in fact but that constitutional error was committed at his trial. *Id.*

The Court opined that Petitioner's claim was not due the same respect as was the petitioner's claim in *Herrera*. *Id.* at 4094. The Court asserted that if Schlup's trial had been error-free, as was the situation in *Herrera*, then the lower court could require that the new evidence clearly and unmistakably establish Schlup's innocence. *Id.* The Court, however, explained that if a claim of innocence were accompanied by assertions of constitutional errors at trial, then a petitioner need not prove that the new evidence unquestionably establish innocence. *Id.* The majority maintained that if a court were convinced that the new evidence raised enough doubt about a petitioner's guilt to destroy the confidence of the trial's result and that there is no assurance that the trial was free of constitutional errors, then the petitioner's claim of innocence is sufficient to justify a review of the constitutional claims. *Id.*

In the case at bar, the Court found that because the fairness of Schlup's trial was questionable, the new evidence need not conclusively convince the court of his innocence, rather, it need only raise a reasonable doubt that the conviction was fair. *Id.* The majority, therefore, concluded that evidence of Schlup's innocence would allow the court to hear his underlying constitutional claims. *Id.*

The Court next discussed the standard under which second and successive *habeas corpus* petitions would be reviewed where a petitioner claims "actual innocence" but cannot show cause or prejudice. *Id.* The Court initially noted that because the doctrine of *res judicata* did not attach itself to a denied *habeas* petition at common law, a petitioner, after being denied relief by one court, could renew a petition with another court and the court would be compelled to consider the claims. *Id.* The majority, however, explained that limitations have been imposed upon this right to further the systematic interests of finality, comity, and conservation of scarce judicial resources. *Id.* at 4095 (citing *Kuhlmann*, 477 U.S. 436 (1986); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Wainright v. Sykes*, 433 U.S. 72 (1977)). To preserve these interests, Justice Stevens acknowledged that district courts may deny hearings on successive *habeas corpus* petitions unless there is a showing of cause or prejudice. *Id.* The Court, however, recognized that because the doctrine of *habeas corpus* was an equitable remedy, an exception existed for those rare and extraordinary cases where the cause and prejudice standard does not provide enough protection against a fundamental miscarriage of justice. *Id.* (citing *Carrier*, 477 U.S. 478 (1992)). The Court opined that linking a petitioner's innocence to an exception for a fundamental miscarriage of justice would remain rare, yet retaining this unique exception would ensure relief to those who deserve it. *Id.*

The Court subsequently reviewed the conflicting standards of proof used to determine when constitutional error resulted in the conviction of one who is actually innocent. *Id.* at 4096. In *Carrier*, Justice Stevens noted, the Court required the petitioner to show that a constitutional error “probably” or “more likely than not” resulted in a wrongful conviction, while in *Sawyer*, the Court required a more stringent “clear and convincing evidence” standard. *Id.* (citing *Carrier*, 477 U.S. at 496; *Sawyer*, 112 S. Ct. at 2517). Justice Stevens concluded that the court of appeals wrongly applied the *Sawyer* standard to Schlup’s case. *Id.* The Court reasoned that the *Carrier* standard was more appropriate to employ where a petitioner claims that constitutional error has produced the conviction of an innocent defendant. *Id.* In rejecting *Sawyer* as binding precedent, the majority noted that the claim in *Sawyer* was not based on actual innocence, but rather on the claim that Sawyer’s death penalty sentence was too severe. *Id.* at 4097. Consequently, Justice Stevens explained, the threat to societal interests by those infrequent claims actually showing innocence was notably less than that of threats posed by unfair sentencing claims. *Id.* at 4096. Accordingly, the Court found that the *Carrier* standard, which required the lesser standard, more effectively balanced the systematic interests of society against the importance of avoiding the execution of an innocent person, which would be, the Justice cautioned, the ultimate miscarriage of justice. *Id.* at 4097.

Further, the majority noted that in applying the *Carrier* standard, the district court’s review should focus on a petitioner’s claim of actual innocence. *Id.* Justice Stevens explained that the court is not bound by standard admissibility rules, rather, the court may consider the reliability of all relevant evidence not previously considered at trial. *Id.* The Court added that in reviewing *habeas corpus* claims, the district court was not to use the evidence testing techniques used in a motion for summary judgment. *Id.* at 4098-99. Justice Stevens articulated that when the district court determines the credibility of new evidence, it should make its determination from the perspective of a reasonable, properly instructed juror. *Id.* at 4098.

Finally, the Court distinguished the *Jackson v. Virginia* standard used in reviewing insufficiency of evidence claims from the *Carrier* standard employed in actual innocence claims. *Id.* (citing *Jackson*, 443 U.S. 307, 324 (1979)). Justice Stevens first noted that the *Jackson* standard did not deal with determinations of witness credibility because such reviews were generally beyond the range of analysis of the *habeas* court. *Id.* Second, Justice Stevens posited that under the *Carrier* standard the *habeas* court must contemplate what reasonable jurors would do, while the *Jackson* standard requires the court to center its analysis on whether a juror had the power, as a matter of law, to reach a conviction. *Id.* Hence, the Court found the *Jackson* standard to be inappropriate. *Id.*

Accordingly, the majority determined that the Eighth Circuit applied the wrong standard in reviewing Schlup's claim and, therefore, vacated the Eighth Circuit's decision, remanding the case to the United States District Court for the Eastern District of Missouri. *Id.* at 4099.

Justice O'Connor concurred in the judgment, but wrote separately to further explain the Court's decision. *Id.* (O'Connor, J., concurring). The Justice recognized, as did the majority, that the "probably" or "more likely than not" *Carrier* standard was more difficult to meet than the standard of "reasonable probability" required for prejudice claims. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 695 (1984)). Agreeing with the majority, Justice O'Connor differentiated the Court's standard from the rationality standard used in *Jackson*. *Id.* (citing *Jackson*, 443 U.S. 307 (1979)). The Justice noted that the *Jackson* standard focused on the power of the trier of fact to make determinations regarding the competence of record evidence and that the *Carrier* standard was radically different because it focused upon the foreseeable behavior of jurors. *Id.* Justice O'Connor emphasized that, although the Court's new standard only applied in cases showing actual innocence, it was a standard needed to ensure that such unique cases were actually heard. *Id.*

In conclusion, Justice O'Connor explained that the Court's ruling did not affect the traditional discretion enjoyed by courts hearing *habeas corpus* petitions. *Id.* The Justice noted that because the district court abused its discretion by erroneously applying the *Sawyer* standard, the majority did not have to determine whether discretionary abuse was the appropriate standard of review. *Id.*

Chief Justice Rehnquist, joined by Justice Kennedy and Justice Thomas, dissented. *Id.* (Rehnquist, C.J., dissenting). After an exhaustive review of both the facts of Schlup's case and the Court's holdings in *Kuhlmann*, *Carrier*, and *Sawyer*, the Justice concluded that the more difficult "clear and convincing evidence" standard in *Sawyer* was the better standard. *Id.* Chief Justice Rehnquist stated that the "clear and convincing" standard struck the proper balance between the State's interests in finality, the Judiciary's regard for federalism, and the opportunity of a prisoner to show his actual innocence. *Id.* at 4101 (Rehnquist, C.J. dissenting). The Chief Justice criticized the majority's application of *Carrier*. *Id.* The Chief Justice explained that the majority required a petitioner to demonstrate that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* This standard, the Chief Justice's examined, constituted an attempt to hybridize two distinct standards. *Id.* The Chief Justice found the "probability" determination to be a question of fact while a finding that in light of new evidence no reasonable juror could reach a conviction was a question of law. *Id.* The Chief Justice commented that the

Court's analysis of *Carrier* was destined to create confusion in *habeas corpus* cases. *Id.* at 4099 (Rehnquist, C.J., dissenting).

Moreover, the Chief Justice emphasized that in claims of actual innocence, a *habeas* court is not the proper place to retry a petitioner's case. *Id.* at 4101 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated that if the *Carrier* standard were to be adopted, a modified version of the *Jackson* standard — in which the reviewing court could use its discretion to conduct, as it deemed necessary, limited evidentiary hearings — would more properly represent principles espoused in *Carrier*. *Id.*

Justice Scalia, joined by Justice Thomas, also dissented. *Id.* at 4102 (Scalia, J., dissenting). Justice Scalia criticized the majority for virtually ignoring 28 U.S.C. § 2244, which provides federal judges a great deal of discretion when reviewing a successive *habeas* petition. *Id.* Justice Scalia asserted that the Court was obligated to obey the statute unless the statute was unclear or vague on the issue of successive *habeas corpus* claims. *Id.* Noting that federal courts “have no inherent power to issue the writ[.]” Justice Scalia expressed alarm at the majority's apparent belief that it held powers beyond that of Congress. *Id.* Justice Scalia emphasized that there was no binding precedent prior to this case that interpreted the statute to require federal courts to hear a claim of actual innocence and reach the merits of the petition. *Id.* at 4103 (Scalia, J., dissenting). In quoting the congressional statute, the Justice concluded that mandatory adjudication of subsequent petitions was not required, as Congress specifically meant to leave the reviewing of *habeas corpus* petitions to the court's discretion. *Id.* at 4102 (Scalia, J., dissenting) (citation omitted). The Justice also noted that the majority should have used the “clear and convincing evidence” standard to determine whether a federal court may grant a petitioner an evidentiary hearing. *Id.* at 4104 (Scalia, J., dissenting). Justice Scalia concluded that the district court and the appellate court properly exercised their sound discretion by dismissing *Schlup*'s second petition, and the Justice would have affirmed the Eighth Circuit's decision. *Id.*

Analysis

The Supreme Court's decision in *Schlup* represents a retreat from the elevated standards of proof previously required to obtain federal review of a *habeas corpus* petition. Requiring a lesser standard of proof for a successive *habeas corpus* petition that asserts actual innocence does not, as Chief Justice Rehnquist feared, make it inevitable that confusion will arise in the reviewing *habeas* court. *See id.* at 4099 (Rehnquist, C.J., dissenting). Rather, courts, through experience and wisdom, will be sufficiently able to determine the level of credibility that reasonable fact-finders would place on newly relevant evidence. *See id.* at 4098.

A factor in the legislative intent animating 28 U.S.C. § 2244 was to give courts discretion in reviewing *habeas corpus* petitions. *Id.* at 4102 (Scalia, J., dissenting). By utilizing the *Carrier* standard, the Court is not mandating that courts hear all *habeas corpus* petitions. Rather, by prohibiting those petitions that do not meet the threshold “probability” standard, the Court is in effect setting a limit on the availability of *habeas corpus* relief.

Although Justice Scalia claimed that the Court essentially disregarded 28 U.S.C. § 2244, a defendant’s constitutionally protected right of due process under the Fourteenth Amendment supersedes the “Finality of Determination” statute. *See id.* at 4102 (Scalia, J., dissenting). The Court’s affirmation of *Carrier* sends a clear message that it is committed to the fundamental principle that belies the maxim: “one is innocent until proven guilty.” Allowing review of a *habeas* petitioner’s conviction through a successive *habeas* petition, supported by evidence of actual innocence, demonstrates the Court’s continuing devotion to the basic concept of justice — the search for the ultimate truth.