No. 09-35276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD R. LEE,

Petitioner-Appellee,

v.

ROBERT O. LAMPERT,

Respondent-Appellee.

Appeal From the United States District Court for the District of Oregon in Case No. CV-02-300-CL, District Judge Owen M. Panner

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BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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The Innocence Network (the "Network") is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners whose actual innocence may be proved through post-conviction evidence. The fifty-eight members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Network and its members are dedicated to improving the reliability of the criminal justice system and preventing wrongful convictions by researching their causes and pursuing legislative and administrative reforms to enhance the truth-seeking functions of the criminal justice system.

I. INTRODUCTION

The petition for rehearing presents a question of exceptional importance requiring en banc resolution.[1] The panel adopted an unduly restrictive construction of the statute of limitations for federal habeas petitions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the decision, filing a first federal habeas petition even one day outside AEDPA's one-year period requires dismissal, regardless of the strength of the actual innocence showing, unless the petitioner is entitled to equitable tolling.

The panel's ruling conflicts with well-established equitable principles governing habeas jurisprudence. As the Supreme Court stated in *Schlup v. Delo*, before AEDPA's passage: "[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. . . . *[It is a] fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.*" 513 U.S. 298, 324-25 (1995) (emphasis added) (internal quotations omitted). Applying these principles, the Court held that an actual innocence showing provides a "gateway" for the petitioner to pursue his constitutional claims despite a procedural bar. *Id.* at 315. The Supreme Court has continued to recognize this actual innocence gateway in cases since AEDPA, such as *House v. Bell*, concluding that a petitioner who "satisf[ies] the gateway standard

[1] Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29-2(a), this brief is filed with the consent of all parties.

set forth in *Schlup*" has the right to proceed "with procedurally defaulted constitutional claims." 547 U.S. 518, 555 (2006).

The panel attempts to justify its rejection of the Supreme Court's actual innocence gateway by referring to congressional intent, but its decision results in an absurd scheme contrary to the efficiencies Congress envisioned. Under the decision, a petitioner's *successive* habeas petition may be heard on the merits if the petitioner meets the actual innocence gateway, but a time-barred *first* habeas petition will not be, despite meeting the actual innocence gateway, until the petitioner completes the appeals process and files a second petition. The decision thus creates strong incentives to increase the number of habeas filings, a result inconsistent with Congress's intent.

If the panel decision were allowed to stand, it would work a miscarriage of justice, create dramatic inefficiencies, and cause grave constitutional concerns. Accordingly, the Innocence Network respectfully requests that the Court grant the petition for rehearing en banc.

II. ARGUMENT

A. Preserving the Actual Innocence Gateway Presents an Issue of Exceptional Importance.

1. The panel decision disregards the crucial role of equity and innocence in habeas.

The *Lee* decision construes the § 2244(d) statute of limitations so narrowly that an actually innocent person who files a habeas petition even one day after the

one-year limitations period may remain incarcerated or even be executed. 610 F.3d 1125, 1127-31 (9th Cir. 2010). The Supreme Court, however, has made clear that it is improper to "construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). Indeed, cases decided after AEDPA, such as *House v. Bell*, have reaffirmed that the *Schlup* gateway applies to procedural defaults not explicitly addressed by Congress. 547 U.S. at 536 (procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration").

As detailed below, the panel's statutory construction is inconsistent with habeas's role as an equitable remedy, unsupported by evidence that Congress intended to deprive courts of their equitable discretion, and contrary to Supreme Court decisions including *Schlup* and *House*.

a. Courts have long held equitable discretion in adjudicating habeas petitions.

Fundamental fairness considerations have long governed the writ's vital role in preventing unjust incarceration. *See, e.g.*, *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles.") (internal quotation omitted).

The use of habeas corpus to secure relief from wrongful confinement was "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). Indeed, the

Constitution itself recognizes and protects the Great Writ in the Suspension Clause: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. 1, § 9, cl. 2. The first Judiciary Act also expressly recognized the writ. Act of Sept. 24, 1789, ch. 20, § 14. Likewise, in early decisions, U.S. courts embraced the common-law principle that habeas preserves individual liberty against unjust restraints. *See, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

b. Recent Supreme Court decisions have embraced the role of equity and actual innocence.

Modern Supreme Court decisions have continued to ensure "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (citation omitted). In *Murray v. Carrier*, for example, the Court held that to avoid a "miscarriage of justice," "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for [state law] procedural default." 477 U.S. 478, 495-96 (1986).

The same day, the Court "conclude[d] that the 'ends of justice' require federal courts to entertain [successive habeas] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Kuhlmann*, 477 U.S. at 454.

Similarly, in *McCleskey v. Zant*, the Court provided an innocence safety valve for the cause-and-prejudice standard, explaining: "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty . . . ." 499 U.S. 467, 495 (1991) (citation omitted).

In *Schlup v. Delo*, decided shortly before the passage of AEDPA, the Court continued to develop its innocence jurisprudence. 513 U.S. at 325.[2] *Schlup* held that a showing of actual innocence may excuse procedural errors where equity so demands, describing an actual innocence showing as "'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404).

Although aware of *Schlup* when enacting AEDPA, Congress did not preclude the application of the actual innocence gateway to time-related defaults, and its silence should not be construed as a rejection of the equitable principles traditionally governing the writ. *See Holland*, 130 S. Ct. at 2560 (improper to "construe a statute to displace courts' traditional equitable authority absent the 'clearest command'"). Nor did Congress prohibit use of the courts' equitable

[2] *Cf. Slack v. McDaniel*, 529 U.S. 473, 487 (2000) ("complete exhaustion rule" must not become a "trap . . . for the unwary pro se prisoner") (internal quotation omitted).

authority to excuse a procedural default when faced with a strong actual innocence showing. *See Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005).

The *House* decision, issued long after AEDPA's enactment, emphasizes the actual innocence gateway's continuing vitality. The petitioner, Paul Gregory House, was convicted of murder, with the "central forensic proof connecting House to the crime" being blood and semen evidence. 547 U.S. at 544. House prosecuted several state-court habeas petitions disputing the reliability of this evidence. His petitions were denied, in part, because he had waived his arguments under state law. *Id.* at 534-35. The Supreme Court held that although federal habeas relief is generally not available for "claims forfeited under state law," "the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration" in extraordinary circumstances. *Id.* at 536 (internal quotation omitted). As explained in *House*, the actual innocence gateway provides the "specific rule to implement this general principle." *Id.*

Most importantly here, *House* considered and rejected the argument that AEDPA superseded the *Schlup* actual innocence gateway. The respondent argued that AEDPA's imposition of a clear-and-convincing standard of proof "replaced" the *Schlup* more-likely-than-not standard. *Id.* at 539-40. The Court disagreed, concluding that the two AEDPA provisions addressing actual innocence—the very provisions the panel relied on here—were inapposite outside their limited purview:

> One AEDPA provision establishes a [clear-and-convincing evidence] standard for second or successive petitions involving no retroactively applicable new law, 28 U.S.C. §2244(b)(2)(B)(ii); another sets it as a threshold for obtaining an evidentiary hearing on claims the petitioner failed to develop in state court, § 2254(e)(2). ***Neither provision addresses the type of petition here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence.*** Thus, the standard of review in these provisions is inapplicable.

House, 547 U.S. at 539 (emphasis added). Just as in *House*, Congress expressed no intent to overturn the *Schlup* standard for a procedural default for first habeas petitions. Indeed, *House*'s reasoning applies with even greater force here because the procedural default at issue—failure to comply with AEDPA's statute of limitations—is solely a federal procedural requirement.

Thus, although the panel contends that "Lee gets his history wrong," 610 F.3d at 1131, it is the panel that fails to account for the long-held equitable discretion vested in courts to prevent miscarriages of justice involving non-jurisdictional procedural defaults like a time-bar. Congress was required to act clearly if it wanted to overturn this long history, *Holland*, 130 S. Ct. at 2560, but instead was silent.[3] As *House* recognized, congressional silence is insufficient to

[3] The panel cites a House Report stating: "'[t]his title incorporates reforms to curb the abuse of the statutory writ of habeas corpus.'" *Lee*, 610 F.3d at 1132 n.10 (quoting H.R. Rep. No. 104-518, at 111 (1996)). This statement provides no basis to infer congressional intent to preclude courts' longstanding equitable discretion. As a former member of the House recently stated: "nothing in the statute should

rob courts of their equitable discretion and actually innocent petitioners of their liberty or life.

2. The actual innocence gateway provides a key "safety valve."

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[4] *Schlup*, 513 U.S. at 324-25. The actual innocence gateway ensures that a miscarriage of justice does not occur in the "extremely rare" but critical cases in which a prisoner demonstrates actual innocence. *Id.* By contrast, the panel's decision would require dismissal of a federal habeas petition filed even one day after the one-year deadline, regardless of the strength of the actual innocence showing. As the Court has stated, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

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have left the courts with the impression that they were barred from hearing claims of actual innocence . . . ." Bob Barr, *Death Penalty Disgrace*, N.Y. Times, June 1, 2009; *cf.* 141 Cong. Rec. S7803-01, at S7827 (June 7, 1995) (Orrin Hatch: discussing successive petitions, "Any time somebody can show innocence, we allow that.").

[4] *See* Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2138 (2002) ("[E]ven those gravely concerned about conservation of judicial resources have acknowledged that the 'policy against incarcerating or executing an innocent man . . . should far outweigh the desired termination of litigation.'" (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)).

Several case examples highlight the actual innocence gateway's crucial role in ensuring the equitable application of AEDPA to first federal habeas petitions. In *Souter v. Jones*, the petitioner, Larry Pat Souter, presented extensive evidence that he was innocent of the murder for which he was convicted, but failed to file his federal habeas petition within AEDPA's one-year period. 395 F.3d 577, 588 (6th Cir. 2005). The Sixth Circuit, applying the actual innocence gateway, ordered that Souter's petition be considered, even though it was not timely.

Souter was not prosecuted for murder until twelve years after the victim's death. The prosecution's evidence consisted primarily of a bottle found near the victim and expert testimony that the bottle previously had a sharp edge that could have been used to kill the victim. *Id.* at 581-83. In his petition, Souter provided extensive evidence of his actual innocence, including an expert witness's recantation of trial testimony and photos from the crime scene showing blood stains inconsistent with the prosecution's theory. *Id.* at 583-84.

Recognizing that the petition would otherwise be time-barred, the Sixth Circuit held that Souter "presented new evidence which raises sufficient doubt about his guilt and undermines confidence in the result of his trial," and that he "should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims," including allegations of ineffective assistance of counsel and due process violations. *Id.* at 597, 602.

After serving 13 years in prison, Larry Pat Souter was exonerated and released from state prison. *See Souter v. Jones*, No. 02-cv-00067 (W.D. Mich. October 11, 2005). Under the panel's decision, his habeas petition would have been dismissed, and his constitutional and actual innocence claims would never have been considered.

The recent *Larsen* case in the Central District of California also shows the critical importance of preserving the actual innocence gateway with regard to the one-year AEDPA statute of limitations. David Larsen was convicted of "possession of [a] dagger" in California state court. Because of Larsen's prior felony convictions, the conviction triggered California's three-strikes statute, resulting in a sentence of 28 years to life in prison.

Larsen's conviction was based on a police officer's testimony that an individual threw a dagger under a car just as the officer drove into a parking lot. *Larsen v. Adams*, ___ F. Supp. 2d __, No. 2:08-cv-04610, 2010 WL 2488992, at *4-*7 (C.D. Cal. June 14, 2010) . His trial counsel, who was later disbarred, failed to identify key eyewitnesses, who had seen another person, *not Larsen*, throw the dagger. *Id.* at *7-*14, *18. The district court found that these newly identified witnesses provided strong evidence satisfying the *Schlup* actual innocence gateway. *Larsen v. Adams*, 642 F. Supp. 2d 1124, 1140 (C.D. Cal. 2009). The district court further concluded trial counsel's failure to investigate "severely

prejudiced Petitioner's defense because, had the jury heard this exculpatory testimony, *no reasonable juror would have found Petitioner guilty beyond a reasonable doubt*." *Larsen*, 2010 WL 2488992, at *28 (emphasis added).

Although the district court found Larsen's habeas petition meritorious and granted his release, the order is stayed pending appeal to this Court. Under *Lee*, because Larsen's initial federal habeas petition was filed after AEDPA's one-year deadline, the order releasing Larsen would be overturned, notwithstanding the compelling evidence of his actual innocence.[5]

Likewise, the petitioner here presented similarly compelling evidence of actual innocence such that "any reasonable juror would conclude these charges have not been proven beyond a reasonable doubt." 607 F. Supp. 2d 1204, 1221 (D. Or. 2009). In the face of this evidence, dismissing Mr. Lee's petition as untimely due to a minor procedural misstep—failing to file a "placeholder" federal habeas petition before exhausting his state habeas remedies—would work the "miscarriage of justice" that *Schlup* decries. 513 U.S. at 315.

[5] Also troubling is the case of Bruce Lisker, who was convicted of murder in 1985. Despite being time-barred by AEDPA, Mr. Lisker made a *Schlup* gateway showing, established constitutional errors resulting in a successful habeas petition, and was set free. *Lisker v. Knowles*, 463 F. Supp. 2d 1008, 1018-31 (C.D. Cal. 2006). After the *Lee* panel decision, however, the respondent filed a motion to reopen the habeas proceedings. The result sought by the respondent—returning an exonerated man to prison based on a procedural technicality—contradicts *Schlup*'s miscarriage-of-justice standard and AEDPA's finality principles.

3. The actually innocent have no incentive to disregard the statute of limitations.

Contrary to the *Lee* panel's assertion that a prisoner would discover facts establishing his actual innocence and then "hold them until he felt the time was right," 610 F.3d 1130 n.4, inmates have no incentive to file their habeas petitions late, and every incentive to file timely to obtain relief sooner (and to avoid the limitations bar).

Prisoners fail to file timely habeas petitions for a number of reasons, often beyond their control, but procedural gamesmanship is not one of them. For example, prisoners are much more likely than the general population to suffer from mental or learning disabilities or simply to have a low IQ.[6] According to government statistics, 23% of state inmates report having a mental impairment.[7] Inmates also tend to be relatively uneducated. A Department of Education study revealed that, in 2003, 57% of state and federal inmates were not high school

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[6] *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. Rev. & Soc. Change 451, 481-84 (1990-1991).

[7] U.S. Dep't of Justice, *Survey of Inmates in State and Federal Correctional Facilities*, Table 4 (2004), at http://bjs.ojp.usdoj.gov/content/pub/html/mpp/tables/mppt04.cfm.

graduates at the beginning of their sentences, and only 22% had any postsecondary education.[8]

4. Remedying federal constitutional error in a case of actual innocence strongly outweighs comity and finality interests.

The Supreme Court has repeatedly recognized that "principles of comity and finality . . . 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *House*, 547 U.S. at 536 (citing *Carrier*, 477 U.S. at 495; *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). This principle can be traced to the longstanding equitable considerations discussed above. *See, e.g.*, *Kuhlmann*, 477 U.S. at 447.

Concerns about comity toward the States should not deter the Court from preserving the actual innocence gateway for initial federal habeas petitions. The procedural default here involves a ***federal*** procedural requirement, namely the statute of limitations applicable to federal habeas petitions submitted by persons convicted in state courts. *See* 28 U.S.C. § 2244(d)(1).[9] Using innocence as a gateway to overcome a federal procedural bar presents far less serious comity concerns than cases in which the Supreme Court has applied the innocence

[8] U.S. Dep't of Educ., *Literacy Behind Bars: Results From the 2003 National Assessment of Adult Literacy Prison Survey*, at vi, 28, at http://nces.ed.gov/pubs2007/2007473.pdf.

[9] This concern with preventing miscarriages of justice is not unique to § 2244. In *United States v. Montano*, the Eleventh Circuit held that an actual innocence showing "serves . . . to lift the procedural bar caused by [the movant's] failure timely to file his § 2255 motion." 398 F.3d 1276, 1284 (11th Cir. 2005) (citations omitted).

gateway to excuse various ***state-law*** procedural defaults. *See, e.g.*, *House*, 547 U.S. at 536-39. Thus, this is not a situation calling for restraint in granting habeas relief to show deference to state courts.

Further, as recognized in *Lonchar*, a ***first*** federal habeas petition puts less strain on comity and finality interests, in part because successive petitions "are less likely to lead to the discovery of unconstitutional punishments." 517 U.S. at 324. The panel's decision, however, would perversely impede the goal of finality. Under the panel's holding, meeting the actual innocence gateway allows a petitioner to pursue a ***second or successive*** habeas petition but does not allow a petitioner to pursue a time-barred ***first*** habeas petition. Resolving all constitutional claims in the first federal habeas petition promotes finality and conserves judicial resources. "If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action." *McCleskey*, 499 U.S. at 491.

The small number of state prisoners that file habeas petitions, and even smaller number of petitions ultimately granted, further ameliorate any comity concerns. *See, e.g.*, Nancy King et al., *Final Technical Report: Habeas Litigation*

in U.S. District Courts at 58 (Vanderbilt Univ. Law Sch. Nat'l Ctr. For State Courts 2007) (district courts granted <1% of state prisoner habeas petitions).[10]

The panel suggests that the small number of successful petitions counsels against the innocence gateway, but that analysis ignores the value of protecting the innocent and the gateway's small impact on comity and finality. Allowing even one innocent person to remain unjustly incarcerated or be executed is fundamentally at odds with our system of justice.

B. If Allowed to Stand, the Panel's Decision Would Render § 2244(d) Unconstitutional.

The conviction and incarceration of an innocent person violates the Eighth Amendment and the Fourteenth Amendment's Due Process Clause, both of which require that the courts consider evidence demonstrating actual innocence. The Eighth Amendment protects against "cruel and unusual punishments," but "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Likewise, the Fourteenth Amendment protects citizens from unconscionable state action, such as the

[10] *See also* Victor Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 259 (1995) (federal courts grant less than 1% of habeas petitions); Daniel Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. Cal. L. Rev. 2507, 2523-24 (1993) (1970s data showing that <1% of state prisoners file habeas petitions, and <4% of petitions are granted).

continued incarceration of an individual who has shown his actual innocence. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

By rejecting the actual innocence gateway for petitions barred by AEDPA's statute of limitations, the panel has mistakenly, and unnecessarily, created a conflict between § 2244(d) and the Eighth and Fourteenth Amendments. *See Souter*, 395 F.3d at 601-02. As this Court has recognized, the Supreme Court has not expressly decided whether there is a freestanding constitutional claim based on actual innocence. *Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1130-31 (9th Cir. 2008), *rev'd on other grounds*, 129 S. Ct. 2308 (2009); *Majoy v. Roe*, 296 F.3d 770, 776-77 (9th Cir. 2002).[11] Indeed, cases like *In re Davis* presuppose such a freestanding actual innocence claim. *In re Davis*, 130 S. Ct. 1 (2009). *Davis* presented no other constitutional violation, but the Court still remanded for determination of whether newly discovered evidence would establish the inmate's actual innocence. *Id.* at 1. If a constitutional actual innocence claim were not independently cognizable, the remand would have been pointless.

[11] Other Circuits are in accord. *Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997); *O'Dell v. Netherland*, 95 F.3d 1214, 1246-47 (4th Cir. 1996); *Milone v. Camp*, 22 F.3d 693, 700 (7th Cir. 1994); *Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir.), *vacated in part on other grounds*, 343 F.3d 950 (8th Cir. 2003) (en banc); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999).

The panel decision rests on a mistaken reading of this Court's prior case law, asserting that *Ferguson v. Palmateer* already decided the constitutionality of the AEDPA statute of limitations. In *Ferguson*, however, the Court held only that the statute of limitations does not constitute a per se violation of the Suspension Clause. 321 F.3d 820, 823 (9th Cir. 2003). *Ferguson* did not address, let alone decide, whether the refusal to acknowledge the actual innocence gateway violates the Eighth and Fourteenth Amendments. The panel also simply ignores recent Supreme Court precedent, such as *Davis*, and Ninth Circuit precedent, such as *Osborne*, that recognize a freestanding constitutional right to present claims of actual innocence as at least an open legal question.

Procedurally barring the claim of an actually innocent person impairs the scope of habeas review below the Constitution's minimum protections. "If there is any core function of habeas corpus—and constitutionally required minimum below which the scope of federal habeas corpus may not be reduced—it would be to free the innocent person unconstitutionally incarcerated." *Alexander v. Keane*, 991 F. Supp. 329, 338 (S.D.N.Y. 1998). The serious constitutional issues raised by the panel's decision thus provide a further reason to grant en banc review. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

III. CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Network respectfully requests that the Court grant rehearing en banc and overturn the panel's decision.

Dated: September 9, 2010

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32 AND CIRCUIT RULE 29-2(c)(2)

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7) and Ninth Circuit Rule 29-2(c)(2), the foregoing brief is proportionately spaced, has a typeface of 14 points Times New Roman, and contains 4,196 words.

Dated: September 9, 2010

COOLEY LLP

By */s/ Lori R.E. Ploeger*
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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By *_/s/ Lori R.E. Ploeger_*
Lori R.E. Ploeger

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