NO. 00-35640

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK STEVEN VAN BUSKIRK,
Petitioner-Appellant,

v.

GEORGE H. BALDWIN,
Superintendent, Eastern Oregon Correctional Institution,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRIEF OF AMICUS CURIAE NORTHERN CALIFORNIA INNOCENCE PROJECT IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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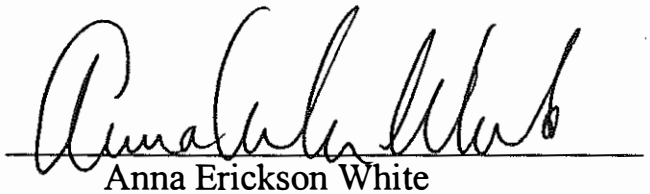
CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae National California Innocence Project states that it has no parent corporation and that no publicly held company owns ten percent or more of its stock, because it is a non-profit organization.

Dated: August 3, 2001



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I. INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), and the accompanying motion for leave, *amicus curiae*, the Northern California Innocence Project ("NCIP"), respectfully submits this Brief in support of Petitioner-Appellant Mark Steven Van Buskirk's Petition For Rehearing And Rehearing *En Banc* of *Van Buskirk v. Baldwin*, No. 00-35640, 2001 U.S. App. LEXIS 14341 (9th Cir. June 28, 2001). Rehearing and rehearing *en banc* is necessary because the Panel opinion incorrectly applies the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. §§ 2244 *et seq.*) ("AEDPA") to a petitioner's request to pass through the actual innocence gateway to allow a procedurally defaulted claim to be considered on the merits. In so doing, the opinion conflicts with *Schlup v. Delo*, 513 U.S. 298 (1995), in which the Supreme Court reaffirmed the long-standing actual innocence ("or miscarriage of justice") *exception* to the bar against procedurally defaulted claims. In addition, the opinion overlooks a recent Supreme Court decision, *Williams v. Taylor*, 529 U.S. 420, 450 (2000), which instructs that the "stringent requirements" of § 2254(e)(2) of the AEDPA do not limit the availability of evidentiary hearings in procedurally defaulted claims which also involve assertions of actual innocence. Finally, the opinion directly conflicts with the holding of another Ninth Circuit panel, *Silva v. Wood*, No. 97-35713, 2001 U.S. App. LEXIS 15043 (9th Cir. June 29, 2001), which analyzed a *Schlup* actual innocence assertion without reference to the AEDPA.

NCIP is a non-profit organization that assists in exonerating inmates who were wrongfully convicted in California and advocates legal reforms to prevent future wrongful convictions. As explained briefly above and in more detail below, the Panel erred in abandoning the *Schlup* actual innocence exception when it imposed § 2254(e)'s "due diligence" requirement to an actual innocence assertion. NCIP believes that the *Van Buskirk* opinion would result in the execution or

continued incarceration of individuals who are entirely innocent, which, as the Supreme Court warned, is "[t]he quintessential miscarriage of justice." *Schlup,* at 324-25.

Since the Panel's *Van Buskirk* opinion is in direct conflict with Supreme Court precedent and another Ninth Circuit opinion, rehearing or rehearing *en banc* is appropriate. Alternatively, *amicus curiae* requests that the opinion be modified and reissued excluding the dicta portion of the opinion regarding "due diligence."

II. ARGUMENT

A. The Panel's Failure To Recognize The Continued Vitality Of The "Miscarriage Of Justice" Exception And To Consider Supreme Court Precedent Effectively Suspends The Writ Of Habeas Corpus.

1. Availability of Habeas Review Through the Actual Innocence Gateway is Essential to American Jurisprudence.

The history and evolution of the Writ of Habeas Corpus is prolific, but its purpose is simple: to protect individuals against wrongful imprisonment. *See Ex Parte Watkins*, 28 U.S. 193, 202 (1830). Habeas relief has, of course, been subject to certain procedural requirements and limitations. For example, a habeas petitioner may, in some circumstances, be barred from seeking a writ in federal court where he has failed to develop a material fact in state-court proceedings. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (applying new cause and prejudice standard). However, federal courts have recognized one long-standing alternative to the general cause and prejudice standard in procedural default cases: a procedurally defaulted claim may be considered even without a showing of cause and prejudice, if the petitioner makes an adequate showing of *actual innocence. Schlup*, 513 U.S. 298 (emphasis added).

Despite the clear standard enunciated in *Schlup*, the *Van Buskirk* Panel held that § 2254(e)(2) established a new "due diligence" predicate to actual innocence assertions. This means that a petitioner must show not only that the evidence was

"new" in that it was not presented at trial, and that no reasonable juror would have convicted petitioner in light of such evidence, but that such evidence could not have been developed through the exercise of due diligence. By applying § 2254 to a *Schlup*-type assertion, the *Van Buskirk* panel severely curtailed the actual innocence exception.

2. The Panel's Opinion Effectively Suspends the Writ for Actually Innocent Prisoners.

The United States Constitution explicitly states that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion of the public Safety may require it." U.S. Const. art I, § 9, cl. 2. An unconstitutional "suspension" may occur when, after the government action in question, a prisoner has been left with an inadequate or ineffective method by which to test the legality of his imprisonment. U.S. Const. art I, § 9, cl. 2; *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2000). In the instant case, the Panel's application of § 2254(e)(2) to the actual innocence gateway raises these constitutional concerns. While rare, examples of innocent prisoners who would likely have remained incarcerated or executed absent the actual innocence exception do exist.

For example, in 1979, Dennis Williams and Verneal Johnson were convicted of murder, kidnapping, and rape. Williams was sentenced to death and Johnson to life imprisonment. Their defense counsel was simultaneously representing himself in disbarment proceedings and failed to adequately defend his clients. In addition, he represented a key prosecution witness. William H. Freivogel, *Lessons from 13 Innocent Men,* St. Louis Post-Dispatch, Apr. 30, 2000, at B3. The evidence that finally exonerated Williams and Johnson was a police interview that was found in a box of court records. This document could well have been held to have been discoverable by trial counsel under the Panel's due diligence requirement.

Similar facts appear in *Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996). Steven Toney was convicted of rape and sodomy and sentenced to two consecutive life terms. *Id.* at 695-96. His defense counsel failed to investigate the issue of mistaken identity or obtain blood tests. *Id.*; *see also,* Joe Holleman, *Man Wrongly Convicted Savors Freedom at Last; Brentwood Man Served 13 Years in Rape Case*, St. Louis Post-Dispatch, Aug. 11, 1996, at D1. In 1996, DNA tests exonerated Toney after the Eighth Circuit granted him an evidentiary hearing. Under the *Van Buskirk* opinion, however, Toney may not have been granted the opportunity to present the evidence that eventually set him free.

Finally, the facts in *Schlup* itself demonstrate that the court's continued authority to reach a claim's merits is crucial to protecting the innocent. Schlup confronted not only inadequate counsel, but racial violence and tension in prison. Black witnesses were hesitant to come forward on behalf of a white defendant and even more reluctant, out of fear for their own safety, to implicate the members of the 'Aryan Brotherhood' who actually committed the crime. *Id.* at 310-11. Under such circumstances, measures of diligence have little relevance. The court has a duty to prevent fundamental miscarriages of justice. *See, e.g., id.* at 320-21.

As the examples above illustrate, applying § 2254(e) to restrict habeas relief regardless of actual innocence raises serious constitutional questions under the Suspension Clause. In such a situation, courts have specifically avoided construing statutes "to derogate from the traditional liberality of the writ of habeas corpus." *Sanders v. United States*, 373 U.S. 1, 11-12 (1963). In the words of the Supreme Court, "[i]f any otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS v. St. Cyr*, 121 S. Ct. 2271, 2279 (2001) (internal citations omitted).

As set forth below, the Supreme Court has held that § 2254(e)(2) has a limited application: it applies to procedurally defaulted claims that a petitioner seeks to raise by showing cause and prejudice for the default without an accompanying assertion of actual innocence. Since this construction avoids any question of violating the Suspension Clause, under *St. Cyr*, it is the better construction.

3. Rehearing or Rehearing *En Banc* is Necessary Because the Panel's Opinion is Inconsistent With Supreme Court Precedent and Conflicts With Ninth Circuit Law.

Recently, in *Williams v. Taylor*, 529 U.S. 420 (2000), the Supreme Court unanimously held that the stringent requirements of § 2254(e)(2) only apply in specific circumstances which do not include *Schlup* actual innocence assertions.

The petitioner in *Williams* sought federal habeas relief and an evidentiary hearing on constitutional claims that he had been unable to develop in state court. Petitioner made no assertion of actual innocence. In interpreting the opening paragraph of § 2254(e)(2), the Court went out if its way to limit the reach of § 2254(e)(2) to procedural default cases where no assertions of actual innocence are also made. Specifically, the Supreme Court held that § 2254(e)(2) was limited to cases covered by "*Keeney's* cause and prejudice standard":

> Contrary to the Commonwealth's position, however, there is no basis in the text of § 2254(e)(2) to believe Congress used "fail" in a different sense than the Court did in *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992)] or otherwise intended the statute's further, more stringent requirements to control the availability of an evidentiary hearing in a broader class of cases than were covered by *Keeney*'s cause and prejudice standard.

Williams, 529 U.S. at 433-34 (emphasis added).

In *Keeney*, respondent Tamayo-Reyes attacked his plea of *nolo contendere* to first degree manslaughter, alleging that it was invalid because his translator had not properly translated the *mens rea* element of manslaughter. *Id.* at 3. Petitioner

did not attempt to invoke the actual innocence exception. The Supreme Court held that a federal habeas corpus petitioner whose constitutional claim is procedurally barred must either show cause or prejudice or that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing. *Id.* at 2. Thus, by limiting § 2254(e)(2)'s reach to the class of cases covered by "*Keeney's* cause and prejudice" standard, the Supreme Court in *Williams* deliberately left intact classes of cases not covered by the *Keeney* standard, such as those covered by the *Schlup* actual innocence exception.[1]

Thus, under the Supreme Court's reasoning in *Williams*, the actual innocence gateway remains a viable exception to the cause and prejudice standard applied to procedurally defaulted claims. Thus, the Panel's opinion that the *Schlup* exception has been overridden by the AEDPA contradicts Supreme Court law.

Moreover, the continued viability of the actual innocence exception was reaffirmed in another recent Ninth Circuit opinion. In *Silva v. Wood*, No. 97-35713, 2001 U.S. App. LEXIS 15043 (June 29, 2001),[2] the Ninth Circuit found that the district court had "abused its discretion in finding *Schlup* inapplicable and dismissing the petition." In *Silva*, the Court was presented with compelling facts demonstrating actual innocence. Silva was convicted of murder. At trial, the

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[1] The conclusion that § 2254(e)(2) is in large part a codification of *Keeney* is supported by the composition of the section itself, in that the section includes both the "cause" (§2254(e)(2)(A)) and "prejudice" (§2254(e)(2)(B)) inquiries. *Williams*, 529 U.S. at 433 (noting the similarities between the language in *Keeney* and §2254(e)(2)).

[2] The *Silva* opinion warns that the "disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3." *Id.* at *1. Circuit Rule 36-3(b)(iii) permits citation "in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." It is for this purpose that *amicus curiae* provides this citation.

prosecution relied on the testimony of three witnesses who testified that Silva confessed to the murder. However, this testimony was directly contradicted by evidence that, although readily available, was not presented at trial. Nevertheless, the Court of Appeals held that the district court "erroneously failed to evaluate properly all the evidence, both old and new, relied on by Silva, and in so doing 'abused its discretion in finding that the new evidence has no import on previous evaluations of the totality of [the circumstances].'" *Id.* at *4-*5 (citation omitted). In reaching this conclusion, the *Silva* Panel defined the *Schlup* actual innocence test without reference to the AEDPA, and thus without employing the due diligence threshold inquiry relied upon in *Van Buskirk*. *Id.* at *3.

B. In Lieu of a Rehearing, the Panel's Dicta Regarding "Due Diligence" Should Be Stricken.

If the Panel and the Court are not inclined to grant rehearing, the portion of the *Van Buskirk* opinion reading a "due diligence" threshold on the "miscarriage of justice" gateway should be stricken as dicta.

The Ninth Circuit possesses the power to modify a Panel opinion by striking erroneous or superfluous passages. *See, e.g., United States v. Zolin*, 842 F. 2d 1135, 1136 (9th Cir. 1988) (*en banc*). This is an important power, because, as one Ninth Circuit case explained, dicta allowed to lurk within the parameters of an opinion can have unintended but significant consequences. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987). In *Mada-Luna*, the third judge on the panel concurred in the result but refused to concur in the opinion because of the majority's dicta. *Id.* at 1018. "Once set loose into the stream of judicial opinions, such dicta are often quoted and used to decide future cases . . . . All of these dicta deal with important questions which will surely and squarely arise in future cases. The future consideration of these matters ought not to be influenced by dicta pronounced unnecessarily and without full briefing." *Id.* at 1019.

These warnings about dicta ring particularly true in the instant case where a significant conflict has arisen between § 2254(e)(2) and the *Schlup* gateway. This conflict should not be resolved by the Panel's dicta.

III. CONCLUSION

The nature of the Writ of Habeas Corpus demands "that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). For the actual innocence gateway to continue to serve as a "safeguard against compelling innocent man to suffer an unconstitutional loss of liberty," *McCleskey v. Zant*, 499 U.S. 467, 495 (1991), the Panel's opinion in this matter must be revisited. For the reasons stated in this Brief, *amicus curiae* respectfully ask this Court to grant the petition for rehearing and accept the suggestion for rehearing *en banc*. Alternatively, *amicus curiae* respectfully ask this Court to modify the Panel's opinion by striking the "due diligence" requirement as dicta.

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