NOTE: THE OLD PROBLEM WITH NEW EVIDENCE: A REVIEW OF *FONTENOT V. CROW* AND WHY NEWLY PRESENTED EVIDENCE IS SUFFICIENT TO OPEN THE ACTUAL INNOCENCE GATEWAY

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INTRODUCTION

Karl Fontenot and Tommy Ward were each tried and convicted twice for the 1984 murder of Donna Denice Haraway.[1] Despite initially confessing,[2] both men would go on to spend the next three decades proclaiming their innocence.[3] After serving more than thirty years, Karl Fontenot was released from prison following a successful federal habeas petition that included a claim of actual innocence.[4] In 2020, Mr. Ward was also granted post-conviction relief and ordered to be released from custody, but in August 2022, the decision was reversed on appeal and Ward's conviction and life sentence remain in place.[5]

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1. Fontenot v. Crow, 4 F.4th 982, 992, 1009 n.13 (10th Cir. 2021).
2. *Id.* at 1052.
3. Clifton Adcock, *State Asks U.S. Supreme Court to Uphold Conviction in 'Innocent Man' Case*, FRONTIER (Jan. 24, 2022), https://www.readfrontier.org/stories/state-asks-u-s-supreme-court-to-uphold-conviction-in-innocent-man-case/.
4. *See Fontenot*, 4 F.4th at 992; Clifton Adcock, *Federal Appeals Court Upholds Overturned Conviction in Ada 'Innocent Man' Murder Case*, FRONTIER (July 14, 2021), https://www.readfrontier.org/stories/federal-appeals-court-upholds-overturned-conviction-in-ada-innocent-man-murder-case.
5. *See* Oklahoma v. Ward, No. PR-2020-958 (Okla. Crim. App. Jan. 7, 2021) (order granting stay); Ali Meyer, *"The Innocent Man" Tommy Ward Files Another Brief,*

During the many decades Mr. Fontenot and Mr. Ward sat in prison, the Innocence Movement took root.[6] Public interest in true crime became mainstream, and cases involving questionable investigations and possible wrongful convictions produced numerous water cooler moments, thanks to documentaries like Netflix's *Making a Murderer*[7] and the *Serial* podcast.[8]

The abduction and murder of Ms. Haraway and the subsequent investigation and conviction of Mr. Fontenot and Mr. Ward was itself the subject of at least two books and one documentary series,[9] and Mr. Fontenot's case was the first undertaken by the Oklahoma Innocence Project.[10] But hidden behind the details that captured the public's attention, this case—particularly that of Mr. Fontenot—touches on a legal matter that has remained unresolved for nearly as long as Mr. Fontenot was imprisoned: how to define "new evidence" in a petition for habeas relief involving a claim of actual innocence.

An actual innocence claim serves as an exception or gateway though which a habeas petitioner may get his or her procedurally barred claim reviewed.[11] While the Supreme Court has established that such claims must be supported with "new reliable evidence,"[12] the Court has failed to articulate exactly what qualifies as "new" evidence. This lack of

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Maintains Innocence, OKLA'S NEWS 4 (July 7, 2021, 4:32 PM), https://kfor.com/news/local/the-innocent-man-tommy-ward-files-another-brief-maintains-innocence; Jason Burger, *Convicted Oklahoma Murderer on Netflix Series to Remain in Prison, Appeals Court Rules*, KOCO NEWS (Aug. 30, 2022 4:04 PM), https://www.koco.com/article/oklahoma-netflix-ada-innocent-man-tommy-ward-murder-appeal/41024122.

6. *See* Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2011) ("The innocence movement refers to a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice in the United States.").

7. *Making a Murderer* is a Netflix docuseries detailing the convictions of Steven Avery and Brendan Dassey for the 2005 murder of Teresa Halbach. The first season of the series premiered in 2015. Thirty-five days after its release, the series attracted more than nineteen million viewers. *See* Jethro Nededog, *Here's How Popular Netflix's 'Making a Murderer' Really Was According to a Research Company*, INSIDER (Feb. 12, 2016, 2:28 PM), https://www.businessinsider.com/netflix-making-a-murderer-ratings-2016-2.

8. *Serial* is an award-winning podcast that launched in 2014. The show's first season covered the murder of high school student Hae Min Lee and the subsequent arrest and conviction of her ex-boyfriend, Adnan Syed. *Serial* would eventually be downloaded one billion times. *See Season One, Episode 12: What We Know*, N.Y. TIMES (Feb. 26, 2021), https://www.nytimes.com/article/serial-podcast-season-1-episode-12.html.

9. Details of the case are covered in Robert Mayer's 1987 book, *The Dreams of Ada*, and John Grisham's 2006 nonfiction book, *The Innocent Man*. In 2018, Netflix released a docuseries, *The Innocent Man*, based on Grisham's book.

10. *Oklahoma Innocence Project Takes on First Case*, INNOCENCE PROJECT (July 31, 2013), https://innocenceproject.org/oklahoma-innocence-project-takes-on-first-case.

11. Herrera v. Collins, 506 U.S. 390, 404 (1993) ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

12. Schlup v. Delo, 513 U.S. 298, 324 (1995).

clarity has resulted in a circuit split over whether to adopt a broader or narrower new evidence standard.

This Note will argue that courts should adopt the broader ("newly presented") standard for new evidence in a petition for habeas relief involving a claim of actual innocence. Part I provides a brief overview of the federal habeas relief process for state prisoners, with a focus on how actual innocence serves as a gateway through which petitioners can receive review of their otherwise procedurally barred constitutional claims. Part II examines the current circuit split over whether to define the "new evidence" petitioners must present in support of their actual innocence claims as evidence not available at the time of trial ("newly discovered") or evidence not previously presented to the factfinder ("newly presented"). This examination includes a discussion of the Court of Appeals for the Tenth Circuit's 2021 decision in *Fontenot v. Crow,* adopting the newly presented standard.[13] Part III discusses how the Supreme Court's decisions in *House v. Bell*[14] and *McQuiggin v. Perkins*[15] support adopting the newly presented standard. Part IV addresses oft-raised arguments against adopting a broader new evidence standard, including concerns over judicial resources, finality, and strictness, and contends that such arguments are not tenable under close scrutiny. Finally, Part V discusses how information gleamed from the Innocence Movement supports the need to adopt the newly presented standard.

I. HABEAS RELIEF AND THE ACTUAL INNOCENCE GATEWAY

Habeas relief has a long and complicated history.[16] The process of seeking such relief is also long and complicated. As both the history and process have been detailed elsewhere, this Part will be limited to a brief discussion on federal habeas relief sought by petitioners convicted in state court, which is sufficient to provide context for the analysis that follows.

Prisoners convicted in state court can seek to challenge their convictions in federal court by applying for a writ of habeas corpus.[17] Courts may only consider such challenges on the grounds that the prisoner "is in custody in violation of the Constitution or laws or

13. *See* Fontenot v. Crow, 4 F.4th 982, 1032-33 (10th Cir. 2021).

14. House v. Bell, 547 U.S. 518 (2006).

15. McQuiggin v. Perkins, 569 U.S. 383 (2013).

16. For discussions on the history of habeas relief, see Justin F. Marceau, *Is Guilt Dispositive: Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2078-86 (2014); Robert C. Stacy II, Schlup v. Delo: *The Result of Curbing Unlimited Jurisdiction by Limiting Discretion*, 74 N.C. L. REV. 897, 906-24 (1996); Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 HAW. L. REV. 225, 228-33 (2008).

17. 28 U.S.C. § 2254(a).

treaties of the United States."[18] Habeas relief is not generally available unless the petitioner has already exhausted all available state remedies.[19] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes additional requirements, including placing a one-year deadline for prisoners to apply for a writ of habeas corpus.[20]

If a petitioner's underlying claim is procedurally barred, that bar can generally only be overcome by demonstrating cause for and actual prejudice from the default.[21] However, in "extraordinary" cases, a petitioner's barred claim may be reviewed if failing to review the claim would result in a fundamental miscarriage of justice.[22] The Supreme Court has recognized actual innocence as falling within the fundamental miscarriage of justice exception.[23] Establishing actual innocence thus serves to create a "gateway" through which the petitioner may get his or her procedurally barred claim reviewed.[24] The Court has found that the actual innocence gateway also applies to initial claims barred by AEDPA's statute of limitations.[25] A petitioner's claim of actual innocence alone is generally not considered enough for habeas relief.[26] In other words, a petitioner claiming actual innocence must still claim a corresponding constitutional violation arising from the underlying state criminal proceedings.

In *Schlup v. Delo*, the Supreme Court noted that to pass through the actual innocence gateway, a petitioner must establish that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[27] The Court also noted that to be credible, such claims must be supported with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical

18. *Id.*

19. 28 U.S.C. § 2254(b)(1)(A).

20. *Id.* § 2244(d)(1).

21. House v. Bell, 547 U.S. 518, 536 (2006) ("As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error.").

22. McCleskey v. Zant, 499 U.S. 467, 494 (1991) (citing Murray v. Carrier, 477 U.S. 478, 485 (1986)) (noting that federal courts can issue a writ of habeas corpus in "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime," and describing such cases "as implicating a fundamental miscarriage of justice").

23. *Id.*

24. Herrera v. Collins, 506 U.S. 390, 404 (1993).

25. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013).

26. *Herrera*, 506 U.S. at 404 (1993). However, the Court in *Herrera* did note that hypothetically, although the threshold would be extremely high, a "truly persuasive" postconviction demonstration of actual innocence in a capital case would render the execution of the petitioner unconstitutional and warrant federal habeas relief in the absence of a state avenue to review the claim. *Id.* at 416-17. In a later decision citing *Herrera*, the Court noted it had "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." McQuiggin v. Perkins, 569 U.S. 383, 392 (2013).

27. Schlup v. Delo, 513 U.S. 298, 327 (1995).

evidence—that was not presented at trial."[28] When determining whether this actual innocence standard has been met, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial."[29]

II. THE CIRCUIT SPLIT ON DEFINING NEW EVIDENCE

Despite addressing the actual innocence gateway multiple times since *Schlup*,[30] the Supreme Court has failed to explicitly define what qualifies as "new" evidence. This has resulted in a circuit split that remains unresolved more than twenty-five years after *Schlup* was decided.[31] The lower courts' interpretations of "new" evidence generally fall into two camps: evidence that was not previously presented at trial ("newly presented evidence"), and evidence that was not previously available at trial ("newly discovered evidence").[32] The remainder of this Part will describe the current circuit split, including the Tenth Circuit's recent adoption of the newly presented standard in *Fontenot v. Crow*.

A. Newly Presented Standard

Seventh Circuit

The Court of Appeals for the Seventh Circuit has been unequivocal in its interpretation that *Schlup* requires newly presented evidence, not newly discovered evidence.[33] In *Gomez v. Jaimet*, the new evidence under consideration by the Seventh Circuit included statements by Gomez's co-defendants and Gomez's own testimony, neither of which had been previously presented at trial but were alleged to be known to the petitioner at the time of trial and thus not newly discovered.[34] The court in *Gomez* noted that not only does *Schlup* not include a newly discovered requirement, but the court should not view the lack of such a requirement as "a mere oversight."[35] This, the court asserted, is particularly true in cases involving ineffective assistance of counsel

28. *Id.* at 324.

29. House v. Bell, 547 U.S. 518, 538 (2006) (citations omitted) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) [hereinafter Friendly, *Is Innocence Irrelevant?*]).

30. *See House*, 547 U.S. at 536-39; *McQuiggin*, 569 U.S. at 386-87.

31. The Court has thus far declined to act on the opportunity to resolve the circuit split. For example, in *Hancock v. Davis*, the Court denied certiorari in a case where the circuit split was "squarely and clearly presented." *See* Reply Brief for the Petitioner at 1, Hancock v. Davis, 139 S. Ct. 2714 (2019) (No. 18-940), 2019 WL 2297315, at *1.

32. Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012) ("There is a circuit split about whether the 'new' evidence required under Schlup includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, *i.e.*[,] newly presented evidence.").

33. Jones v. Calloway, 842 F.3d 454, 461 (7th Cir. 2016) (citing Schlup v. Delo, 513 U.S. 298, 322, 324 (1995)) (noting that new evidence in the context of the actual innocence gateway means evidence not presented at trial, not newly discovered evidence).

34. Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003).

35. *Id.*

claims, where a stricter new evidence standard would serve as a "roadblock to the actual innocence gateway."[36] The court went even further, stating:

> The burden for proving actual innocence in gateway cases is sufficiently stringent and it would be inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court. . . . [I]f a petitioner comes forth with evidence that was genuinely not presented to the trier of fact then no bar exists to the habeas court evaluating whether the evidence is strong enough to establish the petitioner's actual innocence.[37]

Sixth Circuit

In *Souter v. Jones*, the Court of Appeals for the Sixth Circuit reviewed a habeas petition involving photographs assumed arguendo to be available to the defendant at his original trial.[38] After referencing the *Schlup* standard directly, the court noted that the photographs qualified as new evidence in support of the petitioner's claim of actual innocence because there was "no evidence in the record that they were ever presented to the jury."[39]

In *Freeman v. Trombley*, the court noted that while none of the petitioner's materials were newly discovered evidence, the evidence could be considered new for purposes of showing actual innocence so long as the evidence was not presented at trial, "irrespective of whether [petitioner] acted with reasonable diligence in discovering it and pursuing relief."[40] In a 2012 opinion, the court—while claiming not to have yet directly addressed the definition of new evidence—affirmed that previous rulings suggested that the newly presented evidence standard was sufficient under *Schlup*.[41]

Second and Ninth Circuits

Other circuits have explicitly adopted or otherwise shown support for the newly presented interpretation of new evidence. In *Griffin v. Johnson*, the Court of Appeals for the Ninth Circuit noted that while the language in *Schlup* provides support for both interpretations of new evidence, the court relied on the language in *Schlup* and its own

36. *Id.* at 679-80.

37. *Id.* at 680 (citation omitted).

38. Souter v. Jones, 395 F.3d 577, 602 n.9 (6th Cir. 2005). The Supreme Court later cited to this opinion, though not in reference to the issue of defining new evidence. *See* McQuiggin v. Perkins, 569 U.S. 383, 390-91 (2013).

39. *Souter*, 396 F.3d at 602 n.9.

40. Freeman v. Trombley, 483 F. App'x 51, 57 (6th Cir. 2012).

41. Everson v. Larose, Nos. 19-3805, 19-4154, 2020 U.S. App. LEXIS 14290, at *11 (6th Cir. May 4, 2020); *see also* Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012) ("Our opinion in *Souter* suggests that this Circuit considers 'newly presented' evidence sufficient.").

past reasoning to find that petitioners can satisfy *Schlup* with newly presented evidence.[42]

In *Rivas v. Fischer*, the Court of Appeals for the Second Circuit concluded that the petitioner "presented a credible and compelling claim of actual innocence."[43] In describing what made the claim credible under *Schlup*, the court appeared to define new evidence simply as "evidence not heard by the jury."[44] While *Rivas* may have failed to affirmatively resolve the issue, a majority of courts in the Second Circuit that have reviewed the issue appear to have adopted the newly presented standard.[45]

B. Newly Discovered Standard

Eighth Circuit

The Eighth Circuit took an early stance in support of the newly discovered interpretation of new evidence. In *Amrine v. Bowersox*, the Court of Appeals for the Eighth Circuit declared that a "petitioner can obtain review of procedurally defaulted claims if he produces reliable new evidence not available at trial."[46] In support of this statement, the court cited to *Schlup* directly.[47] Interestingly, the section of the *Schlup* opinion cited by the court does not include a "not available at trial" requirement. Instead, the Court in *Schlup* noted that the "emphasis on 'actual innocence' allows the reviewing tribunal to consider the probative force of relevant evidence that was *either* excluded or unavailable at trial."[48] The *Schlup* Court went on to add, quoting Judge Friendly:

> The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any

42. Griffin v. Johnson, 350 F.3d 956, 961-63 (9th Cir. 2003). For more on the previous cases relied on by the court, see Sistrunk v. Armenakis, 292 F.3d 669, 676-77 (9th Cir. 2002) (noting that petitioner's evidence is all newly presented and can be considered in analyzing the *Schlup* claim); Majoy v. Roe, 296 F.3d 770, 775-76 (9th Cir. 2002) (describing a *Schlup* gateway analysis as including a consideration of "all the evidence, including evidence not introduced at trial").

43. Rivas v. Fischer, 687 F.3d 514, 540 (2d Cir. 2012).

44. *Id.* at 543. The court did not address the issue at length but noted that "[w]hat makes the claim 'credible,' as *Schlup* defines that term, is that it is based on new evidence—that is, evidence not heard by the jury—in the form of the essentially unchallenged testimony of a respected forensic pathologist, set against the word of a disgraced medical examiner." *Id.*; *see also* Lopez v. Miller, 915 F. Supp. 2d 373, 400 (E.D.N.Y. 2013) (citing the *Rivas* opinion when noting that "[a]ll of this evidence is 'new' for actual innocence purposes because it was not presented at trial").

45. *See* Jimenez v. Lilley, No. 16-CV-8545 (AJN)(RWL), 2018 U.S. Dist. LEXIS 96927, at *20 (S.D.N.Y. June 7, 2018) (noting the court's own research suggested the majority of courts in the circuit that considered the question have adopted the *Rivas* definition of new evidence).

46. Amrine v. Bowersox, 128 F.3d 1222, 1226-27 (8th Cir. 1997) (citing Schlup v. Delo, 513 U.S. 298, 326-28 (1995)).

47. *Id.*

48. Schlup v. Delo, 513 U.S. 298, 327-28 (1995) (emphasis added).

> unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."[49]

Despite no mention of diligence from the Court in *Schlup*,[50] the court in *Amrine* would go on to declare "[e]vidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence."[51] This added diligence requirement appears to be derived from Eighth Circuit precedent that predates the holding in *Schlup*.[52] Regardless of its origins, the court's requirements for new evidence under *Amrine* have endured.[53]

C. Holdings of Other Circuits

The Third Circuit has offered mixed support for both the newly discovered and newly presented standards. In *Hubbard v. Pinchak*, the Court of Appeals for the Third Circuit declined to find that a petitioner's own newly-proffered testimony qualified as new evidence because the testimony was available at trial.[54] Arguably, the court's decision may have been influenced less by a firm belief in the newly discovered standard and instead rooted in concerns over setting the evidence bar too low to be consistent with the type of "rare" actual innocence cases described in *Schulp*.[55]

This more modest approach arose again in *Houck v. Stickman*, when the Third Circuit expressed concern that the definition of new evidence in *Gomez* was potentially too expansive given the facts of *Gomez*, but also found the definition adopted in *Amrine* potentially too narrow.[56] At the time, the court noted an inclination to accept the *Amrine* standard with an exception for evidence not discovered by ineffective trial counsel.[57] In *Reeves v. Sci*, the Third Circuit would

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49. *Id.* at 328 (quoting Friendly, *Is Innocence Irrelevant?*, *supra* note 29, at 160).

50. The Court in *Schlup* uses "diligence" only once in a footnote, when noting that the petitioner had raised an argument before the district court about a lack of diligence by counsel as it related to establishing cause and prejudice, but the argument was rejected and not renewed with the Court. *See Schlup*, 513 U.S. 298 at 351.

51. *Amrine,* 128 F.3d at 1230.

52. The court in *Amrine* cites to two cases in support of its diligence requirement: *Smith v. Armontrout*, 888 F.2d 530, 542 (8th Cir. 1989), which was decided before *Schlup*, and *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996), which in turn seems to rely on cases decided before *Schlup* and the opinion of the district court that "[p]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in *Schlup*." Bannister v. Delo, 904 F. Supp. 998, 1004 (W.D. Mo. 1995).

53. *See* Amrine v. Bowersox, 238 F.3d 1023, 1028 (8th Cir. 2001); Osborne v. Purkett, 411 F.3d 911, 920 (8th Cir. 2005); Kidd v. Norman, 651 F.3d 947, 953 (8th Cir. 2011).

54. Hubbard v. Pinchak, 378 F.3d 333, 340 (3d Cir. 2004).

55. *Id.* at 341 ("To allow [petitioner's] own testimony that he proffers (supported by no new evidence) to open the gateway to federal review of claims that have been procedurally defaulted under state law would set the bar for 'actual innocence' claimants so low that virtually every such claimant would pass through it.").

56. Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010).

57. *Id.*

finally adopt the standard outlined in *Houck*,[58] but in doing so, it actually seemed to back away from *Amrine*. In addition to expounding on the reasons the newly presented standard could find support in *Schlup*,[59] the court repeatedly expressed concern over properly correcting the grievous error of convicting an innocent person.[60]

The Court of Appeals for the Fifth Circuit has repeatedly pronounced its lack of decision on the circuit split.[61] The court has, however, been far from silent on the issue. In 2018, the court noted that "evidence that was available to be presented to the jury at the time of trial is not now 'new' evidence, even if it was not actually presented."[62] The same year, the court also found that even though fingerprint comparison results existed at the time of trial, since the information was not presented at trial *and* was unknown to the prosecution, defense, and trial judge during the trail, it qualified as new evidence.[63] The court has also held that evidence does not qualify as new under *Schlup* if "it was always within the reach of [petitioner's] personal knowledge or reasonable investigation."[64]

D. Tenth Circuit's Adoption of the Newly Presented Standard

One of the most recent developments in the new evidence circuit split comes from the Court of Appeals for the Tenth Circuit's opinion in *Fontenot v. Crow*.[65] Karl Allen Fontenot was tried and convicted twice for the abduction, rape, and murder of Donna Denice Haraway.[66] Ms. Haraway was abducted while working the night shift at a gas station convenience store in Ada, Oklahoma on April 28, 1984.[67] Prior to her abduction, Ms. Haraway reported receiving obscene phone calls while at work, which were never investigated by local police.[68] Sketches of two men who had been shooting pool at another convenience store on the night of the abduction were circulated by

58. Reeves v. Fayette Sci, 897 F.3d 154, 164 (3d Cir. 2018) ("[W]e now hold that when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway.").

59. *Id.* at 162.

60. *Id.* at 163-64.

61. *See e.g.*, Tyler v. Davis, 768 F. App'x 264, 265 (5th Cir. 2019) ("Further, we have 'yet to weigh in on the circuit split concerning' whether the new evidence must be 'newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial.' " (quoting Hancock v. Davis, 906 F.3d 387, 389 & n.1 (5th Cir. 2018))).

62. Shank v. Vannoy, No. 16-30994, 2017 WL 6029846, at *2 (5th Cir. Oct. 26, 2017).

63. Floyd v. Vannoy, 894 F.3d 143, 156 (5th Cir. 2018).

64. Hancock v. Davis, 906 F.3d 387, 390 (5th Cir. 2018) (quoting Moore v. Quarterman, 534 F.3d 454, 465 (5th Cir. 2008)).

65. Fontenot v. Crow, 4 F.4th 982 (10th Cir. 2021).

66. *Id.* at 992.

67. *Id.* at 992-93.

68. *Id.* at 996-98.

police.[69] Several members of the public reported that one of the men in the sketches resembled Tommy Ward, a resident of Ada.[70] When police spoke with Mr. Ward, he reported being with his friend, Karl Fontenot, on the day in question, having first gone fishing and then later spending the evening at a party.[71]

After multiple police interviews and sitting for a polygraph examination, Mr. Ward confessed to the kidnapping, rape, and murder of Ms. Haraway, and implicated Mr. Fontenot and another man, Odell Titsworth, as his accomplices.[72] Mr. Fontenot was subsequently arrested and after being interrogated, also confessed to participating in the crimes.[73] In their confessions, both men provided details on how and where the crimes were committed, and the clothing worn by the victim during the attack.[74]

Problems with the confessions arose almost immediately. Mr. Fontenot recanted his statements on multiple occasions.[75] He was also unable to pick Mr. Titsworth, his alleged accomplice, out of a photo lineup.[76] Mr. Titsworth, denying any involvement in the crimes, was later proven to have been injured and in a cast when the crimes were committed and thus physically incapable of having committed the acts alleged by Mr. Ward and Mr. Fontenot.[77]

More than a year later, Ms. Haraway's remains were located.[78] The location and condition of the remains contradicted many of the details provided in the confessions. Mr. Ward and Mr. Fontenot had, for example, both told police that the only weapon used in the attack was a knife, while the medical examiner found no evidence of stabbing and reported Ms. Haraway's cause of death as a gunshot wound to the head.[79]

Despite these and many other inconsistencies in their confessions,[80] both Mr. Ward and Mr. Fontenot were brought to trial, found guilty of kidnapping and first-degree murder, and sentenced to death.[81] By 1988, both convictions had been overturned based on the use of the taped confessions during the joint trial.[82] Both men were tried again, this time separately, and both were again found guilty of murder.[83]

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69. *Id.* at 994-95, 998.
70. *Id.* at 998.
71. Fontenot v. Crow, 4 F.4th 982, 998 (10th Cir. 2021).
72. *Id.* at 999-1000.
73. *Id.*
74. *Id.*
75. *Id.* at 1000-01.
76. *Id.* at 1001.
77. Fontenot v. Crow, 4 F.4th 982, 1001 (10th Cir. 2021).
78. *Id.* at 1002.
79. *Id.* at 1004-05.
80. *Id.* at 1002-06 (comparing various other aspects of the confessions to the evidence collected and to eyewitness statements).
81. *Id.* at 1007.
82. *Id.* at 1007-08.
83. Fontenot v. Crow, 4 F.4th 982, 1009 (10th Cir. 2021).

On February 24, 2016, after decades of state-level appeals, Mr. Fontenot filed a petition for federal habeas relief in the Eastern District of Oklahoma.[84] Mr. Fontenot ultimately presented nine substantive constitutional claims and a gateway claim of actual innocence based on new evidence.[85] The new evidence included information related to Mr. Fontenot's alibi for the night of the murder; the harassing calls Ms. Haraway had received at work; recanted, altered, and inconsistent witness statements; and information related to Ms. Haraway's remains.[86] The federal district court granted Mr. Fontenot's petition, finding that Mr. Fontenot had not only successfully passed through the actual innocence gateway, but that each of his substantive constitutional claims were meritorious.[87]

On appeal, the Court of Appeals for the Tenth Circuit affirmed the district court's grant of habeas relief.[88] In doing so, the Tenth Circuit adopted the newly presented standard for new evidence.[89] The court cited two reasons for adopting the newly presented standard. First, because the actual innocence gateway serves to remove procedural bars to habeas relief, a diligence requirement for new evidence hinders habeas courts' ability to ensure that federal constitutional errors do not result in the incarceration of innocent people.[90] Further, to the extent the newly discovered standard requires diligence, such an interpretation appears to be in conflict with the Supreme Court's 2013 opinion in *McQuiggin v. Perkins*.[91] In *Perkins*, the Court noted that "[i]t would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar [AEDPA] erects, yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition."[92]

Second, the Tenth Circuit found that reading diligence into the new evidence requirement does not further the purpose of the new evidence, which is to lend credibility to the actual innocence claim "by showing it is not based solely on evidence a jury has already found sufficient to convict the petitioner."[93] Whether a petitioner exercised diligence is not relevant to the primary goal of "avoiding a manifest injustice," and is not necessary to prevent a wave of unmeritorious claims because, as other courts have noted, new reliable evidence supporting innocence is not available in the vast majority of cases.[94]

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84. *Id.* at 1014-15.
85. *Id.* at 1016-17.
86. *Id.*
87. *Id.* at 1017.
88. *Id.* at 1082-83.
89. Fontenot v. Crow, 4 F.4th 982, 1032 (10th Cir. 2021).
90. *Id.* at 1032-33.
91. *Id.*
92. McQuiggin v. Perkins, 569 U.S. 383, 399 (2013).
93. Fontenot v. Crow, 4 F.4th 982, 1033 (10th Cir. 2021).
94. *Id.*

III. SUPREME COURT CASELAW SUPPORTS THE ADOPTION OF THE NEWLY PRESENTED STANDARD

Having briefly introduced the role of new evidence in opening the actual innocence gateway in Part I and summarizing the ongoing circuit split over how to define new evidence in Part II, this Note will now turn to addressing why courts should adopt the newly presented standard.

The Supreme Court has repeatedly emphasized the need to review *all* the evidence when making an actual innocence gateway determination.[95] In 2020, Justice Sotomayor noted that "[w]hen confronted with actual-innocence claims asserted as a procedural gateway to reach underlying grounds for habeas relief, habeas courts consider all available evidence of innocence."[96] Set against the backdrop of the important role factual innocence has historically held in habeas relief,[97] this emphasis on *all* evidence could be enough to justify the broader newly presented interpretation of new evidence. If not, the Court's opinions in both *House v. Bell* and *McQuiggin v. Perkins* offer more specific support for the newly presented standard.

A. House v. Bell

Paul Gregory House was convicted of murder and sentenced to death in Tennessee for the 1985 killing of Carolyn Muncey.[98] After several state-level appeals, House sought federal habeas relief.[99] The district court denied relief, holding in part that House had failed to demonstrate actual innocence under *Schlup*.[100] The Court of Appeals for the Sixth Circuit affirmed the district court's denial of habeas relief, and the Supreme Court granted certiorari.[101] In ultimately finding that House satisfied the actual innocence gateway, the majority failed to mention either the "newly presented" or "newly discovered" standard of new evidence, but the dissent did use the phrase "newly presented," noting that "[t]he point in *Schlup* was not simply that a hearing was required, but why—because the District Court had to assess the probative force of the petitioner's *newly presented* evidence."[102]

More telling still is the Court's commentary on the actual evidence presented by House. In addition to new DNA evidence that, given scientific advances, would likely meet most definitions of newly

95. *See* Schlup v. Delo, 513 U.S. 298, 328 (1995) (quoting Friendly, *Is Innocence Irrelevant?*, *supra* note 29, at 160); House v. Bell, 547 U.S. 518, 538-39, 547 (2006).

96. Reed v. Texas, 140 S. Ct. 686, 689 (2020) (mem.) (respecting denial of certiorari).

97. Marceau, *supra* note 16, at 2086-87; Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 423-24 (2018).

98. *House*, 547 U.S. at 521-22.

99. *Id.* at 534.

100. *Id.* at 534-35.

101. *Id.* at 535-36.

102. House v. Bell, 547 U.S. 518, 506 (2006) (Roberts, C.J., dissenting) (emphasis added).

discovered evidence, House also presented evidence supporting an alternative explanation for why the victim's blood had been detected on a pair of his pants.[103] As with the DNA evidence, part of House's blood evidence—including testimony from a medical examiner about blood degradation[104]—may be considered newly discovered, as the testimony seems to rest in part on scientific knowledge or techniques that may not have been available at the time of the original trial.[105] Other evidence involving the blood, however, arguably falls much more comfortably into the newly presented definition of new evidence.[106]

Specifically, House presented evidence that the blood collected during the victim's autopsy was improperly handled by law enforcement and subsequently contaminated the pants.[107] In support of this theory, some evidence related to the original custody, transportation, and testing protocols of the blood and pants was presented.[108] Considering the role the blood on the pants played in the original trial,[109] it seems at least plausible that some of this evidence would qualify as newly presented, particularly if newly discovered evidence excludes evidence reasonably discoverable at the time of trial. Yet in its decision, the Court clearly takes the blood evidence into account in evaluating House's claim of actual innocence.[110]

B. McQuiggin v. Perkins

Floyd Perkins was charged and convicted of the 1993 murder of Rodney Henderson.[111] The evidence presented against Perkins at trial included testimony from an alleged eyewitness identifying Perkins as the perpetrator and the statements of other witnesses who claimed to have heard Perkins make incriminating statements before and after the murder.[112] Perkins took the stand in his own defense and offered an account of events that suggested the State's eyewitness may have committed the murder.[113]

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103. *Id.* at 542.
104. *Id.* at 542-43.
105. *Id.* at 563 (Roberts, C.J., dissenting).
106. *See* Laurel Freemyer, Note, *Does Actual Innocence Actually Matter? Why the Schlup Actual Innocence Gateway Requires Newly Presented, Reliable Evidence*, 50 CREIGHTON L. REV. 367, 393-94 (2017) (concluding at least some of the evidence in *House* was newly presented). *But see* Jay Nelson, Note, *Facing Up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 HASTINGS L.J. 711, 717 (2008) (noting that *House* involved newly discovered evidence, not newly presented evidence). Whether or not the evidence in *House* qualifies as newly presented, the debate at the very least illustrates that the line between these two forms of evidence can be murky.
107. House v. Bell, 547 U.S. 518, 543-44 (2006).
108. *Id.*
109. *Id.* at 542.
110. *Id.* at 547-48, 554.
111. McQuiggin v. Perkins, 569 U.S. 383, 387-88 (2013).
112. *Id.* at 388.
113. *Id.*

As part of his petition for federal habeas relief, Perkins claimed actual innocence, which he supported with three affidavits.[114] All three affidavits had been executed more than five years before Perkins's habeas petition, and one had been signed more than eleven years before the petition.[115] The district court noted that qualifying the affidavits as newly discovered evidence was "dubious," but even if they were newly discovered, the evidence was still insufficient to open the actual innocence gateway.[116]

While Perkins's evidence was evaluated and arguendo accepted as newly discovered, and the Court noted it saw no cause to disrupt the district court's finding that Perkins failed to satisfy the *Schlup* standard on remand,[117] the Court's opinion in *Perkins* still provides support for the adoption of the newly presented standard. First, as touched upon by the Tenth Circuit in *Fontenot*,[118] the Court's opinion in *Perkins* served to remove technical barriers to accessing the miscarriage of justice exception. The Court in *Perkins* not only found that the miscarriage of justice exception survived passage of AEDPA, but specifically noted that "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations."[119]

The opinion in *Perkins* thus highlights the Court's continued concern over substantive justice as it relates to the incarceration of the innocent.[120] *Perkins* removed a procedural barrier to habeas relief for those able to make a credible showing of actual innocence, thereby expanding (or at least refusing to contract) the *Schlup* actual innocence gateway. Such reasoning is similar to that raised by the Tenth Circuit in adopting the newly presented standard[121] but does not rely on the "diligence" requirement that some courts have attached to the newly discovered standard.[122] The newly discovered standard, whether or not it includes diligence, serves to create a procedural hurdle for proving actual innocence. In this light and without explicit language from the Court indicating otherwise, it seems hard to justify a narrow, technical reading of the new evidence requirement after the Court's actions in *Perkins*.

Beyond this more theoretical view of the Court's reasoning, the opinion in *Perkins* very specifically addressed the issue of timing and delay in evaluating the evidence proffered in an actual innocence

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114. *Id*. at 389.
115. *Id.*
116. *Id.* at 389-90.
117. McQuiggin v. Perkins, 569 U.S. 383, 400-01 (2013).
118. *See supra* Section II.D.
119. *Perkins*, 569 U.S. at 393.
120. *Leading Case: III. Federal Statutes and Regulations: B. Antiterrorism and Effective Death Penalty Act of 1996—Actual Innocence Gateway*—McQuiggin v. Perkins, 127 HARV. L. REV. 318, 323-25 (2013).
121. *See supra* Section II.D.
122. *See supra* Section II.C.

claim. While the Court in *Perkins* noted that delay and diligence on the part of the petitioner in presenting new evidence is relevant to determining whether a petitioner has made the necessary showing of actual innocence—and may in fact seriously undermine a petitioner's claim—delay alone is not a bar to the actual innocence gateway.[123] The Court found that taking delay into account in the context of the merits of the actual innocence claim as opposed to as a threshold limitation "is tuned to the rationale underlying the miscarriage of justice exception," namely, "ensuring that federal constitutional errors do not result in the incarceration of innocent persons."[124]

While timing is not irrelevant in evaluating newly discovered evidence, as demonstrated by *Perkins* itself, it certainly seems most germane to newly presented evidence, particularly evidence the petitioner may have known about or could have gained access to at the time of trial. Under a newly presented evidence standard, evidence available at the time of trial—like any other delayed evidence—would not be prohibited but would be at a significantly increased risk of being found unreliable or uncredible and thus insufficient to open the actual innocence gateway. Extending the Court's rational on delayed evidence to newly presented evidence provides another means of ensuring that constitutional errors do not result in the continued incarceration of the innocent, and at least one lower court has already adopted such a reading of *Perkins*.[125]

Finally, the line between newly presented and newly discovered evidence is not always clear.[126] Had the district court in *Perkins* applied the newly presented standard, it would have had no need to accept the evidence arguendo as newly discovered or expend extra effort on expressing concerns about the evidence being "dubious" in qualifying as newly discovered. Allowing the evidence in *Perkins* in as newly presented would not have altered the court's rational in finding the evidence failed to open the actual innocence gateway because of the court's ability to factor in delay.

123. McQuiggin v. Perkins, 569 U.S. 383, 399-400 (2013).

124. *Id.* at 400 (quoting Herrera v. Collins, 506 U.S. 390, 404 (2013)).

125. Jimenez v. Lilley, No. 16-CV-8545 (AJN)(RWL), 2018 U.S. Dist. LEXIS 96927, at *18-20 (S.D.N.Y. June 7, 2018) (finding the Court's failure in *Perkins* to find timeliness a threshold issue "plainly implies" that evidence available at trial still qualifies as new evidence). *But see* Shank v. Vannoy, No. 16–30994, 2017 WL 6029846, at *6-7 (5th Cir. Oct. 26, 2017) (holding after *Perkins* that evidence available to be presented to the jury, even if it was not actually presented, is not new evidence).

126. *See supra* note 106 and accompanying text.

IV. ADDRESSING CONCERNS OVER JUDICIAL RESOURCES, FINALITY, AND STRICTNESS UNDER THE NEWLY PRESENTED STANDARD

This Note has already highlighted the shaky reasoning some courts have relied upon in adopting the newly discovered standard[127] and the support for the newly presented standard found in two Supreme Court opinions. This Note will now turn to addressing arguments raised in support of the newly discovered standard, or alternatively, in opposition to the newly presented standard. None of the three concerns highlighted in this Part—judicial resources, finality, or strictness—are sufficient to justify adopting the newly discovered standard over the newly presented standard.

A. Judicial Resources

Concerns over judicial resources are often raised when discussing any expansion of habeas relief, but any suggestion that adopting the newly discovered standard will have a meaningful impact on federal judicial resources is not tenable. Scholars have long predicted that limits on state prisoners' access to federal courts will not have a significant impact on the overall federal caseload.[128] According to one analysis, for every federal habeas petition filed by a state prisoner, more than twelve civil suits were commenced in federal court.[129] Personal injury and contract actions were also found to occupy a significantly greater portion of federal courts' calendars than habeas petitions.[130]

Under current precedent, petitioners raising an actual innocence claim in a federal habeas petition must also have an underlying constitutional claim, something that may be less likely to be at issue in many of the other cases occupying the courts' time. However, even if it is justifiable to factor in judicial resources when determining habeas practices, this does not automatically mean that the brunt of resulting limitations should fall on the shoulders of petitioners.

The district court in *Fontenot*, after finding that Mr. Fontenot's new evidence made it "more likely than not, no reasonable juror would have convicted him[,]"[131] went on to determine that Mr. Fontenot's constitutional rights had been violated by, but not limited to, (1) the District Attorney's Office withholding evidence in violation of *Brady v.*

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127. *See supra* Section II.B (discussing the Eight Circuit's reliance on pre-*Schlup* precedent and language that does not appear in *Schlup* itself in adopting the newly discovered standard).

128. *See* Gregory J. O'Meara, S.J., *"You Can't Get There From Here?": Ineffective Assistance Claims in Federal Courts After AEDPA*, 93 MARQ. L. REV. 545, 552 (2009) (citing Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 346 (1987-1988)).

129. *Id.* at 553.

130. *Id.*

131. Fontenot v. Allbaugh, 402 F. Supp. 3d 1110, 1132 (E.D. Okla. 2019) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

Maryland,[132] (2) the Ada Police Department interfering with Mr. Fontenot's attorney-client privilege,[133] and (3) police misconduct that permeated the investigation, including the taking of a false confession, and the prosecutor knowingly introducing that false testimony at trial.[134] Despite all the apparent problems in this case, Oklahoma still appealed the district court's ruling ordering a new trial or Mr. Fontenot's release, and went on to file a motion requesting the Supreme Court stay the Tenth Circuit's order to retry or release Mr. Fontenot within 120 days.[135] Oklahoma also continues to fight the release of Mr. Fontenot's former co-defendant, Tommy Ward, who (as of August 2022) remains in prison despite his conviction being vacated in December 2020, after it was discovered that investigators withheld key evidence from Ward's attorneys.[136]

The state response in Mr. Fontenot's case is not unique. Despite the Supreme Court's ruling in *House*, Tennessee continued to keep Mr. House in prison for an additional two years.[137] Even when the results of new DNA testing failed to tie House to the crime, the prosecution declined to drop the charges against him for several years.[138]

It seems fundamentally unfair to place the burden of limiting judicial resources at the feet of petitioners when it is clear that states are not passive players in habeas relief, but instead remain aggressive in defending original convictions even when a petitioner has established both actual innocence and underlying constitutional violations. It at least begs the question whether the burden on judicial resources, to the extent it drives habeas practices, be balanced or alleviated in some other manner. For example, as at least one scholar suggests, perhaps the government should be prevented from retrying petitioners like House and Fontenot for the same offense once they have proven actual innocence under *Schlup* and successfully raised a meritorious constitutional claim.[139]

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132. *Id.* at 1160-94.

133. *Id.* at 1194-98.

134. *Id.* at 1206-16.

135. Following the Tenth Circuit's July 2021 ruling, the State was given 120 days to either appeal to the Supreme Court or decide to take Mr. Fontenot to trial for a third time. In October 2021, the State requested the Supreme Court stay the Tenth Circuit's order. *See* Ali Meyer, *U.S. Appeals Court Vacates Oklahoma Murder Conviction Featured in 'The Innocent Man,'* OKLA'S NEWS 4 (Jul. 14, 2021, 08:34 AM), https://kfor.com/news/local/u-s-appeals-court-vacates-oklahoma-murder-conviction-featured-in-the-innocent-man/; Dana Hertneky, *Okla. AG Asks US Supreme Court to Rule On Fontenot Case*, NEWS 9 (Oct. 12, 2021, 5:40 PM), https://www.news9.com/story/616610f0402efe0c1852ad62/okla-ag-asks-us-supreme-court-to-rule-on-fontenot-case.

136. *See* Clifton Adcock, *Judge Orders Second Man in Ada's 'Innocent Man' Case Freed, State to Appeal*, FRONTIER (Dec. 21, 2020), https://www.readfrontier.org/stories/judge-orders-second-man-in-adas-innocent-man-case-freed-state-to-appeal; *see also supra* note 5 and accompanying text.

137. Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 STAN. L. REV. 535, 559-60 (2018).

138. *Id.*

139. *See generally* Barry, *supra* note 137.

B. Finality

Finality[140] is an oft-raised concern in many of the Court's opinions on actual innocence.[141] While the role of finality can serve many purposes,[142] the very existence of an actual innocence exception to hearing barred claims proves it is not the only—or even the most important—goal.[143] Justice may require finality, but "without justice, finality is nothing more than a bureaucratic achievement."[144]

The discussion of finality in habeas relief is by no means misplaced. The Court has long recognized, for example, that Congress intended AEDPA to advance the principles of comity, finality, and federalism,[145] and a broader new evidence standard could, arguably, increase at least to some small degree the number of actual innocence gateway claims. But the Court has also repeatedly recognized the need to balance these interests with the injustice of incarcerating an innocent person.[146] Any thumb on the scale for finality that seemed justified at the time AEDPA was enacted now seems out of place in light of the Innocence Movement that has since unfolded.[147]

There is also a lack of internal logic in using finality as a justification for narrowing a process created to serve as an exception to procedures enacted in the pursuit of more finality. The logic breaks down even further when considering that the new evidence requirement derives from a case (*Schlup*) in which the Court declined to adopt the more stringent "clear and convincing" standard in favor of the "more likely than not" standard for evaluating actual innocence. As one scholar noted in reviewing the Court's decision to adopt the "more likely than not" requirement, "the qualitative impact of a less

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140. Finality is the "notion that a legal judgment—whether that be a judgment of conviction or of sentencing—should be considered the last word on a matter once the courts have completed direct review of the case, and the judgment then should not be revisited by a court at any future time." Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121, 123 (2014).

141. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993); Schlup v. Delo, 513 U.S. 298, 322 (1995); House v. Bell, 547 U.S. 518, 560 (2006) (Roberts, C.J., dissenting).

142. Ryan, *supra* note 140, at 125-27 (discussing how finality could serve punitive interests, enhance the deterrent effect of criminal statues and the effectiveness of rehabilitation, conserve resources, and provide closure to victims).

143. Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171, 226-27 (2014) (arguing that principles of comity and finality must yield to the necessity of correcting unjust incarcerations).

144. Gilbert v. United States, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting).

145. Williams v. Taylor, 529 U.S. 420, 436 (2000).

146. McQuiggin v. Perkins, 569 U.S. 383, 393 (2013) (citing Schlup v. Delo, 513 U.S. 298, 324 (1995)).

147. Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J.C.R. & C.L. 55, 73-74 (2014).

exacting standard can be extraordinary to individuals."[148] Undoubtedly, the same can be said for the newly presented standard.

Finally, lenity in allowing a petitioner to establish actual innocence is not the enemy of finality. Judge Friendly's views on actual innocence, as cited in *Schlup*[149] and *House*,[150] were offered not as a means to broaden habeas review but as a solution for limiting collateral attacks and achieving more finality in the habeas process.[151] Judge Friendly's views on the issue have been generally well-received, and innocence has become a central theme in habeas relief.[152]

While it is debatable whether a heavy focus on innocence in determining habeas relief is the best approach or one the Court will continue to maintain,[153] a focus on actual innocence can serve as either a counterbalance to what is otherwise a heavy emphasis on finality or as a means of achieving finality by limiting those pleas for relief upon which the Court may expend its resources. In either case, adopting a standard for new evidence that may make proving actual innocence "easier" need not be seen as automatically inconsistent with finality concerns.

C. Strictness

Courts and commentators have frequently stressed the strictness of the *Schlup* standard, and the Supreme Court has likewise repeatedly described the actual innocence gateway standard as "demanding."[154] This difficulty in meeting the *Schlup* standard for actual innocence has been offered by some as support for adopting the stricter newly discovered standard.[155] This, however, conflates the newly presented standard being broader with it being somehow significantly easier to meet. Conversely, such reasoning at least implies that without the

148. James G. Clessuras, *Supreme Court Review,* Schlup v. Delo: *Actual Innocence as Mere Gatekeeper*, Schlup v. Delo, *115 S. Ct. 851 (1995)*, 86 J. CRIM. L. & CRIMINOLOGY 1305, 1336 (1996).

149. Schlup v. Delo, 513 U.S. 298, 321-22 (1995).

150. House v. Bell, 547 U.S. 518, 538 (2006).

151. *See* Marceau, *supra* note 16, at 2086-87; Litman, *supra* note 97, at 425-26.

152. *See, e.g.*, Marceau, *supra* note 16, at 2086 (noting that "[h]istory has been kind to Friendly's proposals" and his call for a greater emphasis on innocence and finality in habeas relief achieved "substantial success"); Litman, *supra* note 97, at 431 (noting how the Court cited Judge Friendly in finding Fourth Amendment claims not cognizable in federal habeas because they detract from the central concern of guilt or innocence). Arguably, Judge Friendly may also have been motivated by judicial resource conservation, believing the number of petitioners who were actually innocent to be so low that a focus on such claims would drastically limit habeas review. However, such an assumption (were it held) is untenable today in light of the Innocence Movement and the exploding prison population. *See* Hartung, *supra* note 147, at 66-67.

153. Some scholars argue for a procedural-centered, full and fair review approach to habeas relief, and see several recent Court decisions as indicating a possible shift in the Court's willingness to recognize the importance of procedure in habeas claims, separate from innocence. *See* Marceau, *supra* note 16, at 2127-48.

154. *House*, 547 U.S. at 538; McQuiggin v. Perkins, 569 U.S. 383, 386-87 (2013).

155. *See* Jennifer Gwynne Case, *How Wide Should the Actual Innocence Gateway Be? An Attempt to Clarify the Miscarriage of Justice Exception for Federal Habeas Corpus Proceedings*, 50 WM. & MARY L. REV. 669, 686 (2008).

stricter standard, passing through the *Schlup* gateway will no longer be sufficiently demanding. Neither of these propositions are true.

As a precursor, it is important to consider the Court's own analysis in *Schlup*. In comparing Schlup's actual innocence claim—which was brought as a means to access review of an underlying constitutional claim—to a freestanding claim of actual innocence, the Court noted that Schlup's "conviction may not be entitled to the same degree of respect as one . . . that is the product of an error-free trial."[156] As such, "Schlup's evidence of innocence need carry less of a burden," and petitioners like Schlup should be allowed to pass through the actual innocence gateway when presenting "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error."[157]

However "strong" this evidence of innocence must be, the Court was clear to emphasize that it is less than what would be required for a freestanding substantive claim of actual innocence in a capital case, which would require evidence of innocence strong enough to make a petitioner's execution "constitutionally intolerable" despite a fair trial.[158] The *Schlup* Court then proceeded to adopt a less stringent standard of proof for actual innocence claims than the standard used for erroneous sentencing claims because the latter "would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence."[159] While the *Schlup* standard may be strict, it is clear that the Court did not see the actual innocence gateway as necessitating the most demanding standards available.

None of this is to say that the *Schlup* standard is not, in practice, incredibly demanding. One study found that less than one percent of state prisoners who filed federal habeas petitions were ultimately successful.[160] The success rate is higher in capital cases, but still only comes in at around eight percent.[161] *Schlup* claims specifically are also rarely successful. One study examining approximately 2,750 federal habeas petitions brought by state prisoners found that only one petitioner made a successful *Schlup* claim.[162] Another analysis found the average success rate for *Schlup* claims at about one-half of one

156. Schlup v. Delo, 513 U.S. 298, 316 (1995).

157. *Id.*

158. *Id.*

159. *Id.* at 325.

160. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 284 (2006).

161. *Id.* at 285.

162. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 15, 17, 48-49 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

percent.[163] Other estimates have come in higher, with one analysis finding a nine percent success rate, but even there, less than six percent of those "successful" *Schlup* claims ultimately resulted in relief for the petitioner.[164]

The low success rate for actual innocence claims is likely due in large part to how hard gathering evidence of any kind is for incarcerated petitioners. Unlike at trial where there is a presumption of innocence, in the context of postconviction relief, states have more flexibility in deciding what procedures are due.[165] States can, for example, impose limits on postconviction access to DNA for testing purposes, even if the results of the testing could prove a petitioner's innocence.[166]

Limits on access to evidence through state restrictions are only one hurdle. While perhaps self-evident, it is prudent to remember that petitioners tasked with finding and presenting evidence of their innocence are not only incarcerated, but most are pro se during some or all of the habeas process,[167] relying on family members instead of trained investigators and attorneys to assist them in their efforts.[168] Such a task is difficult enough without factoring in mental illness, illiteracy, or a myriad of other factors that may increase the risk of incarceration and decrease a petitioner's effectiveness in navigating the maze of habeas relief.[169] Having access to counsel is, unfortunately, no guarantee of effective representation. Habeas petitions alleging new evidence of innocence are often accompanied by underlying claims of ineffective assistance of counsel.[170] But having representation certainly can make a difference. Just ask Mr. Fontenot.[171]

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163. Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 STAN. L. REV. 535, 573 (2012).

164. Segal, *supra* note 16, at 247-48.

165. Dist. Att'ys Off. for the Third Jud. Cir. v. Osborne, 557 U.S. 52, 68-69 (2009) (noting that after a valid conviction, the state has more flexibility in deciding what procedures are needed in postconviction relief, and the petitioner's right to due process "is not parallel to a trial right").

166. *Id.* at 73-74 (declining to find a freestanding right to access DNA evidence for testing).

167. In one study, ninety-five percent (2,271) of the noncapital habeas petitions reviewed involved petitioners who were pro se at the beginning of their case, and over ninety-two percent involved no petitioner's counsel at all. KING ET AL., *supra* note 162, at 23.

168. For a discussion on the difficulties petitioners face in gathering evidence for actual innocence claims, including details on Perkins' efforts to gather evidence for his petition, see Tiffany R. Murphy, *"But I Still Haven't Found What I'm Looking For": The Supreme Court's Struggle Understanding Factual Investigations in Federal Habeas Corpus*, 18 U. PA. J. CONST. L. 1129 (2016).

169. Travis S. Hinman, *Varying Degrees of Innocence? Expanding the McQuiggin Exception to Noncapital Sentencing Errors*, 94 N.C. L. REV. 991, 1023-24 (2016).

170. KING ET AL., *supra* note 162, at 28 (finding that of the fifty-nine noncapital habeas petitions reviewed that alleged new evidence of innocence, seventy-five percent also raised ineffective assistance of counsel claims).

171. After decades in prison, Mr. Fontenot's case was taken up by the Oklahoma Innocence Project. His attorney continued to work on his case pro bono until Mr. Fontenot's

In addition to the practical difficulties of gathering evidence of actual innocence, the *Schlup* standard is also hard to satisfy because of the way in which courts will evaluate the evidence presented. As previously discussed, courts consider delay when evaluating the reliability of a petitioner's new evidence.[172] Arguably, factoring delay into the evaluation of actual innocence evidence at all is unjust or at least represents an underestimation by the Court of just how difficult it is to prepare an actual innocence claim.[173] Setting aside the justification for (or wisdom of) such a requirement, factoring in delay when reviewing the petitioner's evidence does have the potential to make otherwise compelling evidence of actual innocence insufficient to open the *Schlup* gateway, again demonstrating that the *Schlup* gateway is indeed strict without requiring any further limitations imposed by the newly discovered standard.

Taking delay into account when weighing reliability serves another purpose. It provides judges leeway in evaluating the type of "newly presented" evidence about which prior courts expressed concern—evidence like a petitioner's own testimony, which the petitioner presumably had available but failed to present at the original trial.[174] Thus, there is no need for a sweeping ban on newly presented evidence over fear that petitioners will withhold or delay evidence intentionally. To the extent that such practices by defendants occur at all, they can be properly addressed in assessing reliability.

The Tenth Circuit's opinion in *Fontenot* seems to follow a similar rationale as that presented here. As already discussed, the Tenth Circuit recognized that diligence did not further the goal of lending credibility to a petitioner's claim of innocence by confirming the claim is based on more than what the jury already heard and evaluated.[175] The court found diligence a hinderance to correcting the injustice of incarcerating innocent persons and unnecessary to prevent unmeritorious claims.[176] The Tenth Circuit did not need to limit its rational to diligence alone. The newly discovered standard more broadly, when used to restrict evidence available or discoverable at the time of trail regardless of diligence, neither furthers the goal of the actual innocence exception in correcting injustice nor is it necessary to keep the *Schlup* standard demanding.

As noted by the Seventh Circuit, "[t]he burden for proving actual innocence in gateway cases is sufficiently stringent and it would be

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release in 2019. *Professor Helps Free Death Row Inmate Who Spent 35 Years in Prison*, UNIV. OF ARK. (Feb. 18, 2020), https://news.uark.edu/articles/52262/professor-helps-free-death-row-inmate-who-spent-35-years-in-prison.

172. *See supra* Section III.B. (discussing how the *Perkins* Court factored in delay in evaluating the reliability of an actual innocence claim).

173. *See* Murphy, *supra* note 168, at 1132, 1141-42.

174. *See supra* Section II.C. (discussing possible concerns by the Third Circuit in finding a defendant's own testimony qualified as new evidence).

175. Fontenot v. Crow, 4 F.4th 982, 1033 (10th Cir. 2021).

176. *Id.*

inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court."[177] Finding and presenting reliable evidence of actual innocence is not easy, and courts applying the broader standard have still found the newly presented evidence insufficient to open the actual innocence gateway.[178] Courts do not need to impose the narrower newly discovered standard in order to make the *Schlup* standard "demanding" or allow review only in "extraordinary" cases. New reliable evidence will still prove "unavailable in the vast majority of cases" under the newly presented standard.

IV. LESSONS FROM THE INNOCENCE MOVEMENT ABOUT THE NEED FOR A BROADER NEW EVIDENCE STANDARD

Thus far, this Note has discussed language from the Supreme Court that supports the adoption of the newly presented standard and addressed counterarguments raised against this standard. This Note will now turn to some of the lessons learned in the wake of the Innocence Movement and how those lessons support the adoption of the newly presented standard.

In recent decades, numerous federal bodies have acknowledged problems in long-used forensic practices.[179] This is particularly troubling in light of reports from groups like the Innocence Project, which reports that forty-three percent of DNA exonerations stem from convictions involving misapplications of forensic science.[180] In one analysis looking at the trial transcripts of more than 130 exonerees, sixty percent of the trials included invalid forensic science testimony.[181] When examining the cases of those later exonerated by DNA, less than a third raised post-conviction challenges to the forensic evidence used to support their convictions, possibly because of the costs associated with hiring forensic experts.[182]

Despite recognition of the problem and some important steps taken to address it,[183] prisoners convicted based on questionable forensic

177. Gomez v. Jaimet, 350 F.3d 673, 680 (7th Cir. 2003).

178. *See, e.g.*, *Gomez*, 350 F.3d at 679-80; Griffin v. Johnson, 350 F.3d 956, 965 (9th Cir. 2003).

179. *See* Jessica Gabel Cino, *Bad Science Begets Bad Convictions: The Need for Postconviction Relief in the Wake of Discredited Forensics*, 7 U. DENV. CRIM. L. REV. 1, 27-29 (2017) (discussing reports and admissions from the Federal Bureau of Investigation, the Department of Justice, the National Academy of Science, and the President's Council of Advisors on Science and Technology regarding problematic forensic practices).

180. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 10, 2021) [hereinafter INNOCENCE PROJECT].

181. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009).

182. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 85-86 (2008).

183. For example, the Federal Bureau of Investigation abandoned comparative bullet-lead analysis after the National Academy of Sciences concluded manufacturing variations

techniques can still struggle to make a later showing of actual innocence, especially if the techniques used to convict the parties have only been questioned but not fully discredited.[184] This is particularly concerning if discrediting a forensic technique could be found by a court not to qualify as newly discovered evidence.[185]

While a broader definition of new evidence alone will not fix the problem of questionable science in wrongful convictions, it would allow for the flexibility petitioners need to present evidence that may have been available at the time of trial but which is now reviewable in a new light—all without hindering a court's ability to review the totality of the evidence against the petitioner. Granted, what qualifies as newly presented versus newly discovered when it comes to forensic evidence can be murky,[186] and some forensic evidence might easily qualify as newly discovered. But given the serious role "junk science" has played in wrongful convictions, using the newly presented standard better assures innocent petitioners have the tools they needed to counterbalance a problem known to play a role in perpetuating injustice.

Similar issues arise with false confessions. According to the Innocence Project, nearly thirty percent of DNA exonerations involve false confessions.[187] Nearly half of those confessions came from confessors who were twenty-one years old or younger at the time of arrest.[188] Other studies have found similar patterns, finding high rates of confessions among the young and those with mental impairments.[189] Both Karl Fontenot and Tommy Ward made confessions to police, the details of which later proved untrue.[190]

Using the newly discovered standard for evidence related to a false confession seems particularly problematic. Recently uncovered scientific evidence that *contradicts* a confession may easily qualify as newly discovered and be effective in undermining the credibility of the confessions. But requiring that evidence be newly discovered, particularly under a standard that prohibits evidence the defendant knew about at the time of trial, seems far too narrow to allow petitioners to raise credible evidence that a confession may have been false. Would, for example, testimony about factors that make a person susceptible to giving a false confession be admissible as newly

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rendered testimony about the science unreliable. *See* John Solomon, *FBI's Forensic Test Full of Holes*, WASH. POST (Nov. 18, 2007), https://www.washingtonpost.com/wp-dyn/content/article/2007/11/17/AR2007111701681.html.

184. Cino, *supra* note 179, at 27-29.

185. *Id.* at 27 (noting how it may be difficult for petitioners with innocence claims involving evidence related to discredited forensic techniques because such evidence is "not a traditional form of newly discovered evidence").

186. *See supra* note 106 and accompanying text.

187. INNOCENCE PROJECT, *supra* note 180.

188. *Id.*

189. Garrett, *supra* note 182, at 88-89.

190. *See supra* Section II.D.

discovered evidence if it based on information known to the defendant at the time of trial but only now understood to raise a person's risk of making a false confession? Given the role false confessions have played in wrongful convictions, the chance that it may not be new evidence seems too high to justify applying a more narrow new evidence standard.

Finally, the Innocence Movement has shed light on the hurdles facing the wrongfully convicted in proving their innocence. One study of exonerees showed parties served an average of twelve years in prison before being exonerated.[191] The Innocence Project reports an average of fourteen years spent in prison before exoneration.[192] One explanation for the delay is, just like any party looking to prove actual innocence, these exonerees had difficulty obtaining access to the evidence they needed, specifically DNA testing.[193] If DNA had been unavailable in these cases, like it is in many cases, it's probable many of these exonerees would have remained wrongfully incarcerated. In fact, none of the exonerees examined in one study even raised an actual innocence claim under *Schlup*, likely because without the DNA testing, they lacked the evidence necessary to pursue such a claim.[194]

Serving, on average, more than a decade before exoneration seems to undercut concerns that defendants will intentionally risk sitting on exculpatory evidence in hopes of raising it later. The low number of claims raised under *Schlup* by exonerees could also suggest that a broader new evidence standard will not open the floodgate of actual innocence claims, since such claims are comparatively rare among both exonerees and habeas petitioners generally. And if nothing else, the low number of *Schlup* claims by exonerees suggests that the courts are correct: the actual innocence gateway is indeed demanding—so demanding that not even the "actually innocent" dare to try and open it.

CONCLUSION

Mr. Fontenot and Mr. Ward's legal battles have gone on for more than thirty years. The debate over the meaning of new evidence has also lingered unresolved for decades. Each matter is in need of final resolution. As argued in this Note, courts should adopt the newly presented standard for new evidence in petitions for federal habeas relief involving claims of actual innocence. The actual innocence gateway is an important part of the federal habeas process, and the current circuit split over whether to define the new evidence as newly discovered or newly presented has important, real-world consequences.

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191. Garrett, *supra* note 182, at 119.
192. INNOCENCE PROJECT, *supra* note 180.
193. Garrett, *supra* note 182, at 119.
194 *Id.* at 111.

The Supreme Court's decisions in *House v. Bell* and *McQuiggin v. Perkins* support the adoption of the newly presented standard. Given the relatively low number of actual innocence petitions, concern over judicial resources is an inadequate justification for adopting the narrower newly discovered standard and places too much of the burden for alleviating resource concerns on the shoulders of petitioners. While finality is a legitimate concern, the Court has already addressed the need to balance finality with the injustice of incarcerating the innocent, and focusing on actual innocence in habeas relief may actually be a way of addressing finality concerns. The practical realities of gathering and presenting evidence in a timely manner makes the *Schlup* standard sufficiently strict, and strictness therefore also fails to justify adopting the narrower newly discovered standard. Finally, the Innocence Movement has highlighted the role of questionable forensic science and false confessions in wrongful convictions, and shows just how difficult proving actual innocence can be, providing further justification for adopting the newly presented standard.