

**In the Supreme Court**  
**Appeal from the Michigan Court of Appeals**  
**Talbot, P.J., Fitzgerald and Whitbeck, JJ.**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Docket No. 145594

WILLIAM CRAIG GARRETT,

Defendant-Appellant

Brief on Appeal – Amicus Curiae, The Innocence Network

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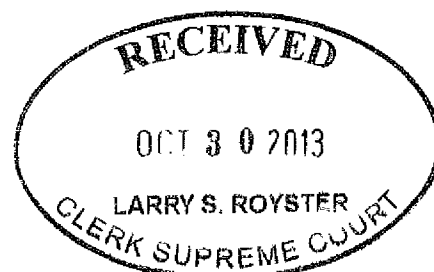
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## STATEMENT OF QUESTIONS INVOLVED

In its March 29, 2013 Order granting Defendant-Appellant William Craig Garrett's ("Garrett") Application for Leave to Appeal, this Court instructed the parties to brief the following issues:

(1) by what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility that he is actually innocent of the crime in the context of a motion brought pursuant to MCR 6.508, and whether the defendant in this case qualifies under that standard; (2) whether the Michigan Court Rules, MCR 6.500, *et seq.* or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence; and (3) whether, if MCR 6.508(D) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions.

The Court's Order also stated that "persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs *amicus curiae*."

In this brief, the Innocence Network will focus solely on the following issue: Whether there is an independent basis for relief on which a defendant who demonstrates actual innocence may seek relief under the United States or Michigan Constitutions.<sup>1</sup>

Plaintiff-Appellee says "No."

Defendant-Appellant says "Yes."

*Amicus curiae*, Innocence Network, says "Yes."

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<sup>1</sup> The Innocence Network limits its brief as stated, because it understands that other amici will seek to file briefs on the other issues presented by the Court.

## AMICUS INTEREST

The Innocence Network is an international affiliation of more than 70 different organizations in 47 states and seven countries dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.<sup>2</sup> In 2012, the work of Innocence Network member organizations led to the exoneration of 22 people around the world, including two in Michigan. These innocent people served a combined 279 years behind bars for crimes they did not commit.

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<sup>2</sup> Innocence Network member organizations include: the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), Arizona Innocence Project, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Network UK, Innocence Project, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of France, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Kentucky Innocence Project, Life After Innocence, Knoops' Innocence Project (Netherlands), University of Miami Law Innocence Clinic, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project (State of Ohio), Ohio Innocence Project, Oklahoma Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (UK), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic.



The Innocence Network has a strong professional interest in the determination of the issues presented in this case. The Innocence Network seeks to remedy wrongful convictions and prevent the continued incarceration of innocent individuals. Additionally, the Innocence Network works to ensure that the wrongfully convicted have meaningful access to judicial relief. As a result, the Innocence Network supports the relief requested by Garrett and urges the Court to hold that the United States and Michigan Constitutions provide an independent basis on which a defendant who brings a freestanding claim of actual innocence may seek judicial relief from continued incarceration. Additionally, even if there were no independent basis for relief, the Innocence Network encourages the Court to find that federal and state law, including Michigan law, provide a gateway for actually innocent defendants, like Garrett, to seek relief.

## SUMMARY OF ARGUMENT

The Innocence Network agrees with Garrett that the continued incarceration of a defendant who is actually innocent of the crime of which he was convicted violates the Due Process and Cruel and Unusual Punishment Clauses of the United States and Michigan Constitutions.<sup>3</sup> A growing body of recent federal authority, including precedent from the United States Supreme Court, recognizes that because punishment of an innocent defendant is unconstitutional, a freestanding claim for relief based on actual innocence<sup>4</sup> is cognizable. Moreover, an emerging vanguard of states, including Arizona, Connecticut, Missouri, New Mexico, and New York, has already recognized that a freestanding claim of actual innocence is required to protect the legitimacy of the judicial system and ensure justice is available for the actually innocent.

In its brief, Plaintiff-Appellee argues that the judicial system provides no avenue for relief from a conviction based on a claim of actual innocence because it is “the trial itself that determines who is guilty and who is innocent.” Appellee’s Brief, p 35. Although Plaintiff understandably refrains from saying so, the result of Plaintiff’s position is clear: in Plaintiff’s view, even if a defendant can come forward with definitive proof that he is innocent of the crime of which he was convicted and that the true perpetrator has been allowed to walk free, the judicial system must close its eyes to this proof and cannot grant any relief to an innocent person

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<sup>3</sup> The Innocence Network agrees with the position set forth in the brief of the amici curiae Michigan Innocence Clinic and American Civil Liberties Union of Michigan that the Michigan Constitution provides for a freestanding claim of actual innocence. In the interest of efficiency and conservation of resources, the Innocence Network will not repeat the same arguments herein, but instead will focus its discussion on federal law.

<sup>4</sup> The Innocence Network also leaves to Garrett and/or other amici the question of what standard of proof a defendant must meet in order to establish actual innocence.

who is wrongly incarcerated. Without diminishing society's legitimate interests in preserving the finality of convictions and conserving judicial resources, the Innocence Network submits that this position is contrary to fundamental notions of justice and fair treatment enshrined in the United States and Michigan Constitutions. Continued imprisonment of a defendant who has demonstrated actual innocence is unconstitutional, and the United States and Michigan Constitutions thus provide an independent basis on which a defendant who demonstrates actual innocence may seek relief from a conviction.

Aside from such a freestanding claim, federal and state law, including Michigan law, recognize the need for a gateway by which courts can review constitutional claims otherwise forfeited under state law. Therefore, the Innocence Network encourages the Court, regardless of how it determines the issue of the existence of a freestanding claim under federal or state law, to determine that a gateway exists in Michigan by which actually innocent defendants can be heard.<sup>5</sup> Alternatively, the Innocence Network suggests that the Court modify the applicable court rules should it determine that such a gateway does not already exist.

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<sup>5</sup> The Innocence Network also refers the Court to the brief of the amici curiae Michigan Innocence Clinic and American Civil Liberties Union of Michigan for a discussion of Michigan law on the gateway issue.

## STATEMENT OF RELEVANT PROCEEDINGS AND FACTS

The factual and procedural background of this case is set forth in Garrett's Brief on Appeal, pp 6-13. In brief, Garrett was charged and convicted of one count of armed robbery after a jury trial. There was no physical evidence linking Garrett to the robbery, and the prosecution's case rested almost entirely on the identification testimony of the complainant.

After trial, it emerged that the complainant suffered from significant cognitive impairments prior to and at the time of the alleged robbery, and continuing through the time of her testimony at Garrett's trial. Medical evidence produced after trial showed that the complainant had a "waxing and waning mental status" and memory at both the time of the incident and the time of trial, and she was diagnosed with senile dementia and Alzheimer's disease soon after trial. In addition, after trial, both Garrett and a witness who testified to his alibi defense passed polygraph examinations verifying their statements that Garrett did not commit the robbery. Another alibi witness who did not testify at trial also passed a polygraph examination verifying Garrett's alibi defense.

Based on these developments, Garrett filed a motion in the trial court for a new trial and to conduct an evidentiary hearing. Following an evidentiary hearing, the trial court granted Garrett's motion and ordered a new trial, but the Court of Appeals reversed, finding that the additional evidence of Garrett's innocence was cumulative. Garrett then filed a delayed application for leave to appeal. After granting leave, the Court of Appeals affirmed Garrett's conviction, and this Court denied further review.

In 2010, Garrett filed a Motion for Relief From Judgment. The trial court denied this motion. In 2011, Garrett filed a timely application for leave to appeal the trial court's decision.

The Court of Appeals denied the application in 2012. On March 29, 2013, this Court granted Garrett's application for leave to appeal.

## ARGUMENT

### Standard of Review

Questions of constitutional law are reviewed *de novo*. *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001).

**I. A Wrongfully Convicted Defendant Who Demonstrates Actual Innocence Has an Independent—Freestanding—Basis for Relief Under the United States Constitution, the Michigan Constitution, and Federal and State Law**

The continued incarceration of a convicted defendant who demonstrates that he is actually innocent of the crime of which he was convicted is contrary to fundamental notions of justice and fair treatment that are enshrined in the United States and Michigan Constitutions. A growing body of authority recognizes that continued incarceration of such a defendant violates the defendant's right to due process of law. *See* US Const, Ams V, XIV § 1; Const 1963, art 1, § 17. Continued imprisonment of an actually innocent defendant also constitutes cruel and unusual punishment. *See* US Const Am VIII; Const 1963, art 1, § 16.<sup>6</sup> These provisions of the United States and Michigan constitutions mandate a remedy for any actually innocent incarcerated defendant.

**A. *United States Supreme Court precedent supports the existence of a federal freestanding claim of actual innocence***

Precedent from the United States Supreme Court shows that the Court is likely to hold that punishment of an actually innocent defendant is unconstitutional. While the United States Supreme Court has not yet squarely decided whether a freestanding claim for relief based on actual innocence is cognizable, its decisions have consistently assumed without expressly

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<sup>6</sup> The “cruel *or* unusual punishment” clause of the Michigan Constitution is disjunctive, and thus provides greater protection to defendants than the “cruel *and* unusual” punishment clause of the United States Constitution.

holding that continued incarceration of an innocent defendant is unconstitutional. *See, e.g., Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993); *McQuiggin v Perkins*, 569 US \_\_; 133 S Ct 1924, 1931; 185 L Ed 2d 1019 (2013) (“We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”) (citing *Herrera*, p 404-405)); *House v Bell*, 547 US 518, 555; 126 S Ct 2064; 165 L Ed 2d 1 (2006) (declining “to resolve the issue” of whether a freestanding actual innocence claim is cognizable); *Robinson v. California*, 370 US 660, 667; 82 S Ct 1417; 8 L Ed 2d 758 (1962) (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).

In *Herrera*, a defendant was convicted of murder and sentenced to death, and thereafter brought unsuccessful habeas corpus petitions in both state and federal court. *Herrera*, p 393. Some ten years after his conviction, the defendant filed another habeas petition, contending that he was actually innocent of the murders of which he was convicted. *Id.* The defendant relied on two affidavits, obtained years after trial, indicating that the defendant’s brother had committed the murders. *Id.* The defendant argued that in light of this evidence, his execution would violate the Due Process and Cruel and Unusual Punishment Clauses of the United States Constitution. *Id.*

While the Court ultimately denied the defendant’s habeas petition, the majority opinion “assume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim.” *Id.*, p 417. The concurrences and dissents in *Herrera* also indicate that, at least in a capital case, the Constitution mandates relief for an innocent defendant. *Id.*, p 419

(O'Connor, J, concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *id.*, p 429 (White, J, concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.*, p 430 (Blackmun, J, dissenting) ("[T]he Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.").

More recent United States Supreme Court decisions have likewise assumed that the United States Constitution requires courts to allow claims for relief based on evidence of actual innocence. *See District Attorney's Office v Osborne*, 557 US 52, 71; 129 S Ct 2308; 174 L Ed 2d 38 (2010) (Court assumed without deciding that there is a "federal constitutional right to be released upon proof of 'actual innocence'"); *In re Davis*, 557 US 952; 130 S Ct 1; 174 L Ed 2d 614 (2009) (remanding an "original" habeas petition to district court for fact-finding on freestanding innocence claim). Thus, although the United States Supreme Court has not squarely addressed the issue, recent cases have strongly suggested that the continued incarceration of a demonstrably innocent defendant is unconstitutional and, therefore, support the existence of a freestanding claim of actual innocence.

***B. Other federal courts have displayed an increasing willingness to recognize a freestanding claim of actual innocence***

Consistent with the United States Supreme Court decisions that suggest evidence of actual innocence can create an independent basis for relief from a prior conviction, other federal courts have displayed an increasing willingness to recognize a freestanding claim of actual innocence. While some older decisions held that evidence of actual innocence, absent some



other constitutional violation, was not a cognizable basis for relief from conviction, more recent federal cases evince a trend toward recognizing the validity of such freestanding actual innocence claims. *See, e.g., Carriger v Stewart*, 132 F3d 463, 476 (CA 9, 1997) (noting that a majority of the Justices in *Herrera* would have supported a freestanding innocence claim and assessing whether petitioner could succeed on such a claim).<sup>7</sup>

Further, some federal habeas cases that ostensibly granted relief from a conviction based on some procedural defect in fact seem to be based on the recognition that the defendant was entitled to relief based on significant evidence of actual innocence. *See, e.g., Ortega v Duncan*, 333 F3d 102 (CA 2, 2003). In *Ortega*, the defendant was convicted of murder based largely on the testimony of a purported eyewitness. *Id.* Years after the trial, the prosecution disclosed that the supposed eyewitness had given perjured testimony in a different case, and the witness subsequently recanted his testimony against Ortega. *Id.* Ortega brought a habeas petition, contending that his conviction and continued incarceration based on the false, recanted testimony violated due process. *Id.*

The *Ortega* court noted that ordinarily, the prosecution must have knowledge of false testimony in order to result in a violation of the Due Process Clause: “a showing of perjury at trial does not in itself establish a violation of due process warranting habeas relief.” *Id.*, p 108.<sup>8</sup>

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<sup>7</sup> As the Second Circuit has recognized, while a claim based on actual innocence is commonly described as freestanding, such a claim is actually rooted in the inherent constitutional violation of incarcerating an innocent defendant. *Triestman v United States*, 124 F3d 361, 379 (CA 2, 1997); *see also In re Dorsainvil*, 119 F3d 245, 248 (CA 3, 1997) (“Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue.”).

<sup>8</sup> *See, e.g., Smith v Gibson*, 197 F3d 454, 460 (CA 10, 1999) (holding that “petitioner had to establish that the prosecutor knowingly presented false testimony” in order to demonstrate a

There was no dispute that, in *Ortega*, the government did *not* have knowledge at the time of trial that the witness had testified falsely. Nonetheless, the *Ortega* court granted the habeas petition, holding that the discovery of false testimony may support an independent violation of due process “if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.” *Id.* (quoting *United States v Wallach*, 935 F2d 445, 456 (CA 2, 1991) (alteration in original)).

While the *Ortega* decision was predicated on a due process violation, the result evinces an unwillingness to tolerate the continued incarceration of a defendant who comes forward with evidence of actual innocence. Because the prosecution did not know that the witness’s testimony was false, the defendant could not meet the usual standard for overturning the conviction based on a due process violation. Nonetheless, the *Ortega* court recognized that the later discovery of perjured testimony negated the evidentiary basis for the defendant’s conviction. *Id.*, p 109 (“We are . . . left with the firm belief that but for [the witness’s] trial testimony, it is unlikely that the jury would have convicted Ortega.”). Thus, while it stopped short of explicitly recognizing a freestanding claim of actual innocence, the *Ortega* decision appears rooted in the belief that the defendant was innocent of the crime of which he was convicted, and its outcome is the same as would have resulted from a freestanding actual innocence claim. *See id.*; *see also* Brandon L. Garrett, *Judging Innocence*, 108 Colum L Rev 55, 109-113 (2008) (discussing how claims formally brought pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), have, in several cases, effectively been used to assert actual innocence).

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due process violation); *Jacobs v Singletary*, 952 F2d 1282, 1287 n3 (CA 11, 1992) (“[O]nly knowing use of perjured testimony constitutes a due process violation.”).

Some federal district courts have likewise recognized that recent authority has produced a “powerful trend” toward recognizing freestanding actual innocence claims. *DiMattina v United States*, No 13-CV-1273, 2013 US Dist LEXIS 83348, p \*87 (EDNY, June 13, 2013) (collecting cases and holding that, “[g]iven this powerful trend, this court assumes that a freestanding innocence claim is cognizable”). As one district court observed, “a defendant with a strong case of innocence will always find a ‘constitutional violation’ that he can attach to his innocence claim, allowing him to challenge his conviction.” *In re Davis*, No. CV409-130, 2010 US Dist LEXIS 87340, p \*43 n36 (SD Ga, Aug 24, 2010). Further, “[a]s a practical matter, by forcing mistakenly convicted individuals to tether those claims to constitutional mistake, the system suffers twice – once for its mistake and again for the ‘error’ that was manufactured to allow the claim of innocence to be heard.” *Id.* The recent district court decisions thus recognize that cases like *Ortega* may be formally decided based on some procedural defect, but in reality reflect an unwillingness to tolerate the continued incarceration of a defendant who can convincingly demonstrate his innocence. *See also Harris v Reed*, 489 US 255, 271; 109 S Ct 1038; 103 L Ed 2d 308 (1989) (Rehnquist, CJ, concurring) (explaining that there must be “a kind of ‘safety valve’ for the ‘extraordinary case’ where a substantial claim of factual innocence is precluded by an inability to show cause” for procedural default). The recent district court decisions have demonstrated an increasing willingness to recognize the validity of freestanding claims for relief from conviction based on evidence of actual innocence.

All of these decisions reflect that where a defendant can convincingly demonstrate his innocence, continuing to imprison him cannot be squared with fundamental notions of justice embedded in the due process and cruel and unusual punishment provisions of the United States Constitution. Thus, courts have recently demonstrated a more forthright willingness to recognize

that actual innocence is, in and of itself, a valid basis to overturn a conviction on collateral review. This Court should follow the “powerful trend” in authority from courts around the country, protect the vital constitutional interests at stake in this case, and hold that a convicted defendant who demonstrates actual innocence is entitled to relief from his conviction.

***C. Many states have likewise recognized a freestanding claim of actual innocence***

Over the last twenty years, a number of states have also recognized freestanding claims of actual innocence. These states, along with the majority of states that have altered their approaches to cases presenting newly discovered evidence, demonstrate an emerging legal consensus on the importance of access to post-conviction relief, especially given the numerous high-profile exonerations in the last two decades.

As articulated more fully in the brief of amici curiae Michigan Innocence Clinic and American Civil Liberties Union of Michigan, the Michigan Constitution provides for a freestanding claim of actual innocence. A freestanding claim of actual innocence is necessary to ensure that the state’s criminal justice system retains the trust of the public and is accessible to those petitioners who are actually innocent. Several other states have recognized freestanding claims of actual innocence and offer useful guidance on this critical legal issue.

In 1994, the Connecticut Supreme Court officially recognized a freestanding claim of actual innocence, holding that an independent claim of actual innocence was “cognizable by way of a petition for writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial.” *Summerville v Warden, State Prison*, 229 Conn 397, 422; 641 A2d 1356 (1994). The court determined that a freestanding claim of actual innocence was consistent with the state’s habeas corpus provision that required the writ to be carried “as law and justice require.” *Id.*, p 423. This newly

cognizable claim was appropriate, according to the court, because “[e]ven the strong interest in the finality of judgments, and the state's interest in retrying a defendant with reasonably fresh evidence, does not require the continued imprisonment of one who is actually innocent.” *Id.*

Several years later, in *Miller v Commissioner of Corrections*, the Connecticut Supreme Court held that a petitioner asserting a claim of actual innocence must “persuade the habeas court by clear and convincing evidence . . . that the petitioner is actually innocent of the crime of which he stands convicted.” 242 Conn 745, 792; 700 A2d 1108 (1997). In applying this standard, Connecticut courts have explicitly held that this burden of proof does not require a petitioner “to establish that his or her guilt is a factual impossibility.” *Gould v Comm'r of Corr*, 301 Conn 544, 564; 22 A3d 1196 (2011).

In 2000, Arizona modified its Rules of Criminal Procedure to include a freestanding claim of actual innocence as a ground for relief. The new rule reads:

Grounds for relief are . . . (h) The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Ariz R Crim P 32.1(h). In the comments accompanying the amended rule, the drafters clearly indicate that Arizona, in drafting this new rule, was reacting to the same increasing awareness of cases of actual innocence that led many states to expand available pathways for parties asserting claims of actual innocence. *Id.* Arizona courts have subsequently recognized that Ariz R Crim P 32(h) makes a claim of actual innocence an independent avenue for a petitioner to gain post-conviction relief. *See, e.g., State v Swoops*, 216 Ariz 390; 166 P3d 945 (Ariz App, 2007) (acknowledging that Ariz R Crim P 32(h) provides independent basis for post-conviction relief,

but holding that petitioner failed to offer sufficient evidence supporting his claim of actual innocence).

Missouri courts hold that relief must be made available “where a freestanding claim of actual innocence is brought independent of any constitutional violation at trial.” *Ferguson v State*, 325 SW3d 400, 409 (Mo App, 2010). The Missouri Supreme Court has held that the “clear and convincing” standard should apply to claims of actual innocence because it “strike[s] a balance” between the “preponderance of the evidence test of ordinary civil cases” and the “beyond reasonable doubt instruction that is given in criminal cases.” *State ex rel Amrine v Roper*, 102 SW3d 541, 547-548 (Mo, 2003). The claim was originally developed for capital cases; however, recent court decisions have suggested that it will be extended beyond that limited scope. *See, e.g., State ex rel Koster v McElwain*, 340 SW3d 221, 230 n9 (Mo App, 2011).

The same year that Missouri recognized a freestanding claim of actual innocence, a New York court held that the “the conviction or incarceration of a guiltless person violates elemental fairness, deprives that person of freedom of movement and freedom from punishment and thus runs afoul of the due process clause of the [New York] State Constitution.” *People v Cole*, 765 NYS2d 477, 484-485 (2003). The court also held “that punishing an actually innocent person is disproportionate to the crime (or lack of crime) committed and violates the cruel and inhuman treatment clause.” *Id.*, p 485. In recognizing a freestanding claim of actual innocence, the court determined that a petitioner making such a claim “must establish by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty.” *Id.*, p 487.

In 2007, the New Mexico Supreme Court held that the continued incarceration of an innocent person violated the state's constitution and that state courts must therefore recognize a freestanding claim of actual innocence. *Montoya v Ulibarri*, 142 NM 89, 97; 163 P3d 476 (2007). The court noted "that to ignore a claim of actual innocence would be fundamentally unfair" and "the conviction, incarceration, or execution of an innocent person violates all notions of fundamental fairness implicit within the due process provision of our state constitution." *Id.* The court also wrote that the incarceration of an innocent person violates the state's constitutional prohibition against cruel and unusual punishment: "It cannot be said that the incarceration of an innocent person advances any goal of punishment, and if a prisoner is actually innocent of the crime for which he is incarcerated, the punishment is indeed grossly out of proportion to the severity of the crime." *Id.* After reviewing various burdens of proof established in other states, the court held that a petition asserting a claim of actual innocence must meet the standard established in *Schlup v Delo*, 513 US 298; 115 S Ct 851; 130 L Ed 2d 808 (1995) by showing that "no reasonable juror could convict the defendant of the crimes for which the petitioner was found guilty." *Montoya*, p 99.

In 2012, the Nebraska Supreme Court noted that although the court had not faced such a case, a "persuasive claim of actual innocence in a post-conviction proceeding might show a constitutional violation" because the "continued incarceration of such a prisoner . . . is a denial of procedural or substantive due process" and therefore a violation of the state's constitution. *State v Edwards*, 284 Neb 382, 401; 821 NW2d 680 (2012).

These states, and others,<sup>9</sup> recognize that to protect the system's legitimacy and ensure justice is available for the actually innocent, a judicially recognized, freestanding claim of actual innocence is required to address the diversity of evidentiary and factual details that are presented in claims for post-conviction relief. Such a freestanding claim can be found within the Michigan Constitution.

\* \* \*

In summary, decisions from the United States Supreme Court, other federal courts, and many states all recognize that continuing to incarcerate a defendant who is innocent of the crime of which he was convicted is simply intolerable and contrary to fundamental notions of justice and fair treatment embodied in our federal and state constitutions and laws. Consistent with the growing judicial consensus that there must be an avenue for relief for an innocent defendant, this Court should hold that the United States and Michigan Constitutions provide an independent basis on which an actually innocent defendant may seek relief from a conviction.

## **II. Both Federal and State Cases Further Recognize the Need for a Gateway for Claims of Actual Innocence**

Even if the Court were to determine that no freestanding actual innocence claim exists under federal or state law, the Court should recognize that evidence of actual innocence can

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<sup>9</sup> For example, North Carolina, has not only recognized that actually innocent defendants should have a right to prove their innocence independent of any other violations but, in 2007, it also became the first state in the nation to begin operating an independent forum for post-conviction claims of actual innocence. Called the North Carolina Innocence Inquiry Commission, the forum was created following the establishment of the North Carolina Chief Justice's Criminal Justice Study Commission ("Chief Justice's Commission") in 2002. The Chief Justice's Commission determined that the state's previous post-conviction relief and exoneration process was "delayed, lengthy, costly, and damaging to the public's confidence in its justice system." *Preamble*, The North Carolina Innocence Inquiry Commission Rules and Procedures (May 25, 2007). In addition, the Chief Justice's Commission found that the volume of motions seeking post-conviction relief was drowning the court system. *Id.*



serve as a gateway to reaching constitutional claims otherwise forfeited under state law. That is, a claim for relief from a conviction that would otherwise be forfeited because of a procedural default can nonetheless be heard if the defendant can present evidence of actual innocence. *See, e.g., McQuiggin*, p 1928 (“[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House* or, as in this case, expiration of the statute of limitations.”); *House*, p 536-538. Support for such gateway claims exists under both federal and state law, including Michigan law.

**A. Gateway claims exist under federal law**

The Supreme Court has long recognized that actual innocence can serve as a gateway to claims for relief from a conviction that would otherwise be procedurally defaulted or barred for other reasons. *House*, p 536-537; *Schlup*, p 327. Such gateway claims, while formally tied to some procedural infirmity apart from the defendant’s actual innocence, grant the same relief that would result if a defendant prevailed on a freestanding claim of actual innocence: relief from conviction and a new trial. *See, e.g., Rivas v Fischer*, 687 F3d 514, 553 (CA 2, 2012) (finding “credible and compelling claim of actual innocence” excused expiration of statute of limitations on defendant’s habeas petition, and “urg[ing] the District Court to take whatever steps needed, in the exercise of its discretion, to facilitate a full, fair, and speedy adjudication of the merits of his petition”). The existence of a gateway to the merits of a defendant’s claim founded on evidence of actual innocence underscores a prisoner’s “powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.” *Kuhlmann v Wilson*, 477 US 436, 452; 106 S Ct 2616; 91 L Ed 2d 364 (1986).

**B. Gateway claims exist under state law**

Michigan, like the states discussed below, recognizes that in the difficult process of balancing the need for finality with the requirements of fairness, a gateway is needed for

defendants who demonstrate a compelling case of actual innocence but whose claims are procedurally barred. Various states have created such a gateway through a myriad of procedures, but each method shares a common recognition that in cases of actual innocence, courts have broad power to act in the interest of justice. Some states have developed the gateway through case law based on the facts of specific cases; others have codified their gateway procedures in statutes or court rules. A review of the various state resolutions of this important issue should compel the Court to recognize that Michigan also has a gateway for actually innocent defendants.

1. **States have developed a gateway for claims of actual innocence through case law**

As discussed more fully in the brief of amici curiae Michigan Innocence Clinic and American Civil Liberties Union of Michigan, Michigan's laws and court rules already provide a gateway for compelling cases of actual innocence. However, Michigan is not alone in recognizing the need for a gateway for innocent individuals to seek relief from their wrongful convictions. Many states also acknowledge the need for formal exceptions to procedural bars for claims of actual innocence and have created such exceptions to procedural bars through case law.

In 1993, the California Supreme Court formally recognized an exception to procedural bars in the state's habeas corpus jurisprudence if the petitioner can establish that his conviction constituted a fundamental miscarriage of justice. *In re Clark*, 5 Cal 4th 750, 759; 855 P2d 729 (1993). The court held that a miscarriage of justice can be established if the petitioner can show that he is "actually innocent of the crime or crimes for which he was convicted." *Id.* Justice Baxter, writing for the majority, noted that while California's habeas corpus jurisprudence differs from the federal practice, the United States Supreme Court's opinion in *Herrera v Collins* from earlier that year highlighted the need for California to speak to the issue of actual innocence and

procedural barriers. *Id.*, p 797-798. In closing his opinion, Justice Baxter forcefully declared that the newly established California standard would ensure “that regardless of delay or procedural default relief will always be available to a petitioner who is innocent of the offense for which he was convicted.” *Id.*, p 797.

Indiana’s Supreme Court faced a similar question just a year later and also formally recognized an exception in the case of procedural bars. *State v Huffman*, 643 NE2d 899, 901 (Ind 1994). The Indiana court was faced with a petitioner claiming actual innocence but barred from court by the doctrine of res judicata. Although the court found that the petitioner failed to meet his burden, the court did formally recognize a gateway for those claiming actual innocence, writing: “finality and fairness are both important goals. When faced with an apparent conflict between them, this Court unhesitatingly chooses the latter.” *Id.*

Like California, Missouri recognizes a formal gateway for habeas corpus petitioners claiming actual innocence who are procedurally barred from post-conviction relief. In *Clay v Dormire*, the Missouri Supreme Court held that there must be an exception to the state’s post-conviction procedural barriers to prevent “a manifest injustice” and to determine if an error was committed that resulted in the “conviction of one who is actually innocent.” 37 SW3d 214, 217 (Mo, 2000). While the court ultimately determined that the petitioner failed to meet his burden in establishing actual innocence, it also clearly articulated that in certain cases, both the “systemic interests in finality . . . and the individual interest in doing justice” justify Missouri’s recognition of a procedural gateway for those claiming actual innocence. *Id.*, p 217-218.

In 2002, Virginia courts also formally recognized the need for exceptions to procedural bars in post-conviction relief proceedings. In *Reedy v Wright*, a Virginia circuit court held that the state’s habeas corpus jurisprudence required a procedural gateway for claims of actual

innocence. 60 Va Cir 18, 25 (2002). The court determined that the state's habeas procedure should follow the federal trend in recognizing a miscarriage of justice exception for claims of actual innocence even where the case is procedurally barred by the state's post-conviction procedural rules. *Id.*, p 25-26. The court also applied the *Schlup* standard, holding that "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.*, p 25.

In 2007, New Mexico recognized both the need for a cognizable, freestanding claim of actual innocence and a procedural gateway for claims barred by post-conviction procedural rules. In *State v Nash*, the New Mexico Court of Appeals ruled that to avoid a miscarriage of justice, an exception must be recognized for procedurally barred claims asserting actual innocence. 142 NM 754; 170 P3d 533 (NM App, 2007). The court applied both the clear and convincing standard of review that the New Mexico Supreme Court had used in its decision establishing a cognizable, freestanding claim of actual innocence and the *Schlup* standard applied by the United States Supreme Court and other states and indicated that it was unclear which standard should apply. *Nash*, p 759.

Nevada has long applied the principle that to avoid procedural bars when seeking post-conviction relief a petitioner must show good cause and actual prejudice or that a miscarriage of justice would result if the court barred his claim. *See, e.g., Mazzan v Warden, Nevada State Prison*, 112 Nev 838; 921 P2d 920 (1996); *Hogan v Warden, Ely State Prison*, 109 Nev 952, 954; 860 P2d 710 (1993). Nevada courts have also held that to demonstrate a miscarriage of justice the petitioner may make "a colorable showing he is actually innocent of the crime." *Pellegrini v State*, 117 Nev 860, 887; 34 P3d 519 (2001).

In 2007, the Utah Supreme Court also determined that the “interests of justice” required courts to weigh “the meritoriousness of the petitioner’s claim” against the reason the procedural bar was invoked. *Bluemel v State*, 2007 UT 90; 173 P3d 842 (2007). The court fell short of creating a formal exception but did hold that courts must “give appropriate weight to each of those factors according to the circumstances of a particular case” when determining whether a procedural bar should keep a petitioner out of court. *Id.* For example, Utah’s courts would hear a “claim of actual innocence supported by the discovery of DNA evidence” with “virtually no justification for a late filing” while at the same time “an entirely frivolous claim would not meet the ‘interests of justice’ exception even with the best possible excuse for late filing.” *Id.*

Consistent with these decisions, this Court should recognize that even if a freestanding innocence claim is unavailable, courts must provide a gateway for defendants who demonstrate a compelling case of actual innocence but whose claims are otherwise procedurally barred.

2. **States have developed a gateway for claims of actual innocence through court rules and statutes**

Beyond creating exceptions to procedural bars for claims of actual innocence through case law, some states have developed formalized exceptions to procedural bars through statutes and court rules.

Texas, like other states that use the habeas petition as an important part of the post-conviction relief process, recognizes the importance of a formal gateway for petitioners claiming actual innocence. Section 11.07 of the Texas Code of Criminal Procedure provides that “a court may not consider” a procedurally barred claim unless the petitioner can show that “by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.” Tex Code Crim P 11.07(4)(a)(2). The Texas Court of Criminal Appeals elaborated on the meaning of this

provision in the 2007 case *Ex parte Brooks* and found that the provision's language must be read through the lens of the *Schlup* standard established by the United States Supreme Court for claims barred by post-conviction procedures. *Ex parte Brooks*, 219 SW3d 396, 401 (Tex App, 2007). The court in *Ex parte Brooks* held that section 11.07(4)(a)(2), read in light of *Schlup*, requires Texas courts to recognize a procedural gateway for claims of actual innocence that are otherwise procedurally barred. *Id.* This holding was re-affirmed by the Texas Supreme Court in *In re Allen*, which again held that Texas courts should apply the *Schlup* standard for claims of actual innocence that are barred by Texas' post-conviction relief procedures. *In re Allen*, 366 SW3d 696, 705 (Tex, 2012).

In 2000, Arizona amended its rules of criminal procedure to allow post-conviction defendants to present freestanding actual innocence claims and/or make a gateway showing of actual innocence to overcome procedural defaults. Ariz R Crim P 32.2(b). The rule specifically exempts claims of actual innocence from the state's post-conviction procedural bars so long as the petitioner can give a "meritorious reason" for the waiving of the bar in question. *Id.*

Illinois law was also amended to include a formal gateway for procedurally barred claims of actual innocence. *See* 725 Ill Comp Stat 5/122-1. The statute creates a carve-out for claims barred by delay that reads: "This limitation does not apply to a petition advancing a claim of actual innocence." *Id.* In 2012, the Illinois Supreme Court decided that there must be a similar gateway for other procedural bars and held that Illinois courts must recognize a "miscarriage of justice" exception to the state's post-conviction procedural rules that requires a petitioner to "show actual innocence." *People v Edwards*, 969 NE2d 829, 835 (Ill, 2012).

Georgia law contains a "manifest injustice" exception to post-conviction procedural bars. Ga Code Ann § 9-14-48(d). Georgia courts have interpreted this exception as a "safety net,

allowing a [state] habeas court to overlook procedural rules to consider constitutional claims in the ‘extraordinary case’ where a prisoner can make a substantial showing that he was convicted despite being actually innocent.” *Perkins v Hall*, 288 Ga 810, 833; 708 SE2d 335 (2011).

Connecticut not only recognizes a freestanding claim of actual innocence, it also has codified a formal exception to post-conviction procedural bars for such claims. Conn Gen Stat § 52-470. Connecticut’s statute detailing post-conviction procedural bars explicitly exempts any “claim asserting actual innocence.” *Id.*

Rhode Island’s post-conviction procedural rules include an “interest of justice” exception, which the Rhode Island Supreme Court has noted applies to “case[s] of actual innocence or newly discovered evidence.” *Miguel v State*, 924 A2d 3 (RI, 2007) (discussing the application of RI Gen Laws § 10-9.1-8).

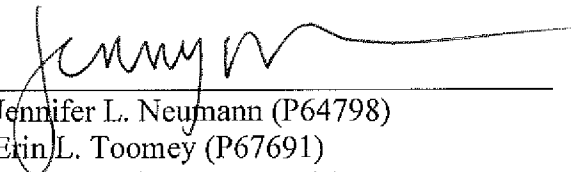
Delaware, like many other states, has an explicit statutory exception to state post-conviction procedural bars. Delaware law expressly allows for a court to hear a petitioner’s claim when it would be in the “interest of justice” or when a petitioner can make a “colorable claim that there was a miscarriage of justice” even if that claim is procedurally barred. Del Super Ct Crim R 61(i). Delaware’s Supreme Court held that these provisions represent “an ‘actual innocence’ exception” to state post-conviction procedural rules. *State v Wright*, 67 A3d 319, 323 (Del 2013).

These state statutes and court rules are consistent with the fundamental need to provide an innocent defendant with an avenue for relief from conviction. Michigan likewise recognizes that fundamental principles of justice require that such an avenue for relief be open to defendants who are actually innocent.

**CONCLUSION**

For all the above-stated reasons, the Innocence Network respectfully requests that this Court hold that an actually innocent convicted defendant is entitled to relief from his conviction under the United States and Michigan Constitutions and is entitled to present claims that would otherwise be procedurally barred. In addition, the Innocence Network respectfully requests that this Court determine that a gateway exists in Michigan by which actually innocent defendants can be heard, or modify the applicable court rules should it determine that such a gateway does not already exist.

Respectfully submitted,



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