No. 16-2118

IN THE
UNTIED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY RUSSO,

Petitioner-Appellant,

---against---

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF OF THE INNOCENCE PROJECT AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the Innocence Project and the National Association of Criminal Defense Lawyers ("NACDL"). This brief is authored by Professor Brandon L. Garrett[1], who teaches at the University of Virginia School of Law. The views expressed in this brief reflect those of Professor Garrett, the Innocence Project and the NACDL, but not those of any other institution, such as the University of Virginia. *Amici Curiae* therefore respectfully submits this brief to lend its perspective to these important issues.

STATEMENT OF INTEREST

The Innocence Project is a 501(c)(3) not-for-profit organization that is affiliated with the Cardozo School of Law at Yeshiva University. The Innocence Project's mission is to free the innocent and to reform the criminal justice system to address the root causes of wrongful convictions. To that end, the Innocence Project regularly utilizes post-conviction remedies such as the one at issue in this proceeding. In light of the hundreds of wrongful convictions proven through DNA testing alone, it is vital to the Innocence Project's mission that both state and federal courts provide

[1] Due to a miscommunication between counsel about the filing date, Mr. Garrett's *pro hac vice* paperwork was not completed prior to his leaving for a trip outside of the country. Mr. Garrett's Motion for Admission and Notice of Appearance will be filed with the Court as soon as he returns from this trip.

meaningful review of credible innocence claims whenever they are brought.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because it involves rules and policies enacted by the Court that may interfere with the ability of defense counsel to zealously advocate for their clients. Where counsel must shoulder the difficult burden of proving innocence by clear and convincing evidence, the Court should not impose unreasonable limitations on the type

of evidence presented or the manner in which counsel makes this showing.

ARGUMENT

This case raises the question of whether adequate avenues remain open to assert innocence claims in federal habeas petitions. The Second Circuit has highlighted the importance of innocence as an exception under the "Savings Clause" to Section 2255. However, that innocence avenue is a meaningful one only if there is a consistent standard permitting review beyond a summary, pre-printed form, so that the actual evidence of innocence can be considered in the filing requesting authority to either file the successive petition or file a habeas petition under Section 2241. In this case, the petitioner asserts that substantial new evidence of innocence surfaced many years after the conviction and after the first Section 2255 petition was litigated. That new evidence could not have been uncovered earlier. And yet it has never received a hearing, much less consideration even in written briefing. The amicus brief below discusses how (1) we have learned through the study of over 300 DNA exonerations how crucial it is that newly discovered evidence of innocence be adequately litigated; (2) we have specifically learned how evidence of innocence, particularly that in the custody of the State, may not be discovered until years after trial, direct appeal, and initial habeas proceedings have been completed; and (3) the

Savings Clause reflects important constitutional values, long recognized by the Second Circuit, that new evidence of innocence be adequately reviewed in federal district courts.

I. It is Crucial that Avenues Remain Open to Assert Claims Based on Newly Discovered Evidence of Innocence

We begin by emphasizing how crucial such avenues are today. The National Registry of Exonerations reports that, in just the past 17 years, 1,934 individuals have been exonerated in the United States.[2] Post-conviction DNA testing has proven over 340 men and women innocent; 20 had been sentenced to death.[3] This humbling wave of exonerations has fundamentally changed our understanding of the importance of making available meaningful avenues to litigate innocence post-conviction.

A large body of empirical research has now explored the facts underlying DNA exonerations in the United States. One author of this brief has written a book, "Convicting the Innocent: Where Criminal Prosecutions Go Wrong," which analyzes the cases of the first 250 DNA exonerations in the United States. DNA exonerations have occurred in thirty-seven states. In just under one-half of those cases, the post-conviction DNA testing also

[2] A current count of all exonerations may be found on the National Registry's website. *See* https://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[3] For a current count of such cases, *see* http://www.innocenceproject.org/all-cases/#exonerated-by-dna.

identified the actual culprits. There is no other country in the world in which such a large group of people had their innocence proven by DNA evidence.

It takes many years to prove a wrongly convicted person's innocence. Even looking at DNA exonerations, in which the evidence is usually straightforward and not subject to significant dispute, the average length of time from conviction to exoneration was 14 years.[4] These DNA exonerees were an average age of 26.5 years old when they were convicted and were, on average, 42 years old when exonerated. As noted, almost half of these cases involved DNA tests that also identified the actual culprits of these crimes. Those actual perpetrators were convicted of 147 additional violent crimes, including 77 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.[5] Accordingly, lengthy delays between wrongful conviction and exoneration affect more than just the wrongfully convicted person; this is a significant public-safety concern.

Although this brief draws on the study of DNA exonerations, we

[4] *See* Innocence Project, *DNA Exonerations in the United States*, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/. *See also* Brandon L. Garrett, *Convicting the Innocent* (2011), supra, at 5 (finding an average length of time of thirteen years from conviction to exoneration among the first 250 DNA exonerations). For updated data reflecting the first 330 DNA exonerations, *see* Brandon L. Garrett, *Convicting the Innocent Redux* (2015), in D. Medwed, Ed., *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent (Cambridge University Press, Forthcoming)*.

[5] *Id.*

recognize that most criminal cases do not have any evidence with DNA to potentially test. DNA cases make up only a small fraction of the 1,934 total exonerations in the United States. The vast majority of DNA exonerations have occurred in cases of sexual assaults involving stranger-perpetrators, in which DNA testing can be conducted on a rape kit prepared after the assault. However, most criminal cases do not have that type of evidence, which can be conclusively linked to the genetic identity of the culprit.

That said, the underlying causes of wrongful conviction have been shown to be relevant across a broad spectrum of criminal cases. Research on exonerations uncovers consistent patterns concerning eyewitness misidentifications due to suggestive line up procedures; contaminated confessions due to coercive and undocumented interrogation procedures; flawed forensic testimony due to lack of quality controls on testing and poor standards for conclusions reached; and unreliable testimony by informants who had incentives to testify for the state. *See, e.g.* Garrett, *Convicting the Innocent*, *supra*. In addition, national scientific bodies have studied some of these underlying causes of wrongful convictions and have called for a national investment in both scientific research and changes in criminal justice practices. National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, 7 (National Academies Press

2009); National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (National Academies Press 2014).

II. Innocent Convicts Face Enormous Challenges in Uncovering and Litigating New Evidence of Innocence

Empirical data shows that innocent individuals are convicted with alarming frequency. We know from the study of DNA exonerations that evidence of innocence is typically not discovered or effectively litigated at trial, during direct appeal, or initial post-conviction proceedings. Because there is no constitutional right to counsel in post-conviction proceedings, innocent prisoners are often forced to file *pro se* habeas petitions without the benefit of factual investigation or expert resources necessary to marshal a meaningful case. These prior denials are poor predictors of innocence. An earlier study of appellate and post-conviction litigation by DNA exonerees found that court opinions written before DNA exonerated the individuals concluded with some regularity that errors asserted by the later-exonerated defendants were harmless or otherwise failed to demonstrate prejudice because of "overwhelming' evidence of guilt." Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 109 (2008). Evidence of innocence sufficient to persuade judges and executive actors to grant relief rarely surfaces until many years after convictions become final and initial rounds

of post-conviction review are exhausted. This makes it all the more important that innocent individuals have a full and fair opportunity to present an innocence claim whenever it is discovered.

Another reason innocent individuals do not effectively litigate innocence in their direct appeals and initial habeas petitions is that, while they personally knew they were innocent, the evidence of their innocence was concealed from them by prosecutors or law enforcement. Speaking to the breadth of these issues of misconduct, the Honorable Alex Kozinski, Chief Judge of the Ninth Circuit, recently described an "epidemic of *Brady* violations in the land." *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting). Empirical data bear this out. An Innocence Project study found that 37% of the DNA exoneration cases involved the suppression of exculpatory evidence, 25% involved the knowing use of false testimony, and 11% involved the undisclosed use of coerced witness testimony.[6] Subsequently, those allegations regarding concealed evidence resulted in 24% of those convictions being overturned.[7] A similar pattern can be observed among death penalty cases generally, and not just those that eventually resulted in exonerations from death row, in

[6] Barry Scheck, Jim Dwyer & Peter Neufeld, *Actual Innocence* (1st ed. 2001).
[7] *See* Emily M. West, *The Innocence Project, Court Findings on Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, 1, 4-5 (Aug. 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.

which as many as one-fifth resulted in reversals due to concealed exculpatory evidence that came to light years after the conviction and death sentence.[8]

Almost one-third of the first 250 people exonerated by DNA brought such claims. Garrett, *Convicting the Innocent*, supra, at 205 (based on review of those cases with available written opinions). They rarely succeeded, although about half of the exonerees who did obtain reversals of their convictions *before* they were exonerated by DNA testing did so based in part on prosecutorial misconduct and concealed exculpatory evidence. *See id*. at 207-08 (stating that ten of twenty-one exonerees received a reversal based in part on prosecutorial misconduct, which included claims of unjustly prejudicial argument and *Brady v. Maryland* claims).

Thus, it is crucial that when evidence of innocence is eventually obtained that there be a meaningful avenue for an inmate to assert such evidence and have it fairly considered by a court.

[8] *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, 5 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (documenting *Brady* violations in 16% to 19% of capital cases).

III. The Section 2255 Savings Clause Requires Meaningfully Adequate Consideration of Newly Discovered Evidence of Innocence

Section 2255 states that a § 2241 habeas petition "shall not be entertained ... unless it ... appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." § 2255(e). The Savings Clause, then, importantly permits filing of a habeas petition if Section 2255 is not adequate or effective as a remedy. While Section 2255 was originally enacted to provide the same scope for remedies and relief as traditional post-conviction habeas corpus, the statute was amended by the AEDPA in 1996 to contain a stringent bar on second or successive petitions.[9] Some courts have treated the second or successive petition bar as "jurisdictional."[10]

However, 2255(h) does not contain such jurisdictional language. It does not say, like 2253(c) does, that an appeal "may not be taken." Instead, it has the character of an affirmative defense. The federal habeas rules direct the Government to respond whether the party has brought a prior post-

[9] 28 U.S.C. § 2255(h) ("A second or successive motion must be certified ... to contain--(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.").

[10] *Williams v. Warden*, 713 F.3d 1332, 1336-37 (11th Cir. 2013) ("Whether a prisoner may bring a ... petition under the savings clause of § 2255(e) ... is a threshold jurisdictional issue."); *contra*, *Webster v. Caraway*, 761 F.3d 764, 768 (7th Cir. 2014) (Easterbrook, J.) ("In light of *Williams* we have taken a fresh look at the issue and once more conclude that §2255(e) does not curtail subject-matter jurisdiction").

conviction motion. Habeas Rule 5(b). The Supreme Court has described AEDPA's "restrictions on successive petitions" as a "modified res judicata rule." *Felker v. Turpin*, 518 U.S. 651, 664 (2001).

Such defenses must be raised or waived; they are not of a "jurisdictional" nature. *See generally*, Leah M. Litman, Luke C. Beasley, *Jurisdiction and Resentencing: How Prosecutorial Waiver Can Offer Remedies Congress Has Denied*, 101 Cornell L. Rev. Online 91 (2016). Moreover, the second or successive petition provisions in Section 2255 contain innocence exceptions.

Specifically, Section 2255(h)(1) contains an exception for cases of: "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense." This is a high burden, and the Court's decision whether evidence of innocence meets this burden or otherwise suggests that the Savings Clause is implicated, cannot be assessed without consideration of the relevant facts.

A highly summary procedure at the COA stage does not permit adequate or effective consideration of evidence of innocence necessary to identify compelling claims of innocence. The Supreme Court has

consistently emphasized that: "[E]quitable principles have traditionally governed the substantive law of habeas corpus," and courts should not "construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631 (2010).

In a range of contexts, the Supreme Court has identified innocence as an issue that implicates these equitable principles. Evidence of innocence may excuse otherwise applicable procedural bars in the procedural default context, *Schlup v. Delo*, 513 U.S. 298 (1995), and in the AEDPA statute of limitations context. *McQuiggan v. Perkins*, 133 S. Ct. 1924 (2013).

The Second Circuit has recognized for almost two decades the importance of considering evidence of innocence under Section 2255. In *Triestman v. United States*, the Second Circuit held that there is an innocence exception to Section 2255 under its Savings Clause. 124 F.3d 361, 376 (2d Cir. 1997). That Court emphasized that "'inadequate and ineffective' must mean *something*, or Congress would not have enacted it in 1948 and reaffirmed it in the AEDPA." *Id*. at 376. That Court added: "And more generally, we encourage the district courts to continue to find that habeas corpus may be sought whenever situations arise in which a petitioner's inability to obtain collateral relief would raise serious questions as to § 2255's constitutionality." *Id*.

Similarly, the Second Circuit has since emphasized that "serious Eighth Amendment and due process questions would arise" if a petitioner, like Triestman, were foreclosed from seeking collateral review of his actual innocence claim. *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. 2001) (quoting *Triestman*, 124 F.3d at 380). Or as the Second Circuit summarized, the Savings Clause permits litigation in cases involving prisoners who (1) can prove "actual innocence on the existing record," and (2) "could not have effectively raised [their] claim[s] of innocence at an earlier time." *Cephas v. Nash*, 328 F.3d 98, 104 n. 6 (2d Cir.2003). To be sure, in *Triestman*, the COA was granted after careful consideration of the underlying facts. Triestman was *pro se* and had sent a letter (not a form) to the Second Circuit seeking permission to file his Section 2255 motion. *Triestman*, 124 F.3d at 365. The Court then asked that counsel be appointed for Treistman, the Government through the Attorney General be given an opportunity to intervene, and additional briefing was ordered, resulting in "thorough briefs being filed." *Id*. at 366. No such careful review has occurred in this matter.

In addition, the U.S. Supreme Court has in the years since *Triestman*, said more concerning the underlying constitutional concerns at stake, emphasizing not just due process concerns but Suspension Clause concerns with inadequate opportunity to raise new evidence of innocence. The Court

has not ruled what standard must be satisfied to make out a showing of actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993). However, the Court has continued to assume that such claims may be litigated, including in non-capital cases. *Osborne v. District Attorney's Office,* 129 S.Ct. 2308 (2009).

When *Herrera* was decided in 1993, only four years after DNA evidence had become available, the Court cited the divided "contemporary practice in the States" regarding claims of new evidence of innocence. *Id.* at 411. The Court noted that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence," given that state statutes of limitations codified a concern for finality. *Id.* at 401. Since then, however, a raft of statutes has been enacted across the country permitting post-conviction litigation of new evidence of innocence. For a survey of the first forty-five such statutes, *see* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 (2008). In federal courts, 18 U.S.C. § 3600, now provides statutory relief for persons seeking access to DNA evidence who were convicted of a federal offense

In its ruling concerning the Suspension Clause in *Boumediene v. Bush*, the Supreme Court emphasized the role of meaningful access to procedures to litigate new evidence. To be sure, *Boumediene* involved a habeas

substitute found unconstitutional, and the Court cited to *Hayman*, which approved of Section 2255, as a contrary example. The Court called that case one of "two leading cases addressing habeas substitutes." *Boumediene v. Bush*, 553 U.S. 723, 774 (2008). However, the Court referred several times to the fact that Section 2255, at issue in *Hayman*, contained a savings clause. *Id*. at 776. *Hayman* and *Swain* (which involved a similar provision regarding courts in the District of Columbia) "placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges." *Id*. In addition, the *Boumediene* Court also highlighted that whether a statute unconstitutionally suspends the writ may depend on the adequacy of process it provides. *Boumediene*, 553 U.S. at 783. The Court surveyed historical practices and concluded that: "There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Id*. at 780. The Court connected the concern with adequate process to Due Process concerns: "The idea that the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context." *Id*. at 781. While the Court emphasized that in

federal criminal cases, the inmate has an initial chance to raise issues during an appeal, *Id*. at 783, the Court highlighted the importance of "the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding," and the Court noted that: "Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting."

Thus, *Treistman*'s "serious constitutional issue" test is buttressed by the Supreme Court's ruling in *Boumediene,* in which the Court emphasized even in the highly contested setting of national security detention that the Constitution ensures meaningful access to habeas corpus remedies, including the specific ability to secure relief based on new exculpatory evidence.

IV. The Court Should Eliminate Its Requirement that Motions For Authorization to File Successive Habeas Petitions Be Limited to the Court's Pre-Printed Form

This Court's local rules require all motions for authorization to file a successive habeas petition to be filed using a pre-printed, fill-in-the-blank form promulgated by the Court ("Form Motion"). *See* Local Rule 22.2(c)(1). The failure to use the Form Motion can be grounds for denial of the motion. *Id.* at 22.2(d). The Form Motion provides helpful guidance to pro se litigants in meeting the statutory requirements and undoubtedly assists the Court in gathering the information necessary to properly docket and

consider such motions. However, the Form Motion deviates from the statutory requirements in important ways that can both prejudice potential habeas petitioners and interfere with attorney's ability to zealously advocate for their clients.

The Form Motion expressly prohibits the filing of any materials outside of the Form Motion itself. *See* Form Motion at 1 ("Separate petitions, motions, briefs, arguments, etc. should not be submitted."). Aside from routine procedural information, the Form Motion only allows movants to (1) state the grounds for relief, (2) recite facts which support these grounds, and (3) identify what evidence is newly discovered, when it was discovered, and why it was not previously available. *See id*. at 5. The only additional materials outside of the fill-in-the-blank form that may be submitted are extra pages if there are more than the two grounds for relief anticipated in the form or if the movant is unable to completely answer the question on the lines provided on the form.

Pursuant to the instructions on the Form Motion, movants are therefore barred from attaching the kind of primary evidence that is most persuasive in showing innocence, such as exculpatory DNA reports, affidavits from eyewitnesses witnesses identifying a third party as the perpetrator, reports from forensic experts providing scientific proof of

innocence, newly discovered law enforcement records or surveillance video establishing an alibi of implicating another person in the crime. Instead, the Form Motion only permits movants to describe these as facts on the few lines provided.

In addition to this prohibition on the filing of evidence, the Form Motion also imposes a requirement that is not contained in the applicable statute or local rules that the facts alleged in the motion be verified under penalty of perjury. *See* Form Motion at 7. On the first page of the form, movants are given the chilling warning that "Any false statement of material fact may serve as a basis for prosecution and conviction for perjury." *Id*. at 1. This requirement that all facts be verified by the movant, especially when coupled with the prohibition on attaching evidence, is especially pernicious in cases where a movant must show innocence.

Although it is possible that a movant may have personal knowledge of facts establishing his innocence, most innocent people know nothing about a crime that they had no involvement with. For example, an incarcerated prisoner does not have personal knowledge of newly discovered exculpatory DNA results because he did not conduct the testing. An innocent person likewise has no personal knowledge of what a newly discovered eyewitness to a crime saw, especially if that eyewitness identifies someone else as the

guilty party. A reasonable reading of the Form Motion would prohibit a movant from even asserting any exculpatory facts known to others.

Motions for authorization are extremely fact-based and require an innocence showing that has been described in other contexts as a "Herculean" task. *See Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006) (discussing clear and convincing innocence burden). Where the burden is so high to begin with, this Court's non-statutory restrictions on the scope and form of evidence that can be presented to establish innocence is extremely prejudicial to movants, and will undoubtedly hamper the Court's efforts in identifying truly meritorious successive habeas claims worthy of encouragement.

Undersigned counsel understand that regular practitioners routinely ignore the instructions on the Form Motion and submit extensive memoranda along with the Form Motion. In this case, counsel for Mr. Russo have asked this Court to consider Mr. Russo's brief as a Motion for Authorization, which would likewise violate the instructions on the Form Motion and Local Rule 22.2. However, the absence of detailed opinions from the Court discussing its disposition of motions for authorization leave it unclear whether materials outside the Form Motion are actually considered. Further, the Form Motion's written prohibition on submitting

evidence may chill some advocates from submitting the best evidence in support of their client's innocence.

In addition to reviewing Mr. Russo's case, Amici respectfully request that this Court review the Form Motion and instructions and make changes necessary to ensure that the Court's policies do not interfere with the fulsome review of evidence of innocence necessary to determine a motion for authorization.

Respectfully submitted,

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*Motion for Admission
Pro Hac Vice Pending

CERTIFICATE OF SERVICE

On this 13th day of December, 2016, I, Bryce Benjet, do hereby certify that a true copy of the foregoing BRIEF OF THE INNOCENCE PROJECT AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER was served upon the following individuals via CM/ECF:

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