

**Summaries of Successful *Schlup v. Delo* Actual Innocence Claims  
Federal District Court Decisions  
Current through 1/1/2020**

Due to the large volume of federal district court cases that rely on *Schlup v. Delo* actual innocence claims (over 21,000 as of 1/1/2020), for the purposes of this document we surveyed 6,550 of those cases that were most likely to be successful. Thus, this list may be incomplete, and attorneys are encouraged to perform additional research in any individual case. If there are successful cases you are aware of (or come across) that are not contained in this document please contact Megan Barnes at [megan@justice360sc.org](mailto:megan@justice360sc.org) or Wendy Peoples at [wendycpeoples@gmail.com](mailto:wendycpeoples@gmail.com).

If there was a successful district court case that was affirmed in the Courts of Appeals, it was included on the list of successful federal circuit court cases. Because of this and our search parameters, there are no successful *Schlup* actual innocence claims included on this list from federal district courts sitting in Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, Guam, Puerto Rico, and the Virgin Islands.

## **ARKANSAS**

### Bragg v. Norris,

128 F. Supp. 2d 587 (E.D. Ark. 2000)

Petitioner convicted of delivering a controlled substance could pass through the *Schlup* actual innocence gateway when “critical” testimony from law enforcement was “not worthy of belief” in light of newly discovered evidence. The identification of the petitioner through his license plate, the exclusion of a second suspect, and the identification of the petitioner through photographs were all “shown to be absolutely misleading or untrue” by documents recovered by defense counsel. The documents in question were found to be reliable, as they were from the police department’s own files. While they could have been discovered through due diligence (which would normally render Petitioner’s actual innocence claim invalid in the Eighth Circuit; *see Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997)), it was “incontrovertible that this evidence was not readily available” as it was only discovered during a replevin action related to the petitioner’s seized vehicle initiated by petitioner well after his trial and conviction. Therefore, the court still allowed the evidence to be presented under this standard.

The court heard petitioner’s underlying constitutional claims, and found that the prosecution violated his due process rights and committed a *Brady* violation. Judgment and sentence vacated and petitioner released on ROR pending appellate review.

### Brown v. Kelley,

No. 516CV00381BRWJJV, 2018 WL 3999705 (E.D. Ark. Aug. 21, 2018)

At petitioner's first trial, the jury split 6-6 on whether he was responsible for raping and murdering an elderly woman with two co-defendants. He was convicted at a second trial. There was substantial physical evidence, including DNA evidence, but none of it connected petitioner to the crime scene. This was all presented at petitioner's trial; however, the co-defendant who contributed the DNA subsequently provided a sworn, detailed confession to raping and murdering the victim alone. Petitioner presented witnesses' undisclosed family relationships with police investigators and undisclosed severe drug use that called into question additional trial testimony placing all three defendants together the night of the offense (but not at the scene).

The court found petitioner's *Schlup* claim "compelling" when it compared evidence of innocence against evidence of guilt. Because the trial was "shot through with several material constitutional violations" (including multiple "serious" *Brady* violations, a "minor" but viable *Giglio* claim, and a successful *Youngblood* claim) the court could not have confidence in the outcome. The court declined to adopt the Report and Recommendation denying relief and instead vacated petitioner's convictions, subject to retrial.

## CALIFORNIA

Souliotes v. Hedgpeth,

No. 1:06-CV-00667 AWI, 2012 WL 1458087 (E.D. Cal. Apr. 26, 2012),

report and recommendation adopted, No. 1:06-CV-00667 AWI, 2012 WL 2684972 (E.D. Cal. July 6, 2012)

Petitioner was convicted in large part because scientific evidence showed that an arsonist started the fire, scientific evidence put Petitioner at the scene of the fire, a witness identified Petitioner as the man repeatedly driving his RV suspiciously in front of the crime scene, and the prosecution presented a myriad of other evidence it argued showed Petitioner had a motive to commit the crime.

Under the appropriate diligence standard, the Magistrate Judge found Petitioner presented new, reliable, exculpatory, scientific evidence of his potential innocence; even the Respondent stipulated to the accuracy of the new evidence. They agreed that substances on Petitioner's shoes were not the same as those found in the fire. The court also concluded that the witnesses identification of Petitioner as the driver of the RV is likely the result of suggestive events occurring after the crime and not deserving of any weight. Because it is not necessary that the evidence conclusively exonerate him, but just that Petitioner show no reasonable juror properly instructed would be more likely than not to find the Petitioner guilty beyond a reasonable doubt, the court concluded that the evidence remaining after the scientific evidence was removed was so weak that it was insufficient to support a finding of guilt. Therefore, Petitioner could pass through the *Schlup* gateway.

**The following are cases that were abrogated by *Lee v. Lampert*, 610 F.3d 1125 (9th Cir. 2010),** which held that, as a matter of first impression, a claim of actual innocence was not an exception to AEDPA's one-year statute of limitations. However on rehearing en banc, the Ninth Circuit held that a credible claim of actual innocence did constitute an

equitable exception to AEDPA's limitations period, and a petitioner who makes the proper showing can pass through the *Schlup* gateway and have his time-barred claims heard on the merits. *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011). Since the Ninth Circuit sitting en banc would not have barred these types of actual innocence claims on these grounds, we have included these cases as examples (they may, of course, have other flaws).

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Larsen v. Adams,

642 F. Supp. 2d 1124, 1144 (C.D. Cal. 2009)

Petitioner was convicted of possession of a dagger. He did not present a defense at trial, while the prosecution presented the testimony of three officers: two testified they had an unobstructed view and saw him throw an object, although there was significant discrepancies about where they were, and whether the alleged knife was concealed, while another testified that petitioner lied about his identity when questioned by police. He also admitted that the fingerprints on the knife recovered at the scene were never tested, and that if it was, so many people had handled it it would be useless.

He subsequently filed a habeas petition under § 2254 and was granted an evidentiary hearing. He presented testimony of an eyewitness, who saw another man who was being very hostile throw a shiny metallic object under the car where the knife was recovered; the testimony of the eyewitnesses wife, who was also at the scene but inside her car, and who also saw the same man throw something shiny under the car and observed Petitioner with his hands at his sides; and testimony of a man inside the bar that night who was threatened by a man with a knife whose description matches that of the other suspect, not petitioner. This suspect and his girlfriend both submitted declarations, claiming that he was the true owner of the knife and Petitioner had been wrongfully arrested.

The court held it "lack[ed] confidence in the outcome of Petitioner's trial" after reviewing the trial evidence and hearing evidence. The court concluded that, had the jury been able to consider the same evidence, "no reasonable juror would [have found Petitioner] guilty beyond a reasonable doubt." Petitioner therefore passed through the *Schlup* gateway. [In a subsequent hearing, petitioner's IAC claim was found to be meritorious].

Nickerson v. Roe,

260 F. Supp. 2d 875, 908 (N.D. Cal. 2003)

Petitioner was charged with two murders and one attempted murder. He was originally charged along with just two other co-defendants (the state sought the death penalty against one co-defendant, and he was tried separately). Petitioner filed a petition for habeas corpus under § 2254 claiming actual innocence. In support of this claim, he introduced substantial evidence undermining the prosecution's case against him, including the recantation of the prosecution's most reliable eyewitness, impeachment evidence, and evidence of witness tampering that formed the basis of his misconduct claim; evidence of the conviction of a fourth man in 2001 for the murders which he argued were committed by only three perpetrators; and finally a detailed history of how the other three men

convicted of the crime have without a single exception declared Petitioner innocent, despite admitting their own guilt and inculcating each other on numerous occasions.

The court found that Petitioner carried his burden under *Schlup* and showed that more probably than not he is innocent of the crimes for which he was convicted. Although his claims were procedurally defaulted in state court, to avoid a miscarriage of justice, the court nonetheless addressed Nickerson's substantive claims. Because the court found the trial constitutionally defective due to police misconduct in the investigation, it did not reach Petitioner's claims of ineffective assistance of counsel and conflict of interest. Habeas was granted and his conviction was vacated.

Lisker v. Knowles,

463 F. Supp. 2d 1008, 1040 (C.D. Cal. 2006)

When Petitioner was 17 years old, he was convicted of killing his mother. He filed a habeas petition pursuant to §2244. After reviewing the evidence, the court found that the hypothetical *Schlup* jury would have the following incriminating evidence before it: (1) Petitioner was found at the scene of his mother's murder with blood on him; (2) he previously pleaded guilty, although that conditional guilty plea immediately was withdrawn when he was not committed to the Youth Authority; (3) he admitted responsibility to Youth Authority officials and to parole officials at certain points; and, (4) he had a poor relationship with his mother, and due at least in part to his use of drugs, he had moved out of the house, and his parents had nailed shut various entry points to the house.

On the other hand, the jury also would know: (1) the weather and lines of sight were such that Petitioner could have seen from outside the house his mother lying in the foyer; (2) bloody shoe prints not belonging to Petitioner were found in the house and possibly on the victim's head; (3) the blood evidence was equivocal; (4) at least some of the missing money actually was in the victim's purse after her murder; (5) the already discredited jailhouse informant to whom Petitioner supposedly confessed offered similar testimony in other cases, had access to information about Petitioner's case which was a potential source of a manufactured confession, was one of at least three inmates who offered police details of a confession by Petitioner, recounted facts in conflict with the evidence, and appeared to have had undocumented prior contacts with police in Petitioner's case; (6) a likely suspect with a violent criminal record gave very suspicious statements to police soon after the murder but was investigated no further; and (7) missteps in the investigation likely tainted the original jury verdict as suggested by various facts including that the detective in charge of the case threw away key evidence and made misstatements to state authorities about the case years later.

The Court found that it is more likely than not that no reasonable juror would convict Petitioner in light of the new evidence. The *Schlup* jury would know that there is essentially no evidence of Petitioner's guilt outside his own brief statements, self-serving when they were made and unaccompanied by verifying details, and that there is a strong suggestion that someone else was responsible for the crime. Despite the evidence of the conditional plea, the Court found that the hypothetical *Schlup* jury probably would acquit Petitioner.

## **DISTRICT OF COLUMBIA**

Eastridge v. United States,

372 F. Supp. 2d 26 (D.D.C. 2005)

Two petitioners were convicted of murder. The government first alleged the two offenders chased down the victim with two other men and stabbed the victim to death, and that several other men were tangentially involved. However, later testimony from a co-defendant actually responsible for the murder showed that these men were not the same persons that stabbed the victim. The court found this testimony reliable, and the government agreed that it was “reasonable” interpretation and did not challenge the actual innocence claim with regard to the ‘murder as principals’ charge. Witness testimony that the defendants confessed to multiple people did not change the court’s analysis, as “it was beyond belief that they would repeatedly say that they killed him, to strangers and friends, while awaiting trial” and the people who allegedly heard these confessions later denied it.

The government continued to assert that the petitioners were guilty of aiding and abetting, but the court found they were actually innocent of this as well. The government introduced no evidence at trial to support the evidentiary requirement that it prove a premeditated design to aid and abet and could not do so now. The court concluded that if reasonable jurors were properly instructed, they would not find the petitioners guilty of murder as principals or as aiders and abettors. Because petitioners’ could open the *Schlup* gateway, and further showed that their Sixth Amendment rights were violated and the prosecution committed a *Brady* violation, the court granted habeas relief.

## **FLORIDA**

Scott v. United States,

740 F. Supp. 2d 1317 (S.D. Fla. 2010)

Petitioner was sentenced as a career offender, because, at the time, carrying a firearm was classified as a crime of violence. In light of developments in Eleventh Circuit law, there was “no doubt” that petitioner was “erroneously sentenced” and was actually innocent of being a career offender. The issue was the interaction between the actual innocence gateway and AEDPA’s statute of limitations. When deciding whether to apply the manifest injustice exception, the court found that the principle that the interests of finality and conservation of judicial resources must yield to correcting a fundamentally unjust incarceration is just as relevant as it is in the contexts of unexhausted claims, second or successive petitions, and claims that are procedurally defaulted because of untimely filing in state court. The court used “common sense” to find that the actual innocence exception applies to the AEDPA statute of limitations in § 2255(f) and petitioner’s procedural default because of his failure to timely file the motion to vacate. Sentence vacated and held for resentencing.

United States v. Nestor,

No. 8:01-CR-269-T-23AAS, 2017 WL 1196714 (M.D. Fla. Mar. 31, 2017)

Petitioner filed an untimely motion to vacate his controlled substance convictions that claimed attorney abandonment. The court found he was entitled to equitable tolling on this basis.

The court found his evidence of actual innocence was so intertwined with the grounds in the motion to vacate that it must be addressed on the merits. The court cautioned of the standard of review for such actual innocence claims: “the 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.’ ” *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327–28).

Petitioner presented an affidavit from an individual who was present inside the apartment when the drug was allegedly delivered to the victim. The affiant attests that “at no time did Petitioner give [the victim] anything to eat or drink.” Because the motion to vacate alleged substantial claims of ineffective assistance of counsel, particularly counsel’s failure to investigate and present the testimony of the affiant, petitioner was entitled to review on the merits.

The government’s motion to dismiss was deferred, petitioner’s motion for hearing was denied, and government ordered to respond to the merits of the motion to vacate.

*\*We were unable to determine what occurred with this case after the order was entered.*

## ILLINOIS

### Dixon v. Watson,

No. 17 CV 1142, 2017 WL 3838027 (N.D. Ill. Aug. 31, 2017)

After sentenced to life for two counts of first degree murder and one count of home invasion, petitioner filed a habeas petition raising an actual innocence gateway claim. The district court found petitioner could pass through the *Schlup* gateway when he offered the following two new pieces of evidence: (1) a Special State’s Attorney’s report addressing officer misconduct under Commander Jon Burge that found sufficient evidence to prove that the investigating officer battered suspects and committed perjury as to their alleged confessions; and, (2) an appellate court brief in petitioner’s appeal of the denial of his postconviction petition, in which the state asserted that the accomplice to which petitioner’s liability was tied was not involved in the murders.

While the court wrote that normally an argument made in an appellate brief is not evidence, it was *support* for evidence not presented at the trial that would have impacted the verdict: that the state dismissed all charges against petitioner’s alleged accomplice, and that the eyewitness who identified him as being near the scene of the crime later recanted that identification. Since petitioner’s conviction was based on accomplice liability, if the accomplice was innocent, petitioner was also by definition innocent. The report on Burge severely undermined the confession that Petitioner always denied making.

The court denied respondents motion to dismiss and reached the underlying merits of the constitutional claims in a separate proceeding.

## INDIANA

Watkins v. Miller,

92 F. Supp. 2d 824 (S.D. Ind. 2000)

Petitioner pled guilty to molesting an eleven year old child; when she later disappeared, he was convicted of her rape and murder. However he presented “compelling evidence” of actual innocence through DNA evidence that “shows conclusively” that petitioner could *not* have been the source of “at least some of the semen found in the victim's body.” The court found that the most reasonable explanation of that scientific evidence is that only one man—who could not have been petitioner—raped the victim, because the DNA all came from one swab. The *Schlup* claim was accompanied by a claim that the prosecution suppressed evidence that: (a) an undisclosed witness saw the victim being abducted at a time for which petitioner had a solid alibi, and by a person who could not have been the petitioner; (b) another suspect in the case failed a polygraph test; and, (c) investigators received reports of other men who had known the victim and who either told others they had killed her or turned up with blood on their clothes the night she disappeared. Petitioner also showed that the ‘jailhouse snitch’ witness had lied and been fed information from the prosecution.

Because petitioner passed through the *Schlup* gateway and had a meritorious *Brady* claim, the court found that petitioner’s conviction had not answered the victim’s “spirit’s... call for justice” and granted habeas relief.

## LOUISIANA

Floyd v. Cain,

No. CV 11-2819, 2016 WL 4799093 (E.D. La. Sept. 14, 2016)

Petitioner was convicted of a murder, primarily based on his confession as there was little physical evidence against him presented at trial. The Magistrate Judge denied habeas relief, but the district court declined to adopt the Magistrate Judge’s report and recommendation. The district court clarified that “unexplained delay” is merely a factor habeas courts should consider in “evaluating the reliability of a petitioner’s proof of innocence.” *McQuiggin*. Since petitioner’s actual innocence evidence was primarily scientific, it was less subject to “manipulation” by petitioners using “stale” evidence. Additionally, the witness statements petitioner sought to present were reliable because they were from witnesses that were alive, members of law enforcement and friends of the victim, and the evidence of his intellectual disability was “new” because the expert who testified at trial only discussed briefly on his drug use and his homosexuality, not his intellectual or adaptive functioning.

Petitioner’s request to test hairs that clearly belonged to someone of another race should be permitted as “new” evidence since they would point to another suspect. Other DNA, fingerprints, hairs, and a witness statement also proved a second man was in the victims room shortly before his death. This evidence, most of which was never presented, “both contradicted key details of petitioner’s confession” (which already had timeline issues) and “strongly suggested” that petitioner did not murder the victim.

Petitioner also presented evidence that he had an IQ of 59 and was vulnerable to police pressures – so much so that he had confessed to another murder, in an identical way,

that same afternoon. He alleged that he was slapped, kicked, and threatened during his interrogation. He was given photos of the crime scene before he confessed and those details appeared in the confession.

The court found that if a reasonable juror was presented with the coerced confession and lack of physical evidence, they would not find him guilty beyond a reasonable doubt. Petitioner overcame the untimeliness of his petition. The court remanded the petition to the Magistrate Judge for an evaluation on the merits.

## MASSACHUSETTS

### Wright v. Marshall,

No. CIV.A. 98-10507-PBS, 2008 WL 2783288 (D. Mass. July 17, 2008)

After receiving life without parole for murder, petitioner filed a habeas petition seeking to revive his procedurally defaulted claims, arguing that he had newly available evidence of his actual innocence. The district court found that the new evidence presented by petitioner was sufficient to establish a likelihood that reasonable jurors would have a reasonable doubt as to whether Petitioner or Smalls was the killer: (1) Small's girlfriend's affidavit stated Smalls raped her and threatened to kill her "just like he killed [victim]" and then made her swear to secrecy, and she was reliable, despite her dislike of Smalls and her later-developed bipolar disease; (2) Petitioner presented evidence that Smalls had a motive to kill the victim after they fought about the victim sleeping with another man that night; (3) Petitioner presented evidence Smalls was obsessed with the victim, and kept pictures of her, even when dating other women; (4) Petitioner presented an affidavit from Smalls mother, whose husband told her he did not get home until after the murder was committed that night (while hearsay, this is permitted under *House*); and, (5) Small's mother testified she saw him with victim's belongings the day after the murder.

While there was also evidence pointing to Petitioner's guilt, such as a supposed phone call confession, inconclusive blood samples and sneaker prints, there need not be a "case of conclusive exoneration." In *House v. Bell*, 547 U.S. 518 (2006), there was found sufficient evidence of actual innocence since "the central forensic proof connecting House to the crime... has been called into question, and House put forward substantial evidence pointing to a different suspect." *Id.* at 553-54.

Petitioner's motion for reconsideration was allowed. [The merits were reached in a separate proceeding and habeas relief was denied].

### Goldman v. Winn,

565 F. Supp. 2d 200, 244 (D. Mass. 2008)

Petitioner was convicted of conspiracy to possess cocaine with intent to distribute for which he was sentenced as a Career Offender based on a prior state kidnapping conviction. However, Petitioner established by clear and convincing evidence his actual innocence of the 1977 state kidnapping conviction in a habeas proceeding.

There were three kidnappers, and one man that assisted the kidnappers when their vehicle was disabled. Several witnesses identified Petitioner as dealing with the disabled vehicle. The victim identified Petitioner as one of his kidnappers; however, even the



prosecutor characterized the victim as a “despicable” person and, therefore, the court inferred victim was an impeachable witness. Nobody identified Petitioner as being at the kidnapping location; Petitioner was not arrested where the ransom money was to be left, had not rented any of the vehicles involved, and his fingerprints were not found at any relevant place. Most significantly, the three other suspects all confirmed they were the only three involved in the kidnapping, and that they called Petitioner and asked him to assist with the disabled vehicle. The testimony of the garage operators who identified Petitioner was completely consistent.

Merely dealing with the disabled vehicle was not enough to make him a coconspirator, so Petitioner had demonstrated “that he was actually innocent of the act on which his harsher sentence was based.” *Spence*, 219 F.3d at 172. Therefore, he had demonstrated that the additional seventeen to twenty years to which he was sentenced in federal court in 1993 because of his 1977 state conviction represented a genuine “miscarriage of justice.” Because a conviction essential to Petitioner’s Career Offender classification had been vacated based on serious constitutional and legal errors at his 1977 trial, this court found his claim for relief under § 2241 to be meritorious, as it would be under § 2255 if it were available to him.

The court found that Petitioner was entitled to be resentenced without regard to that conviction. [He was released with time served in a separate proceeding.]

## MISSOURI

Schlup v. Delo,  
912 F.Supp. 448 (E.D.Mo.,1995)

After the Supreme Court decided *Schlup v. Delo*, petitioner’s case was remanded to the district court for consideration of the evidence supporting actual innocence under this new standard. They held that he could pass through this gateway when presented as new evidence eyewitness testimony all swearing that petitioner did not participate in the prison murder. The eyewitnesses were “credible and believable” despite being incarcerated with petitioner for various crimes. Additionally petitioner presented previously unheard testimony from two prison guards that places him in a different room a minute before the distress call related to the murder came in. The timeline is corroborated by security tapes.

The district court set a hearing for petitioner’s writ of habeas. In that hearing, the district court found that trial counsel was ineffective for failing to interview eyewitnesses to the murder and ultimately granted the writ. *Schlup v. Bowersox*, No. 4:92CV443 JCH, 1996 WL 1570463 (E.D. Mo. May 2, 1996). Schlup was subsequently released from prison.

Reasonover v. Washington,  
60 F. Supp. 2d 937, 950 (E.D. Mo. 1999)

Petitioner, who had previously been convicted of murder, was able to pass through the actual innocence gateway after presenting substantial evidence unavailable at trial in her First Amended Petition for Habeas: (1) a secret tape recording of petitioner and co-defendant candidly speaking about their lack of participation in the murder and their

confusion as to why they have been arrested for it; (2) evidence impeaching a witness through recordings of her phone calls, her agreement with the state, and her invocation of the 5<sup>th</sup> Amendment to certain questions; (3) and evidence impeaching a ‘jailhouse snitch’ witness through her criminal history and current and prior deals with the state. Because the conviction was based “almost entirely” on the testimony of these two witnesses, petitioner can pass through the *Schlup* gateway.

While the court did not consider evidence available but not presented at trial in this analysis because of its concern with *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (stating “evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence”), the court still “discuss[ed] this evidence to complete the record and because the *Schlup* opinion suggests that a habeas court must consider reliable evidence of actual innocence, irrespective of whether that evidence was available at the time of trial.” This evidence was extensive.

The district court found there was a *Brady* violation and did not address the other constitutional violations, as this was sufficient to grant habeas relief.

## **NEBRASKA**

### Richter v. Bartee,

973 F. Supp. 1118, 1130 (D. Neb. 1997)

Petitioner was convicted of rape; at his trial, there was no independent physical evidence that he or any other person raped the victim. There were no other witnesses. While there was an identification of Petitioner, the victim hesitated and had trouble choosing between two photos, even when the lineup did not contain men who looked like Petitioner. And at the time of the incident Petitioner was significantly shorter, thinner, and younger than the described attacker. Petitioner proclaimed his innocence consistently before, during, and after trial, even when under substantial pressure by law enforcement to make a confession. Petitioner produced several alibi witnesses at trial a well.

Petitioner brought a §2254 motion claiming actual innocence, which would be considered a “fundamental miscarriage of justice.” After reviewing the evidence presented at trial, the court stated that “the only evidence that Petitioner committed this rape, or that the victim was ever raped by anyone, derives from the victim.” The court found her testimony highly suspect. She lied to the police and said she had not had sex for the past month; in reality she had had sex on the night of the alleged assault with another man. Police became suspicious of her presenting a false report when the victim stopped crying completely when he left the room, tried to read his notes, and then resumed crying when he re-entered. A police sgt. told the victim he believed she had made a false report. Within a few days of the interview, she had checked herself into a facility seeking treatment for mental illness.

During this proceeding, Petitioner also presented a psychiatrist who reviewed victim’s records and opined that victim suffers from BPD and said that a person with this sort of personality disorder cannot be trusted to accurately report factual events in which

she is personally involved. The court found that the evidence of victim's mental condition raises very significant issues about her ability to perceive and relate the truth.

The court further dismissed evidence that Petitioner and his alibi witness had failed a polygraph, because it would not be available at retrial, the jury had already discounted this testimony, and the petitioner produced evidence that the polygraphs were flawed in administration and scoring.

Without the victim's testimony as a credible witness, the court found it was inconceivable that petitioner would be convicted. The court held he could pass through the *Schlup* gateway and the merits of his petition were considered in a separate proceeding.

## NEVADA

Hanson v. Baker,

No. 304CV00130MMDVPC, 2018 WL 10400454 (D. Nev. Mar. 13, 2018), aff'd, 766 F. App'x 501 (9th Cir. 2019)

Petitioner was convicted of a killing by child abuse, based primarily on "scientific" evidence that purported to show that the child died from intentional shaking or other abuse, and that she could not possibly have died from an accidental fall onto concrete from the steps in front of the family home. After Petitioner filed his third amended habeas petition under § 2254 claiming actual innocence as a gateway claim and was granted an evidentiary hearing (he later filed a fourth amended petition). There he presented credible and convincing testimony of two doctors who maintained that the science concerning so-called shaken baby syndrome had developed and changed significantly and that it was no longer accepted that the triad of subdural hemorrhage, cerebral edema and retinal hemorrhage was a distinct indicator of intentional shaking or other child abuse. Rather it was now accepted that short falls, including falls from surfaces less than three feet high, can cause all three markers and can be fatal. The testimony of the respondents' expert did not contradict the Petitioner's; in fact, she generally supported the conclusion that the science had changed significantly in these respects since trial.

In light of the new evidence presented at the evidentiary hearing, the scientific evidence presented at trial could only be characterized as wrong — the forensic evidence was not indicative of shaking or other child abuse and the death could have resulted from an accidental fall from the steps in front of the family's home. Taking into consideration the trial record, the evidence presented in federal court, and the entire record before the court, the district court found that it was more likely than not that no reasonable juror would have convicted Petitioner in light of the new evidence and granted habeas relief.

[The decision was appealed and the Ninth Circuit issued an opinion affirming the grant of the writ; however it includes less detail on the underlying facts and instead holds that his actual innocence claim was exhausted and that that the statute limiting the discretion of federal district courts to hold evidentiary hearings on a habeas petitioner's claims in certain circumstances did not bar the district court from considering evidence presented at the hearing because in state court the petitioner had attempted to develop a factual basis for actual innocence claim but State had urged against evidentiary hearing,

and petitioner's request in state court for counsel to bring motion for new trial based on changed scientific evidence had gone unanswered].

## **NEW YORK**

### Jimenez v. Lilley,

No. 16CIV8545AJNJCF, 2017 WL 4535946 (S.D.N.Y. Oct. 10, 2017), report and recommendation adopted, No. 16CV8545AJNRWL, 2018 WL 2768644 (S.D.N.Y. June 7, 2018)

Petitioner, convicted of murder, filed a § 2254 petition claiming actual innocence. The Magistrate Judge held that the gateway actual innocence exception could be applied to the procedural bar imposed by the AEDPA's one-year statute of limitations if petitioner's claim met the *Rivas v. Fischer*, 687 F.3d 514 (2d Cir. 2012) "credible and compelling" two-pronged test. The court also found that other federal circuit court's decisions applying 28 U.S.C. § 2254(e)(1) to the petitioner's gateway actual innocence claim were persuasive, and held that the state courts prior findings was entitled to deference under § 2254(e)(1). The finding that the petitioner's confession was not coerced was upheld under this standard.

Petitioner presented two affidavits that supported his alibi. While the state court found these unreliable, the Magistrate Judge found there was clear and convincing evidence to rebut the state court credibility determination. Although the shooting occurred approximately twenty-two years before the signing of the affidavits and twenty-five years before the testimony at the evidentiary hearing, the statements were detailed and did not show that the witnesses misremembered the events of the day of the shooting. Both stated petitioner never left their sight long enough to go to the scene. The relationship between the affiants and the petitioner did not undermine their reliability.

There was also clear and convincing evidence to overcome the State court's findings with regard to the state's witness' recantation. The witness heard the shooter say a Dominican slur with a Dominican accent, and identified the shooter as Dominican; when he learned that the Petitioner was Puerto Rican, he realized he had identified the wrong person. He also stated that he only identified Petitioner because of the pressure he felt and because the prosecutor promised that he would be relocated.

The Magistrate Judge found that this new evidence, along with Petitioner's own testimony and lack of forensic evidence at the original trial, meets the *Rivas* test and that a reasonable juror would have reasonable doubt as to Petitioner's guilt. The merits of his constitutional claims were not reached in this proceeding. The Report and Recommendation were adopted in full by the district court.

## **OHIO**

### Hasan v. Ishee,

No. 1:03-CV-288, 2011 WL 5596891 (S.D. Ohio Nov. 17, 2011)

Petitioner was convicted of killing a prison guard. In federal habeas corpus proceedings he pointed to evidence that a leader of a prison gang and two other inmates

were responsible for the murder. One witness recanted his trial testimony and blamed the murder on one of these men in an affidavit; evidence in the record supported a finding that he did not control or lead the riot from its inception through the time of the murder of the guard; and he asserted that the record establishes that the State used coercive techniques to secure testimony from other inmates.

While the district court did not make a determination of whether the evidence met the actual innocence gateway, it did find that Petitioner established good cause to obtain further discovery on his actual innocence gateway claim. It found that affidavit testimony from multiple inmates (including the recantation), suggested that another inmate controlled the riot and ordered the murder. An officer testified that the database maintained regarding the riot had exculpatory materials in it. Finally, a special prosecutor in the riot cases testified that the State utilized a narrow *Brady* standard.

Petitioner requested additional discovery to support his claim, including the depositions of the prosecutors and law enforcement, copies of witness depositions, and parole records. Again, even though the court did not find at this point that all the presented evidence was reliable, that the State withheld exculpatory evidence, or that Petitioner was actually innocent, it did hold that the evidence did tend to suggest that his request for discovery on his actual innocence gateway claim was not a mere fishing expedition.

## **OKLAHOMA**

Fontenot v. Allbaugh,  
402 F.Supp.3d 1110 (E.D.Okla., 2019)  
[currently being appealed]

Petitioner was convicted of murder, kidnapping, and robbery and subsequently filed a federal habeas petition. The court found that he could pass through the *Schlup* gateway. The crime scene evidence was unpreserved, and there was no evidence linking Petitioner to the general area where victim's remains were found. None of the eyewitnesses identified the Petitioner as the man with the victim. There was, however, a confession that was taken in violation of *Miranda* and produced by supplying him with information (and perhaps threatened him, although that was disputed). The prosecutor then presented false testimony of a jailhouse snitch. The Court held that "no rational juror...could find beyond a reasonable doubt that Petitioner should be convicted on his own words. Given the uncontroverted evidence of his mental and psychological impairments, the material discrepancies between the physical evidence and the story [Petitioner] told the police; the absence of evidence to corroborate his version of the events; and the circumstances surrounding his coerced confession, no reasonable juror would have convicted Petitioner."

The court reached the merits of his petition and found his confrontation rights and due process rights were violated due to police misconduct. His petition for a writ of habeas corpus was granted and a new trial or release was ordered.

## OREGON

Moon v. Coursey,

No. 3:10-CV-00616-BR, 2016 WL 4059659 (D. Or. July 28, 2016)

Petitioner was convicted of kidnapping and aggravated murder and brought a habeas proceeding pursuant to § 2254. Petitioner alleged in his fifth amended petition that he was actually innocent of the kidnapping because “[t]here is no evidence that [Petitioner] had any intent other than to rob, and then to kill, the victim, and no evidence that they moved the victim other than to accomplish the crimes of robbery and homicide.” The petitioner was in the house for about a half hour. The victim was forced to the ground near his front door at gunpoint as they rushed in and at one point blindfolded. The district court concluded it is more likely than not that no reasonable juror would have found Petitioner acted with the intent to interfere substantially with the victim’s liberty to move freely, and he had met the *Schlup* gateway.

Petitioner also made a freestanding innocence claim. The court found this cognizable under *Hererra* since Petitioner’s showing went beyond mere insufficiency of the evidence, *see Bousely*, and instead demonstrates his conduct does not constitute kidnapping under Oregon law.

Habeas was granted and conviction for kidnapping were vacated.

## PENNSYLVANIA

Miller v. Dist. Attorney for Cty. of Philadelphia,

No. CV 12-0742, 2019 WL 2869641 (E.D. Pa. June 12, 2019), report and

recommendation adopted, No. CV 12-0742, 2019 WL 2866506 (E.D. Pa. July 1, 2019)

Petitioner who had been previously convicted of murder asserted in federal habeas corpus proceedings a gateway claim of actual innocence to allow merits review of a procedurally defaulted *Brady* claim. The Magistrate Judge first noted that “the exception is only available when a petitioner presents ‘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,’” *Schlup* 513 at 316, the court reviewed Petitioner’s *Brady* claim.

The key evidence against Petitioner was a police statement made by a suspect in another crime, given while he was trying to secure a lighter sentence for himself. This suspect’s statement against Petitioner was one in a series of statements he made against various people in an attempt to convince police to give him a lesser sentence. Suspect recanted his statement even before Petitioner’s preliminary hearing, and he has been confessing to victim’s murder for more than a decade. Suspect’s statement against Petitioner could have been impeached with evidence of his similarly untrue statements about two other men.

The court found that if Petitioner’s claim of actual innocence provided a gateway for this Court to consider this claim on its merits. The *Brady* claim was meritorious as the evidence was favorable to Petitioner, withheld by the prosecution, and material. These

violations of *Brady* undermined confidence in Petitioner's verdict. He was granted habeas relief and a new trial.

## UTAH

**\*\*Taylor v. Crowther,**

No. 2:07-CV-194-TC, 2017 WL 168871 (D. Utah Jan. 17, 2017)

Petitioner was convicted of two capital murders and subsequently filed a habeas petition under § 2254. He and an accomplice were accused of shooting to death two women. He proffered evidence that he did not fire the fatal shots. The original medical examiner said that based on the evidence, she cannot say with a reasonable degree of medical certainty that the .38 bullet caused the fatal gunshot wound on victim 1. Because Petitioner theorized that this bullet caused an abrasion and not a fatal gunshot, "serious questions were raised" about the state's theory that Petitioner was responsible for her death. Further, Petitioner's statements to a psychiatrist during an examination that he killed both women were not supported by the evidence, and he had a motive to lie when he made the statements, as he was trying to be found incompetent to stand trial. Finally, the co-defendant's testimony was not reliable, especially since Petitioner had already plead guilty. Moreover, in connection with co-defendant's sentencing, prosecutors told the Utah Board of Pardons that he also fired shots.

The State requested that the court, "in effect...to actually impose accomplice liability on Petitioner...because he pleaded guilty, it is a done deal that he is guilty of accomplice liability and so any proof of actual innocence regarding principal liability would be futile." However the district court rejected that theory, and granted Petitioner's request for an evidentiary hearing on his *Schlup* actual innocence claim. **Note:** On February 25, 2019, the District Court issued Findings of Fact & Conclusions of Law Re: Claim of Actual Innocence, concluding that Petitioner had satisfied the *Schlup* test. On March 10, 2020, the District Court granted habeas relief to Petitioner on his claim of ineffective assistance of counsel in connection with his guilty plea. *Taylor v. Crowther*, 2020 WL 1158372 (D. Utah March 10, 2020).

## VIRGINIA

**Cherrix v. Braxton,**

131 F. Supp. 2d 756 (E.D. Va. 2001)

Petitioner has been previously convicted of rape and murder. On habeas, the district court determined that given the nature of the case, DNA tests were reasonably necessary in order for petition to assert actual innocence as a gateway to merits review of claims that may be procedurally barred. The results from the requested DNA retests had the possibility of showing that Petitioner did not assault the victim. As allowed in *Schlup*, Petitioner sought to utilize this evidence of actual innocence to support his claim that his counsel's representation violated his Sixth Amendment right. This circuit had previously found with regard to *Schlup*-type claims of innocence that "DNA evidence that the defendant ... was not the one who contributed the seminal fluid [] established the requisite probability that a reasonable jury would not have returned a guilty verdict."

The court found that Petitioner asserted an ineffective assistance of counsel claim during his state habeas proceedings. However, because his counsel never sought DNA testing which could prove that, but for counsel's ineffectiveness, the result of the proceeding would have been different, Petitioner may be able to assert IAC claims before this court because they were based on newly-discovered evidence that could demonstrate factual innocence (hence it was a *Herrera* instead of a *Schlup* claim). If DNA testing re-affirmed that Petitioner committed the crimes, the court will consider the petition for writ of habeas corpus and render judgment accordingly.

Dick v. Muse,

No. 3:10CV505, 2014 WL 4854689 (E.D. Va. Sept. 29, 2014)

Petitioner was convicted of rape and murder. The State's theory was that eight men had crowded into the bedroom to rape the victim, and then took turns stabbing her. During his federal habeas proceedings, the following new evidence was presented: the DNA showed that only one of the other accused men participated in the rape and murder; the autopsy showed that it was highly likely only one person killed the victim; an expert's crime scene reconstruction supported the theory that this other suspect acted alone; there was alibi evidence for two of the men; Petitioner's recantation was supported by his attorney's admitting they pressured him to plea; another man's recantation was supported by alibi evidence; this other suspect made initial and recurring statements he raped and murdered victim alone; and all the witnesses who directly implicated Petitioner in the rape and murder of the victim had recanted or retracted those accusations.

If credited, these recantations and other evidence could establish Petitioner's assertion of his actual innocence. As permitted under *Teleguz v. Pearson*, 689 F.3d 322 (4th Cir.2012), the court ordered an evidentiary hearing on Petitioner's gateway claim of actual innocence.

*For a nearly identical opinion regarding the co-defendant, see Williams v. Muse, No. 3:09CV769, 2014 WL 2921932 (E.D. Va. June 27, 2014).*

Towler v. Manis,

No. 7:13-CV-00458, 2014 WL 4385792 (W.D. Va. Sept. 3, 2014)

Petitioner was convicted of a number of felonies arising from the robbery of a CVS, including the conviction he challenged in his federal habeas petition—the use of a firearm in the commission of a burglary. He argued that his conviction was for conduct that, because of an intervening legal decision, no longer sufficed to establish his guilt, and that he was actually innocent of this offense.

The district court held that in determining whether the miscarriage of justice exception to excuse procedural default can be applied to Petitioner's claims, the court may review all the evidence in light of an intervening change in law.

In order for Petitioner to be convicted under the newly-announced standard, there would have had to be proof that he used or displayed the gun when *entering* the CVS. The evidence at trial, however, showed that he walked into an open drug store and that the first time anyone saw a gun in his possession was at the counter, after he had handed a note to



the clerk, when he pushed up his shirt to reveal part of the gun. The evidence strongly suggested that the weapon was concealed upon his entry and until his arrival at the pharmacy counter.

The evidence presented at trial—at the very least—satisfied the standard set forth in *Schlup*, which is that it was more likely than not that no reasonable juror would have found him guilty based on the entirety of the evidence. The court did not reach the merits of Petitioner’s claim.

Hash v. Johnson,

845 F. Supp. 2d 711 (W.D. Va. 2012)

The Court found that “this is one of those rare cases” where the Petitioner satisfied the actual innocence exception when he “present[ed] 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.” *Schlup*, 513 U.S. at 316. The Petitioner came forward with evidence showing (1) he was transferred to the jail to be exposed to a known prison informant which runs counter to the explanation offered throughout the state habeas proceedings; (2) an investigator promised to speak to the State regarding how the informant’s testimony was beneficial, and to speak at a 35(b) hearing, but the authorities denied the existence of any such agreement; (3) the informant was allowed to testify falsely at trial that he expected no benefit from his testimony; (4) letters written by informant to officials were never produced to trial counsel; (5) reports of polygraph examinations given to eyewitnesses were never produced to trial counsel; (6) the Prosecution concealed negotiations with a witness regarding a plea agreement in exchange for his testimony; (7) investigators provided a witness with access to crime scene information and guided his answers to the questions; (8) an investigator testified falsely at trial regarding whether the witness interviews were recorded; (9) an investigator saw a weapon matching the caliber weapon used to murder the victim at the home of another suspect but failed to take custody of the weapon and run a ballistics report; (10) the ‘eyewitness’ recanted; and (11) Petitioner presented significant evidence that another suspect may have committed the crime, just like the Petitioner in *House v. Bell*.

The court found that the evidence presented by Petitioner, when weighed against the State’s lack of physical evidence linking Petitioner to the crime and the contradictory and unreliable statements of witnesses, established that Petitioner satisfied *Schlup*’s actual innocence standard. It then reached the merits of his four underlying constitutional claims and found his trial to be “an example of an extreme malfunction in the state criminal justice system.” His conviction and sentence were vacated.

Mobley v. United States,

974 F. Supp. 553 (E.D. Va. 1997)

Petitioner was convicted for possession of firearm by felon after three violent felonies and the court imposed the statutorily mandated minimum sentence of 15 years; however this sentence was based on his incorrect criminal record. He in reality only had two prior violent felony convictions. He filed a motion to correct his sentence under § 2255. While the district court found Petitioner could not show “cause and prejudice” for failing to challenge at sentencing or on direct appeal error in his criminal record, he was still

eligible for habeas relief because the record reflected that he was “actually innocent” of the enhanced sentence he received.

The Superior Court’s order correcting Petitioner’s record clearly establishes that he was never actually convicted of three violent felonies and was therefore actually “innocent” of having an essential element of the 15 year mandatory minimum sentence under § 924(e). He was ineligible for the sentence he received; accordingly, the “cause and prejudice” requirement did not bar the relief sought in the instant petition.

But for this error, the maximum sentence would have been 10 years. The court held that a miscarriage of justice was avoided only by allowing Petitioner to seek habeas relief. It stated that it “was worth noting that the “actual innocence” exception in these circumstances does not undermine legitimate interests in finality of judgment and conservation of judicial resources” because these claims dealing with errors in criminal records were “rare.” The court limited its holding to this: “when a specific sentence is statutorily mandated on the basis of a predicate criminal record and that criminal record is officially but erroneously recorded, a petitioner may obtain relief pursuant to 28 U.S.C. § 2255 without showing “cause” under *United States v. Frady*, 456 U.S. 152 (1982). Indeed, the result reached is no more than a recognition of a principle fundamental to our criminal justice system—the law should never ignore actual innocence and punish in the face of it.”

It reached the merits of the petition, and found that Congress only intended to punish people in possession of firearms after three violent felonies, not two, and that Petitioner could not be sentenced under the statute. Habeas was granted and resentencing set.

\*\* Wolfe v. Johnson,

940 F. Supp. 2d 280 (E.D. Va. 2010), aff’d sub nom. Wolfe v. Clarke, 691 F.3d 410 (4th Cir. 2012)

Petitioner was convicted by a jury of murder for hire, use of a firearm in the commission of a felony, and conspiracy to distribute marijuana; he was sentenced to death on the murder for hire charge. In federal habeas proceedings, Petitioner argued that the State’s assertion of procedural default could be overcome under *Schlup* because the prosecution’s key witness and the confessed gunman in the murder recanted his trial testimony concerning Petitioner’s involvement. In the other gunman’s affidavit, he confessed to lying at Petitioner’s trial and implicating Petitioner in order to avoid receiving the death penalty himself. This was confirmed by several other witnesses. Another witness swore that suspect told him shortly after the murder that he had acted alone, and yet another stated that while he was a cellmate with the gunman, he told him that Petitioner was not involved in the murder and further explained the details of what had occurred. Two additional inmates also repeated a similar story to Petitioner’s investigator about what suspect told them.

The gunman was the only direct witness to link Petitioner to the crime. There was competing evidence as to whether the gunman even claimed that Petitioner was involved. The gunman also implicated a trial witness in the murder, which added a considerable motive for that man to testify against Petitioner. Other circumstantial evidence could be explained by the gunman’s, rather than Petitioner’s, involvement.

The court found that there are two stories of what occurred on the night of the murder, both with hearsay corroboration and almost no other evidence that would support one version over another. Unlike the exacting standard of *Herrera*, the *Schlup* Court found that “if the habeas court were merely convinced that those new facts raised sufficient doubt...to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, *Schlup*’s threshold showing of innocence would justify a review of the merits of the constitutional claims.” 513 U.S. at 317.

The court held that weighing the evidence, it was more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt and he has met the *Schlup* standard. Petitioner’s Motion for an Evidentiary Hearing and Motion for Discovery on his *Brady* and *Giglio* claims was granted.

## WASHINGTON

Rieman v. Gilbert, No. 316CV05250RBLJRC, 2018 WL 571925 (W.D. Wash. Jan. 25, 2018)

Petitioner had previously agreed to plead guilty (an *Alford* plea) to manslaughter after a suspect, who was offered full immunity, testified that Petitioner beat and strangled victim and that he and petitioner disposed of victim’s body. Petitioner remained silent until this man was convicted of another murder and sent to prison, when he finally came forward and said this man threatened to kill him and his family if petitioner ever implicated him. The victim’s blood was in the boat in several locations; the other man’s blood was nowhere; Petitioner’s blood was only in one spot. Petitioner says his blood is at the scene because he was cut trying to intervene in the murder, and this is when he was threatened by the real murderer. The other man had a history of assaulting people by strangulation—at least three events before this murder and two events after. Petitioner had no history of criminal activity. The other suspect additionally made contradictory statements to police and others. Petitioner’s *Alford* plea did not inculcate him, as he could voluntarily enter into such a plea agreement even though he was “actually innocent” of the crime.

The Court of Appeals dismissed the “actual innocence” claim finding that petitioner’s petition had no “newly discovered” evidence that could not have been presented at the time of the plea. However, this was a federal habeas proceeding that did not use Washington’s standard for evidence presented after conviction, and petitioner must only produce evidence that was not presented at trial, not evidence that was undiscovered at trial. *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003).

The district court found that, after considering all the evidence and making credibility determinations, the Petitioner could pass through the *Schlup* gateway. It ordered an evidentiary hearing on the merits of his habeas petition.