No. 12-126

In the
Supreme Court of the United States

GREG MCQUIGGIN, WARDEN
Petitioner
V.
FLOYD PERKINS
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF ALABAMA, COLORADO, FLORIDA, GEORGIA, IDAHO, OKLAHOMA, TENNESSEE, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE SUPPORTING PETITIONER

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.
Ala. Solicitor General
Andrew L. Brasher*
Dep. Ala. Solicitor General
OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us
*Counsel of Record
Counsel for Amicus Curiae

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(additional counsel listed on inside cover)

ADDITIONAL COUNSEL

John Suthers
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

Samuel S. Olens
Attorney General
State of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Robert E. Cooper, Jr.
Attorney General
State of Tennessee
425 5th Avenue N
Nashville, TN 37243

Mark Shurtleff
Attorney General
State of Utah
P.O. Box 140858
Salt Lake City, UT 84114

Rob McKenna
Attorney General
State of Washington
1125 Washington St. SE
P.O. Box 40100
Olympia, WA 98504

Greg Phillips
Attorney General
State of Wyoming
State Capitol Bldg.
Cheyenne, WY 82002

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INTEREST OF AMICI CURIAE

The amici curiae prosecute crimes and incarcerate criminals, so they have powerful interests in the finality of state-court judgments and maintaining society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J. concurring). Those interests are undermined by the rule adopted by the Sixth, Ninth, Tenth and Eleventh Circuits. The amici States thus stand to benefit if the petition is granted and the Sixth Circuit's decision reversed.[1]

ARGUMENT

This Court should grant certiorari because the rule adopted by the Sixth Circuit and other jurisdictions imposes unwarranted costs on States and the federal system. To be clear, the amici States do not contend that no innocent person has ever been convicted of a crime. Law is a human institution, and fallibility is a universal human trait. It is thus a "truism, not a revelation" that our "system of criminal punishment" must accept the "possibility that someone will be punished mistakenly." *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring). That possibility is "sensitive and, to say the least, troubling." *Herrera*, 506 U.S. at 421 (O'Connor, J. concurring). And it fully justifies post-conviction procedures that enable persons who claim

[1] The amici States gave timely notice of their intent to file this brief to counsel for the parties on August 1, 2012. *See* Sup.Ct. R. 37(2)(a). The amici States do not need consent of the parties to file this brief. *See* Sup.Ct. R. 37(4).

to be innocent to seek their release. For example, the statutory exception to the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2244(d)(1)(D), rightly allows inmates to file belated federal habeas petitions based on *new evidence* that materializes years after trial.

But, even though society's interest in vindicating claims of innocence is important, there are countervailing interests that require all litigation to have an end. Congress struck the right balance between these interests, and the Sixth, Ninth, Tenth, and Eleventh Circuits have struck the wrong one. These Circuits' open-ended equitable tolling exception to the one-year statute of limitations exacerbates the practical difficulties of post-conviction litigation and ignores the deleterious effects of actual-innocence claims. Because of the difficulties of litigating guilt and innocence many years after a crime, each "actual innocence" claim creates a risk that someone who is *not* innocent will escape rightful punishment. And each claim undermines the public's confidence in the criminal justice system. Amici submit this brief to highlight these countervailing costs, and explain why they warrant this Court's review of the Sixth Circuit's judgment.

A. The exception to the one-year statute of limitations will have systemic consequences.

The Sixth Circuit's rule creates an unbounded equitable-tolling exception upon a showing of actual

innocence and opens the federal courts to more belated petitions than Congress wanted. In so doing, courts adopting this rule have undermined the States' strong interest in seeing that habeas litigation ends as expeditiously and efficiently as possible.

In 1989, a Judicial Committee chaired by Justice Lewis Powell found "serious problems with the present system of collateral review . . . broadly characterized under the heading of unnecessary delay and repetition." *Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report*, printed in 135 Cong. Rec. S13471-04, S13482 (1989) (hereinafter "Powell Committee Report"). To fix these problems, the Powell Committee proposed, *id.* at S13483, and Congress enacted, the statute of limitations at issue in this case. *See* Statement of Senator Joseph Biden, 135 Cong. Rec. S13471-04, S13473 (Oct. 16, 1989) ("the Powell committee recommended that the time period . . . should be limited to 6 months . . . my bill would require the [federal] habeas corpus petition to be filed within 1 year"). The Sixth Circuit's exception to the statute of limitations for claims of "actual innocence"—particularly when it is unbounded by any requirement of diligence by the petitioner—threatens to revive the "unnecessary delay and repetition" that the States experienced before this innovation. *See* Powell Committee Report, 135 Cong. Rec. at S13482

1. The statute of limitations serves important goals. In adopting the one-year statute of limitations, Congress recognized that parties cannot effectively litigate federal habeas petitions years after a conviction, because "the passage of time may make

reliable determinations of asserted claims . . . difficult or practically impossible." *E.g.*, Statement of Senator Charles Grassley, 136 Cong. Rec. S6789-03, S6828 (May 23, 1990). This Court has similarly explained that "factual determinations are often dispositive of" constitutional claims like ineffective assistance of counsel, "coerced confession, lack of competency to stand trial, and denial of a fair trial." *Peyton v. Rowe*, 391 U.S. 54, 61-63 (1968). Factual issues are, by their nature, difficult to assess years after the facts actually arise. Accordingly, delaying "the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice." *Id* at 62.

The Sixth Circuit's innocence-tolling rule is likely to lead to delays and piecemeal litigation. Especially since the tolling rule is not constrained by a requirement that the petitioner use reasonable diligence in exercising his claims, it gives inmates the freedom to wait to file their habeas petitions until the available evidence shifts to their maximum advantage. This is a special problem in capital cases. As the Powell Committee explained, "[t]he inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out." 135 Cong. Rec. at S13482.

2. The "innocence" tolling rule also has special costs, above and beyond those normally associated with habeas review. Although it is difficult to litigate anything years after the event has occurred, it is even more difficult to litigate *guilt and innocence* years after a crime is committed. But that is

precisely what the Sixth Circuit's rule requires. For every habeas petitioner that asserts his innocence, the State will have to refute his claim with an evidentiary presentation from his trial.

The practical impediments to that kind of mini-retrial are substantial: "[w]itnesses die or move away; physical evidence is lost; memories fade." *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). "Where the original verdict turned on the jury's credibility judgments, long delays effectively eliminate the State's ability to reconstruct its case." *Id.* (quoting Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 147 (1970)). The prosecutors, police officers, witnesses, and victims involved in the case will have moved on. The upshot is that a State starts from a disadvantaged position in refuting an innocence claim when it is brought years after the inmate was prosecuted and convicted.

B. Unfounded claims of actual innocence consume State resources and undermine the criminal justice system.

Any rule to address claims of "actual innocence" must account for the unfortunate but undeniable fact that unscrupulous prisoners falsely claim that they are innocent all the time. The paradigm is the petitioner's "actual innocence" claim in *Herrera*. In *Herrera*, the petitioner argued that he should be able to seek habeas relief on the grounds that he was "actually innocent," even though the State did not violate any of his constitutional rights. Justices O'Connor and Kennedy were sympathetic to the

petitioner's legal argument, but dismissed his particular case as "neither difficult nor troubling" because "[p]etitioner is not innocent, in any sense of the word." 506 U.S. at 419, 421 (O'Connor, concurring). In *Herrera*, "[t]he record overwhelmingly demonstrate[d] that petitioner" was guilty despite his innocence claim. *Id.* at 421.

These unfounded actual-innocence claims impose substantial costs on the system, even when they have absolutely no merit. Especially when publicized, these claims of actual innocence undermine society's faith in the criminal justice system and the finality of long-established convictions. They also require a large amount of resources to litigate and resolve. These costs arise even in cases like *Herrera* where the habeas petitioner is 100% guilty. Here are three examples.

1. *Roger Keith Coleman.* Coleman's case gave rise to one of this Court's most significant decisions on the law of procedural default—*Coleman v. Thompson*, 501 U.S. 722 (1991), in which this Court overruled *Fay v. Noia*, 372 U.S. 391 (1963), and held that an attorney's error in failing to file an appeal could bar the petitioner from pursuing his claims in federal court. That ruling was necessary, in part, because Coleman did not argue, before this Court, that he was actually innocent. But after this Court affirmed the dismissal of his petition, he turned around and very publicly—and very fraudulently—proclaimed his innocence.

Coleman was convicted of raping and murdering his sister-in-law in Virginia in 1982. *Coleman v. Commonwealth*, 307 S.E.2d 864 (1983). Coleman had previously been convicted of attempted rape, and

blood on Coleman's clothes matched his victim's. *Id.* at 870, 877. Coleman was sentenced to death. *Id.* at 876.

Coleman's case first came to this Court's attention because it presented a difficult question about procedural default. Coleman's attorney had missed an appellate deadline in state court, and the lower courts held that this procedural failure blocked Coleman from pursuing, on federal habeas review, his federal claims of ineffective assistance of counsel. Coleman sought to circumvent that default, but made no claim that he could do so because he was actually innocent. He instead asserted that because the default resulted from his attorneys' errors he could show justifiable "cause" for his default. This Court held that Coleman's habeas petition was procedurally barred. "This is a case about federalism," the Court explained, "[i]t concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

Following this Court's decision, Coleman then turned to the avenue many prisoners choose when they are out of options—a fraudulent claim of actual innocence. Although he had not maintained that he could get around the procedural default through an "actual innocence" exception before this Court, he filed a successive habeas petition in the district court arguing that he was "actually innocent" and could surmount the procedural default. *See Coleman v. Thompson*, 798 F. Supp. 1209 (W.D.Va. 1992). That petition was also denied. *See id.* at 1218. *See also*

Coleman v. Thompson, 504 U.S. 188 (1992) (denying application for stay of execution).

Coleman's case then became a cause célèbre. *See Marsh*, 548 U.S. at 189 (Scalia, J., concurring) (discussing Coleman's case). Coleman appeared on several TV programs, and Time Magazine put Coleman on its cover. "Roger Keith Coleman says he didn't kill anybody, but the courts are tired of listening," *Time* magazine intoned. "That could be a tragic mistake." Jill Smolowe, *Roger Keith Coleman: Must This Man Die?*, 139 TIME 40 (May 18, 1992). After Virginia's Governor received roughly 13,000 calls and letters in favor of clemency, he arranged for a lie-detector test, which Coleman failed. *See* Bonnie V. Winston & Greg Schneider, *Coleman put to death: High-profile defendant failed lie detector test*, Roanoke News (May 21, 1992), *available at* 1992 WLNR 1019950. Coleman was executed in 1992, and his last words were: "An innocent man is going to be murdered tonight." *Id.*

Public concern over Coleman's case only grew with his execution, and his supporters unabashedly used Coleman's claim of "actual innocence" to cast doubt on the legitimacy of the justice system. In 1998, for example, a book was published to make the case for Coleman's innocence, which "challeng[ed] the assumptions of anyone who believes that the American justice system is concerned primarily with justice." *See* Lisa Higgins *Amazon.com Review of* May God Have Mercy *by John C. Tucker* at http://www.amazon.com/May-God-Have-Mercy-Punishment/dp/0385332947 (last visited August 20, 2012).

But Coleman's innocence claim was a complete sham. Ten years after his execution, his legal team and a media consortium petitioned Virginia's Governor to allow new DNA testing of semen samples taken from Coleman's victim. The Governor agreed, and the DNA test confirmed what a jury had known more than twenty years earlier—that Coleman was guilty. There was only a 1-in-19 million chance that the DNA belonged to someone else. *See* Michael D. Shear & Maria Glod, *Tests Show Dead Man's Guilt,* Washington Post (January 13, 2006) available at 2006 WLNR 26032589.

2. *Sirhan Sirhan*. Tragically, Sirhan Sirhan became a household name around 45 years ago. Many of those households' residents would be shocked to learn that his attorneys have filed a habeas petition claiming that Sirhan is "actually innocent."

Sirhan shot Senator Robert F. Kennedy in 1968, at close range in the pantry of the Ambassador Hotel in Los Angeles. *See People v. Sirhan*, 497 P.2d 1121 (Cal. 1972). There has never been any doubt about his responsibility for this national tragedy. The assassination was witnessed by journalist George Plimpton, author Pete Hamill, and professional football player Rosey Grier. They were among the men who subdued and disarmed Sirhan after he fired his gun. *See* Pete Hamill, *Two Minutes to Midnight: The Very Last Hurrah*, The Village Voice (June 13, 1968).[2] Sirhan confessed to the murder, but

[2] Available at http://blogs.villagevoice.com/runninscared/2010/05/pete_hamills_ey.php (last visited August 20, 2012).

the trial court refused to accept his guilty plea and required the prosecution to prove its case. *Sirhan,* 497 P.2d at 1127, 1133. Sirhan testified at trial that, although he admitted killing Kennedy, he could not specifically recall the shooting or confessing to the crime. *Id*. at 1127. Nonetheless, "it was undisputed that defendant fired the shot that killed Senator Kennedy." *Id.* at 1125. The prosecution established that Sirhan had killed Kennedy because of the Senator's support for Israel, and Sirhan was sentenced to life imprisonment. *Id.* at 1125-27.

Sirhan's attorneys have recently filed a federal habeas petition that claims Sirhan is "actually innocent" of the crime. *See* Sur-Reply on the Issue of Actual Innocence, (Doc. 195)*, Sirhan v. Galaza*, No. CV-00-5686-CAS, (C.D. Cal. February 22, 2012). Sirhan's theory of "actual innocence" is that Sirhan was brainwashed or hypnotized into attacking Kennedy as a distraction while another, unidentified, shooter killed Kennedy as part of a conspiracy. *Id.* at 2-30. Because the habeas petition is pending in a district court within the Ninth Circuit, Sirhan's attorneys have invoked the Ninth Circuit's "actual innocence" exception to the 1-year statute of limitations. *Id.*

Sirhan's new allegations of "actual innocence" have been widely published. They have led to new conspiracy theories about Senator Kennedy's assassination forty years after the fact. *See, e.g.,* Robert Vaugh, *I know who was behind Bobby Kennedy's murder, by his actor friend Robert*

Vaughn, Daily Mail Online (January 12, 2009)[3]("one of the greatest crimes of the 20th Century remains unresolved by the official verdict, even to this day"). And they have compelled state prosecutors to defend a conviction that was final some 40 years ago.

3. *Thomas Arthur*. The lead amicus here, Alabama, has long dealt with a less famous, but no less false, claim of actual innocence. Thomas Douglas Arthur killed his girlfriend's husband in 1982. The evidence of guilt has always been overwhelming. Arthur's girlfriend, who was also convicted of the murder, initially told the police that she had been raped and that the rapist killed her husband. In fact, as she later testified, she and Arthur conspired to kill her husband and intended to split her husband's life insurance proceeds. This was Arthur's second murder; he was on work-release from his first sentence when he committed it.

Because of procedural errors, Arthur was tried and convicted for the murder three times. At the conclusion of Arthur's third trial in 1991, Arthur personally asked the jury to recommend that the judge sentence him to death. Arthur told the jury that he "wouldn't dare ask you for it if I thought for a minute that I would be executed." *State of Alabama v. Arthur,* Trial Tr. at 1181, CC-87-577 (Jefferson Cnty. Cir. Ct. 1991). Instead, Arthur told the jury that he had already managed to overturn his capital murder conviction on two previous occasions and that, if he was sentenced to death, he would be in a

[3] Available at http://www.dailymail.co.uk/news/article-1111444/I-know-Bobby-Kennedys-murder-actor-friend-Robert-Vaughn.html (last visited August 20, 2012).

better position to challenge his latest conviction too. The jury, and then the judge, obliged his request.

Since then, Arthur has made good on his promise to the jury. After his normal avenues of post-conviction litigation ran out, Arthur filed both an untimely federal habeas action and a civil rights action, in which he alleged his "actual innocence" and requested a DNA test of the rape kit used to examine his girlfriend-accomplice. Both actions were eventually dismissed. *See Arthur v. Allen*, 452 F.3d 1234, 1253-54 (11th Cir. 2006); *Arthur v. King*, 500 F.3d 1335, 1342 (11th Cir. 2007). The Eleventh Circuit noted that Arthur's civil rights action came very late in the process:

> [It was] filed twenty-five years after the crime, fifteen years after his third conviction and death sentence, nine years after the conclusion of his appeals on direct review, five years after the conclusion of his state postconviction proceedings, six years after the initial filing of his federal habeas petition, and four days before the Supreme Court denied his petition for writ of certiorari of his federal habeas petition.

Arthur v. King, 500 F.3d at 1342.

Even though the courts universally concluded that "there was ample evidence linking Arthur to [the] murder," *id.*, Arthur's "actual innocence" claims attracted public support. The Birmingham News has editorialized that "[i]t's inconceivable that the state of Alabama won't order DNA testing before executing a Death Row inmate who claims to be innocent." *DNA Testing for Arthur*, BIRM. NEWS (Nov. 29, 2007). The Atlantic has called Arthur's "excruciating case . .

. an ugly case, tracking many of the failings of the human condition." *Another Death Row Debacle: The Case Against Thomas Arthur*, THE ATLANTIC (Feb. 27, 2012).

Then, three days before his execution date, Arthur filed a successive state post-conviction petition that again alleged his "actual innocence." Arthur relied on newly discovered evidence—namely, a signed and notarized confession from another convicted murderer, Bobby Gilbert, asserting that Gilbert had raped the girlfriend-accomplice and committed the murder. *See Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010). The Alabama Supreme Court issued a last-minute order staying Arthur's execution so that this successive petition could proceed. *Id.*

The trial court conducted an evidentiary hearing, at which the "State presented overwhelming evidence that Gilbert's affidavit is false and that Gilbert and Arthur conspired to fabricate the affidavit." *Id.* at 744. Nonetheless, the court "in abundance of caution" directed the State to "conduct D.N.A. testing on the available physical evidence in this case." *Id.* at 739. Unsurprisingly, the testing was not exculpatory—the only available DNA belonged to the victim, not Gilbert. *Id.* at 740. Arthur appealed all the way to this Court, which denied his cert petition last year. *See Arthur v. Alabama*, 132 S. Ct. 453 (2011).

For his part, Arthur is currently proceeding with yet another civil rights action challenging Alabama's three-drug execution method. *See Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. Mar. 21, 2012). There is little doubt that he has his next "actual-innocence"

habeas petition prepared and ready to file when that civil rights litigation ends. The tolling rule at issue here can only assist his decades-long effort to thwart the imposition of his sentence.

* * *

The States' interests in finality and efficiency outweigh the interest of prisoners in raising untimely claims in habeas, not only upon the discovery of new evidence, but more than one year after the new evidence is discovered. The rule adopted by the Sixth, Ninth, Tenth and Eleventh Circuits undermines the States' interests, gives convicted criminals like Coleman, Sirhan, and Arthur a new avenue to abuse the system, and threatens a return to the days before Congress enacted the one-year statute of limitations. The amici States respectfully request that the Court grant the Warden's petition and reverse the Sixth Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LUTHER STRANGE
Ala. Attorney General

John C. Neiman, Jr.
Ala. Solicitor General
Andrew L. Brasher*
Dep. Ala. Solicitor Gen'l
OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Amicus Curiae
**Counsel of Record*

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