Capital Defense Journal

Volume 7 | Issue 2 Article 3

Spring 3-1-1995

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FACTS

Lloyd Schlup was brought to trial for the murder of a black inmate, Arthur Dade, while they were both incarcerated in a Missouri prison. Schlup was convicted and sentenced to death on the basis of testimony of two corrections officers who witnessed the attack on Dade; the State produced no physical evidence linking Schlup to the killing.

The two witnesses testified as follows. Officer Roger Flowers stated that he released the prisoners from Walk 2 (one of two walks on the lower level of the high security area and where Schlup had his cell) for their noon meal and, after relocking their cells, began to release the prisoners from Walk 1. After releasing the inmates on Walk 1, Flowers saw an inmate running against the flow of traffic carrying a steaming liquid. After this inmate, Rodnie Stewart,[1] threw the liquid in Dade's face, Schlup and another inmate, Robert O'Neal,[2] allegedly attacked Dade. Officer Flowers yelled for help and grabbed Stewart as the other two attackers fled.

Officer John Maylee testified that he witnessed the attack from Walk 7 (40-50 feet above Walk 1). His story matched that of Flowers in most, but not all, respects.[3] He added that O'Neal stabbed Dade several times in the chest after Schlup had jumped on Dade's back. He stated that he did not see what Schlup or Stewart did after the attack, but that he saw O'Neal run down the walk and throw the weapon out a window.

Schlup's defense was that he was not the third man involved in the attack. He rested much of his case on a videotape from a camera in the prisoners' dining room which "showed that Schlup was the first inmate to walk into the dining room for the noon meal, and that he went through the line and got his food."[4] The video showed that about fifteen seconds after Schlup entered the dining room several guards ran out in response to a distress call, and twenty-six seconds later O'Neal ran in dripping blood.[5] Schlup also argued that both Flowers and Maylee were mistaken in their identification of Schlup as the third assailant; Flowers because he had just brought a visitor to Schlup's cell and therefore had Schlup "on the brain," and Maylee because he had an obstructed view three floors above the killing.[6] Schlup's argument was focused on the timing of these events. He argued that since his cell was the one closest to the dining room, testimony that he walked at a normal, if not slow, pace should conclusively eliminate him as a possible participant in the killing.[7]

As the United States Supreme Court later pointed out, "[n]either the State nor Schlup was able to present evidence establishing the exact time of Schlup's release from his cell on Walk 2, the exact time of the assault on Walk 1, or the exact time of the radio distress call."[8] The fact that the jury returned a guilty verdict and death sentence[9] without knowing the exact timing of any of these events became critical in Schlup's appeals.

Schlup attempted to obtain relief at state habeas but was unsuccessful.[10] Thereafter he filed a pro se petition for federal habeas relief, claiming "that his trial counsel was ineffective for failing to interview and to call witnesses who could establish Schlup's innocence."[11]

These witnesses included three inmates whom Schlup said saw the killing[12] and another inmate, Randy Jordan, whom Schlup claimed was the third participant in the killing.[13] The district court denied relief on the ground that Schlup's ineffectiveness claim was procedurally barred,[14] and the Court of Appeals affirmed the denial.[15] After the United States Supreme Court denied certiorari,[16] Schlup (represented by new counsel) filed a second federal habeas petition in the district court.

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[1] Stewart was sentenced to 50 years' imprisonment without the eligibility for probation or parole. *Schlup*, 115 S. Ct. 851, 856 n.12 (1995). *See State v. Stewart*, 714 S.W.2d 724 (Mo. App. 1986).

[2] O'Neal was sentenced to death. *Schlup*, 115 S. Ct. 851, 856 n.12 (1995). *See State v. O'Neal*, 718 S.W.2d 498 (Mo. 1986).

[3] "Maylee testified that he saw Schlup, Stewart, and O'Neal running together against the flow of traffic, and that the three men had stopped when they encountered Dade." *Schlup*, 115 S. Ct. at 855 n.6 (citing Trial Tr. at 332). "Flowers noticed only Stewart running against the flow of traffic, and he testified that O'Neal and Schlup were at the other end of the walk on the far side of Dade." *Id.* (citing Trial Tr. at 249).

[4] *Schlup v. Delo*, 115 S. Ct. at 855.

[5] *Id.* O'Neal had to break the glass when he threw the weapon, a knife, out a window (as Officer Maylee testified). As a result O'Neal cut his hand. He stopped at a sink on Walk 2 to try to wash off the blood before entering the dining room. *Id.* at 855 n.4.

[6] *Schlup*, 115 S. Ct. at 855 n.6. Schlup also claimed that Maylee was "influenced by a postindictment conversation [he had with] another officer who had talked to Flowers." *Id.*

[7] *Id.* at 855 & n.5, 856 & n.10 ("Lieutenant Robert Faherty, the corrections officer on duty in the corridor leading from the prison floor to the dining room, testified that Schlup was the first inmate into the corridor... that he saw Schlup pause and yell something out one of the windows in the corridor, and that he told Schlup to move on. Faherty testified that nothing else unusual had occurred while Schlup was in the corridor.").

[8] *Schlup*, 115 S. Ct. at 856.

[9] The Missouri Supreme Court affirmed Schlup's conviction and death sentence. *State v. Schlup*, 724 S.W.2d 236 (Mo. 1987), *cert. denied*, 482 U.S. 920 (1987).

[10] The Missouri Supreme Court affirmed the denial of Schlup's motion for post-conviction relief. *Schlup v. State*, 758 S.W.2d 715 (Mo. 1988) (en banc).

[11] *Schlup*, 115 S. Ct. at 856.

[12] Lamont Griffin Bey, Ricky McKoy, and Van Robinson. *Schlup*, 115 S. Ct. at 856 n.14. Bey, a black inmate, testified that at the time of the killing he knew who Schlup was, but did not consider him a friend. He stated that he saw Stewart and O'Neal's attack on Dade and said Schlup was not involved. "Bey also stated, 'When this happened, there was a lot of racial tension in the prison .... I would not stick my neck out to help a white person under the circumstances normally, but I am willing to testify because I know Lloyd Schlup is innocent." *Id.* at 858 n.18 (quoting Affidavit of Lamont Griffin Bey, p.2-4 (Apr. 7, 1993)).

[13] *Id.*

[14] *Schlup v. Armontrout*, 1989 U.S. Dist. LEXIS 18285 (E.D. Mo. May 31, 1989).

[15] *Schlup v. Armontrout*, 941 F.2d 631 (8th Cir. 1991) (affirming district court not on procedural ground, but on ground that trial counsel had not been constitutionally ineffective), *reh'g denied*, 945 F.2d 1062 (1991).

[16] *Schlup v. Armontrout*, 503 U.S. 909, 112 S. Ct. 1273 (1992).

In this second petition Schlup raised several claims, including (1) actual innocence of the crime,[17] (2) ineffectiveness of counsel due to a failure to interview alibi witnesses, and (3) failure of the State "to disclose critical exculpatory evidence."[18] Schlup's efforts were futile, however, as the court dismissed the petition without holding a hearing.[19] The court held that Schlup had not met the *Sawyer v. Whitley*[20] "standard for showing that a refusal to entertain those claims would result in a fundamental miscarriage of justice."[21] *Sawyer* established that "a habeas petitioner 'must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[22]

Schlup next turned to the Court of Appeals and applied for a stay of execution pending the resolution of his appeal. The stay was denied.[23] In its final opinion—after Schlup's attorney obtained an affidavit from former Lieutenant Faherty[24] stating "that Schlup had been in Faherty's presence for at least two and a half minutes; that Schlup was walking at a leisurely pace; and that Schlup 'was not perspiring or breathing hard, and he was not nervous'"[25]—the court held that *Sawyer* was the appropriate standard and that Faherty's affidavit was "simply 'an effort to embellish and expand upon his testimony'" and was not grounds for a new trial.[26]

HOLDING

The United States Supreme Court granted certiorari and held that the standard of review for determining whether successive or abusive habeas claims will be heard on the merits—when the petitioner cannot establish cause and prejudice—is not the *Sawyer v. Whitley* "clear and convincing" standard but the lower "more likely than not" standard espoused in *Murray v. Carrier*.[27] The *Carrier* standard applies only to prisoners claiming to be actually innocent of the crime; this small class of petitioners has the burden of showing simply that "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[28] In addition to clarifying the standard of *Sawyer* vis-a-vis *Carrier*, the Court made it clear that with respect to habeas petitioners attempting to get evidence into the federal courtroom, the showing of innocence not connected to any other constitutional claim of error required by *Herrera v. Collins*[29] is higher than those required by both *Sawyer* and *Carrier*.[30]

ANALYSIS/APPLICATION IN VIRGINIA

I. Innocence Alone vs. Innocence Because of Error

The majority held that Schlup was not required to meet the high standard of *Herrera v. Collins*[31] because his claim was substantially a different claim. Herrera claimed that the Eighth Amendment would not tolerate his execution, despite the fact that his trial was error-free, because he was innocent.[32] Such a claim is a substantive claim.[33] On the other hand, Schlup claimed that his innocence could have been established but for constitutional violations that occurred at his trial—namely that his counsel was ineffective under *Strickland v. Washington*[34] and that the prosecution violated *Brady v. Maryland*[35] by withholding exculpatory evidence. In contrast to Herrera's free-standing claim of innocence, this type of claim is procedural, said the Court.

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[17] The district court rejected Schlup's motion to supplement the record "with affidavits from inmates who stated that they had witnessed the event and that Schlup had not been present." *Schlup*, 115 S. Ct. at 858 & n.18. "Two of those affidavits suggested that Randy Jordan—who occupied the cell between O'Neal and Stewart in Walk 2, and who . . . is shown on the videotape arriving at lunch with O'Neal—was the third assailant." *Id.* at 858.

[18] *Schlup*, 115 S. Ct. at 857-58. The "critical exculpatory evidence" included testimony of John Green in an affidavit to the effect that Green—an inmate serving as clerk of the housing unit at the time of the killing—was told by Officer Flowers to call for help and that he had in fact "notified base of the disturbance shortly after it began."

[19] *Schlup*, 115 S. Ct. at 858.

[20] 112 S. Ct. 2514 (1992). *See* case summary of *Sawyer, Capital Defense Digest*, Vol. 5, No. 1, p. 18 (1992).

[21] *Schlup*, 115 S. Ct. at 858. Schlup filed a motion to set aside the order of dismissal and two days later a supplemental motion stating that his attorney had obtained a second affidavit from Green (the housing clerk) confirming his earlier testimony about calling base shortly after the killing and identifying Jordan, not Schlup, as the third participant. The court denied both motions without opinion. *Id.* at 859.

[22] *Schlup*, 115 S. Ct. at 865 (quoting *Sawyer*, 112 S. Ct. at 2515).

[23] *Schlup*, 115 S. Ct. at 859. The Court of Appeals vacated its initial opinion, *Schlup v. Delo*, 1993 WL 409815 (8th Cir. Mo.), and issued a new one also denying relief or rehearing. 11 F.3d 738 (8th Cir. 1993). Missouri's governor granted a stay of execution one day before Schlup's execution date. *Schlup*, 115 S. Ct. at 860 n.27.

[24] *See supra* note 7 and accompanying text.

[25] *Schlup*, 115 S. Ct. at 859 (*quoting* Affidavit of Robert Faherty PP 4, 6 (Oct. 26, 1993).

[26] *Schlup*, 11 F.3d 738, 743 (8th Cir. 1993). The Supreme Court later held that although the Eighth Circuit "seems to have misapplied *Sawyer*, we do not rest our decision [reversing the Eighth Circuit] on that ground because we conclude that in a case such as this, the *Sawyer*, [sic] standard does not apply." *Schlup*, 115 S. Ct. at 865.

[27] *Schlup*, 115 S. Ct. at 865. As a result of this holding, Schlup's case was remanded for consideration under the lower *Carrier* standard. *See Carrier*, 477 U.S. 478 (1986).

[28] *Schlup*, 115 S. Ct. at 864 (quoting *Carrier*, 477 U.S. at 496).

[29] 113 S. Ct. 853 (1993).

[30] The lowest of the "access" standards is, of course, cause and prejudice for the default, as outlined in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Schlup faces an identical standard on the substance of his ineffective assistance of counsel and *Brady* claims.

[31] 113 S. Ct. 853. The *Herrera* court did not actually establish a standard of proof for such a claim. It merely assumed that federal courts could hear it if evidence of innocence was "truly persuasive" and that the doors of state courts were closed. Herrera's evidence was seen as not persuasive. *Id.* at 869.

[32] *Id.*

[33] *Schlup*, 115 S. Ct. at 860.

[34] 466 U.S. 688, 694 (1984) (holding that a petitioner claiming ineffective assistance of counsel must show two things: first, that "counsel's assistance was [not] reasonable considering all the circumstances," and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

[35] 373 U.S. 83 (1963).

Therefore, having filed a successive or abusive second federal habeas petition, "Schlup may obtain review of his constitutional claims only if he falls within 'the narrow class of cases . . . implicating a fundamental miscarriage of justice.' Schlup's claim of innocence is offered only to bring him within this 'narrow class of cases.'"[36]

What Schlup was claiming could "not by itself provide a basis for relief;" hence, its success "depend[ed] critically on the validity of the *Strickland* and *Brady* claims."[37] Schlup's conviction should not, therefore, be given as much respect as one like Herrera's (Schlup's evidence carries less of a burden), since without new evidence of innocence "a concededly meritorious constitutional violation" is not enough to establish a miscarriage of justice that could serve as the basis for review by a federal habeas court.[38]

> The Court concluded that a distinction must be made between a substantive *Herrera* claim and Schlup's procedural claim. Three items of evidence are particularly relevant: the affidavit of black inmates attesting to the innocence of a white defendant in a racially motivated killing;[39] the affidavit of Green describing his prompt call for assistance;[40] and the affidavit of Lieutenant Faherty describing Schlup's unhurried walk to the dining room.[41] If there was no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims.[42]

Because habeas corpus is an equitable remedy, the Supreme Court has crafted an exception to the "cause and prejudice" standard established in *Wainwright v. Sykes*[43] for review of successive[44] or abusive[45] claims.[46] *Murray v. Carrier* established this exception which allows a habeas court to hear a claim in order to "correct[] a fundamentally unjust incarceration."[47] As a means of ensuring that this fundamental miscarriage of justice exception would remain rare, the Court required that the petitioner be innocent of the crime; this exception's protection will thus never extend to "prisoners whose guilt is conceded or plain."[48]

The standard of review established for this category of claims—the standard that will be applied to Schlup on remand—does not require as strong a showing as *Herrera* or even *Sawyer*. This *Carrier* standard requires only a showing that "a constitutional violation has **probably resulted** in the conviction of one who is actually innocent."[49]

II. Innocence vs. Innocence of the Death Penalty

What the Court created in *Sawyer*, and what the Eighth Circuit wrongly applied in its review of Schlup's second habeas petition, was a higher standard, appropriate for cases in which the petitioner claimed he was "actually innocent of the death penalty."[50] For these cases, instead of using the *Carrier* "probably resulted" standard, the Court has "adopted a more exacting standard of proof" and "held that a habeas petitioner 'must show by **clear and convincing evidence** that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[51] "No attempt was made in *Sawyer* to reconcile this stricter standard with *Carrier*'s use of 'probably.'"[52]

The Court addressed two competing concerns in its analysis of which standard to apply in Schlup's case: "societal interests in finality, comity, and conservation of scarce judicial resources" and the petitioner's "interest in justice."[53] It concluded that the proper balance—"when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime"—could be struck only by *Carrier* and not by *Sawyer*.[54]

With respect to the societal interest, the Court stressed that claims like Schlup's are quite rare and observed that these claims must be supported by "new reliable evidence . . . that was not presented at trial."[55] And with respect to the individual interest, the Court stated that the "interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent."[56] Therefore applying the higher *Sawyer* standard—fashioned to reflect the relative importance of a claim of an erroneous sentence—to a case like Schlup's would "give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence."[57]

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[36] *Schlup*, 115 S. Ct. at 860-61 (citations omitted). *See McClesky v. Zant*, 499 U.S. 467, 493-494 (1991).

[37] *Schlup*, 115 S. Ct. at 861. "In light of our conclusion that the courts below applied the wrong standard in evaluating Schlup's gateway innocence claim . . . we need not express a view concerning the merits of Schlup's underlying constitutional claims." *Id.* at 861 n.30.

[38] *Id.* at 861.

[39] *See supra* note 12.

[40] *See supra* note 18.

[41] *See supra* note 7, and notes 24-25 and accompanying text.

[42] *Schlup*, 115 S. Ct. at 862.

[43] 433 U.S. 72 (1977). *Wainwright* held that procedurally defaulted claims may be heard upon a showing of (1) cause for non-compliance with state procedure and (2) prejudice to the defendant.

[44] Identical grounds rejected earlier on the merits. *See Schlup*, 115 S. Ct. at 863 & n.34 (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986)).

[45] Grounds available earlier but not relied upon. *Id.* (citing *Sanders v. United States*, 373 U.S. 1, 17-19 (1963)).

[46] A trio of 1986 cases can be cited for this proposition: *Kuhlmann v. Wilson*, 477 U.S. 436 (plurality opinion), *Carrier*, 477 U.S. 478, and *Smith v. Murray*, 477 U.S. 527.

[47] *Carrier*, 477 U.S. at 495.

[48] *Schlup*, 115 S. Ct. at 864 (noting that petitions claiming actual innocence are extremely rare) (quoting *Kuhlmann*, 477 U.S. at 452).

[49] *Schlup*, 115 S. Ct. at 864 (quoting *Carrier*, 477 U.S. at 496) (emphasis added). *Kuhlmann* added that the petitioner must show a "fair probability" that "the trier of the facts would have entertained a reasonable doubt of his guilt." 477 U.S. at 454, 455 n.17.

[50] *Sawyer*, 112 S. Ct. at 2523 (concluding that these type of actual innocence claims "must focus on those elements which render a defendant eligible for the death penalty").

[51] *Schlup*, 115 S. Ct. at 865 (emphasis added) (quoting *Sawyer*, 112 S. Ct. at 2515).

[52] *Schlup*, 115 S. Ct. at 865.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 865 (giving as examples "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence").

[56] *Schlup*, 115 S. Ct. at 866.

[57] *Id.*

The *Carrier/Schlup* standard, although not as exacting as either the *Herrera* or *Sawyer* standards, requires a showing that "a constitutional violation has **probably resulted** in the conviction of one who is actually innocent."[58] This "more likely than not"[59] level of scrutiny, however, requires a substantially higher showing than does the *Strickland* prejudice standard for review of ineffective assistance of counsel claims.[60]

As noted, the *Strickland* two-prong test assesses first the performance of the trial attorney and second the resulting prejudice, if any, to the defendant.[61] The crucial part of this test, the prejudice prong, considers whether "there is **a reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[62] The Court held that "a reasonable probability" did not require a preponderance of the evidence/more likely than not showing, but that it required more than a showing that the error has "some conceivable effect."[63] Significantly, the Court stated that a more likely than not standard—like the newly discovered evidence standard—"presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so . . . the appropriate standard of prejudice should be somewhat lower."[64]

Having concluded that the appropriate standard of review for Schlup's claim was *Carrier*, the Court found that "it surely cannot be said that a [reasonable] juror . . . would vote to convict [Schlup]. Under a proper application of either *Sawyer* or *Carrier*, petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."[65] This holding is important because it sends a clear message to lower courts: automatic approval of convictions will not be tolerated without a thorough consideration of new evidence of innocence, provided the evidence is related to and supports a claim of constitutional error.

III. *Schlup*: A Lawyer Hero Story

Schlup's case was one that could have easily been lost had it not been for excellent lawyering on the part of his habeas attorney. If it were not for his attorney's continuous investigation—his affirmative defense of his client,[66] as opposed to the passive adversarial testing done by Schlup's trial counsel—Schlup would probably never have been granted a second federal habeas review.

An Eighth Circuit judge who dissented in both denials of federal habeas relief concluded that Schlup's trial counsel had been ineffective not **despite** the fact that he had reviewed 100 interviews conducted by prison investigators, but **because** he had reviewed these transcripts and failed to follow any of them up with his own personal interviews.[67] In fact, Schlup's trial attorney did not interview anyone in person. He failed to contact any of the many witnesses who proved very helpful to Schlup's case on habeas: Green, the inmate clerk who telephoned in the disturbance; Jordan, the third participant according to Schlup; Bey, McKoy and Van Robinson, all witnesses to the killing according to Schlup; Flowers and Maylee, corrections officers who identified Schlup as the third assailant; and Faherty, the corrections officer who saw Schlup loiter on the way to lunch.

Schlup's habeas attorney performed commendably. At all stages of trial and appeal, all attorneys would do well to emulate such diligence. Although the entire trial was over, he was not satisfied that the first attorney had found everything there was to find. He was right; there was much left to be discovered. And it is this sort of persistence, this continuous investigation, that may very well save Schlup's life.

Summary and analysis by:
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[58] *See supra* note 49 and accompanying text.

[59] *Schlup*, 115 S. Ct. at 867 ("To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."). It should be noted that the *Carrier/Schlup* standard which the Court adopts "focuses the inquiry on the likely behavior of the jurors" and differs greatly from the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard of review of insufficient evidence claims; *Carrier* is much easier to satisfy. *Jackson*, the Court emphasized, "looks to whether there is sufficient evidence which, if credited, could support the conviction." While *Jackson* looks at the trier of fact's power to reach the conclusion it did, *Carrier/Schlup* looks at the likelihood of such a conclusion. As a result of these differing perspectives, Schlup (and most petitioners) would fail under *Jackson*, since "the mere existence of sufficient evidence to convict would be determinative." *Schlup*, 115 S. Ct. at 868-69. Under *Carrier* Schlup's claim of misidentification is given consideration, whereas under *Jackson* the mere existence of the identifications by Flowers and Maylee would exclude any possibility of success for Schlup.

[60] *Schlup*, 115 S. Ct. at 867 & n.45 (Citing *Strickland*, the *Schlup* court held that the *Carrier/Schlup* standard requires the petitioner to "make a stronger showing than that needed to establish prejudice. At the same time, the showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard required under *Sawyer*").

[61] *Strickland*, 466 U.S. at 687-96.

[62] *Id.* at 694 (emphasis added).

[63] *Id.* at 693-94.

[64] *Id.* at 694 (citation omitted). For a discussion of the *Strickland* test, see *Washington v. Murray*, 4 F.3d 1285 (4th Cir. 1993), and case summary of *Washington*, Capital Defense Digest, Vol. 6, No. 2, p. 8 (1994).

[65] *Schlup*, 115 S. Ct. at 869.

[66] *See supra* notes 7, 12, 18, & 24-25 and accompanying text.

[67] *Schlup*, 115 S. Ct. at 860 & n.26.