

New York State Supreme Court

Appellate Division – Second Department

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff/Respondent,

-vs-

MARTIN H. TANKLEFF,

Defendant/Appellant.

**AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT/DEFENDANT BY THE
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
NEW YORK STATE DEFENDERS ASSOCIATION,
HON. JOHN S. MARTIN, JR. (ret.), AND HON. HERBERT A. POSNER (ret.)**

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Suffolk County Indictment Numbers: 1290/88 and 1535/88

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INTEREST OF THE AMICI

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers (“NACDL”), the New York State Association of Criminal Defense Lawyers (“NYSACDL”), the New York State Defenders Association (“NYSDA”), Hon. John S. Martin, Jr. (ret.), and Hon. Herbert A. Posner (ret.), in support of the defendant/appellant’s brief in *People v. Martin Tankleff*.

The National Association of Criminal Defense Lawyers is the preeminent organization in the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, the NACDL has more than 12,800 direct members – and 92 state, local, and international affiliate organizations with another 35,000 members – including private criminal defense attorneys, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America’s criminal justice system.

The New York State Association of Criminal Defense Lawyers is a non-profit membership organization of over 800 attorneys who practice criminal defense law in the State of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing.

The New York State Defenders Association is a not-for-profit membership association of more than 1400 public defenders, legal aid attorneys, 18-B counsel and private practitioners throughout the state. With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 5,000 lawyers who serve as public defense counsel in criminal cases in New York, and also provides technical assistance to counties considering changes and improvements in their public defense systems.

Hon. John S. Martin, Jr. served as a United States District Judge for the Southern District of New York for thirteen years and was the United States Attorney for the Southern District of New York for three years. Prior to serving on the federal bench and as United States Attorney, Judge Martin served as Assistant to the Solicitor General of the United States (1967-69), consultant to the National Commission on Law Enforcement and the Administration of Criminal Justice (1966-67), Assistant U.S. Attorney for the Southern District of New York, and as Chief Appellate Attorney for that office (1962-66), and was a law clerk to the Hon. Leonard P. Moore, United States Court of Appeals (1961-62). Judge Martin also practiced in the private sector for nineteen years at several New York-based law firms. He graduated from Manhattan College in 1957 and received his LL.B. from Columbia Law School in 1961. In 2003, Judge Martin returned to private practice and is now a partner at Martin & Obermaier, LLC in Manhattan.

Hon. Herbert A. Posner served as a New York State Supreme Court Justice from 1982 to 2002, in both the Civil and Criminal Terms of that court. Prior to that Judge Posner served six years on the New York City Civil Court. He entered judicial service after nine years in the New York State Assembly, where he was the Chairman of the Environmental Conservation Committee until December 31, 1975. In December, 2001, Judge Posner retired after 35 years of distinguished public service.

The NACDL, NYSACDL, NYSDA, Judge Martin, and Judge Posner have an interest in ensuring that those who are accused of crimes although actually innocent are not convicted or punished. Accordingly, the amici urge this Court to clarify the standard for a post-conviction motion court's evaluation of a claim of actual innocence in New York, an issue upon which there is presently no appellate guidance. The amici further urge that this Court reverse Mr. Tankleff's conviction following application of the correct legal standard to his claim of actual innocence.

STATEMENT OF FACTS

We incorporate by reference the statement of facts and procedural history set forth in Mr. Tankleff's brief.

SUMMARY OF ARGUMENT

Under the Federal Constitution, a defendant who argues that he is actually innocent but was convicted following a trial lacking constitutional error must demonstrate by clear and convincing evidence that he is actually innocent and therefore, his conviction and sentence result in a “manifest injustice.” The existence of such a federal claim has been recognized, however the legal standard by which it should be judged is not well defined, although it is clearly “extraordinarily high.”

On the other hand, a defendant who moves to vacate his conviction on the grounds that he is actually innocent but was convicted following a trial infected with constitutional error is entitled to relief if he demonstrates that, considering all the available evidence, any reasonable juror would have a reasonable doubt of his guilt. Defendant need not show that he is actually innocent, only that there is a reasonable possibility that he could not be convicted.

The State Constitution grants at least those rights conferred by the Federal Constitution, and may not grant less. Because the conviction of one who is innocent violates the State Constitution, the State legislature has demonstrated a particular interest in guarding against such convictions. Consequently, a defendant has a right to raise a claim of actual innocence under the State Constitution, which offers more protection than its federal counterpart. Further, the legislature provided a statutory mechanism to address such constitutional violations in CPL § 440.10(1)(h) and, in CPL § 440.30(6), the evidentiary standard that must be applied to such claims – at a

hearing a defendant must prove each fact essential to his claim by a preponderance of the evidence.

The motion court in this case, although recognizing defendant's state constitutional right to challenge his conviction based on actual innocence, incorrectly held that in order to prevail, defendant must prove by clear and convincing evidence that he is actually innocent. By contrast, the Supreme Court has held that under the Federal Constitution, a defendant who alleges (as Mr. Tankleff did) that although he is actually innocent he was convicted following a trial infected with constitutional violations, need only meet a *lower* standard – that in light of all the evidence, a reasonable juror would have a reasonable doubt of his guilt – even where his claims are brought in a second habeas petition where both federal statutes and case law militate against reaching the merits of such claims (considerations not applicable to state court claims). Thus, contrary to the motion court's decision, the standard that a defendant must meet in order to prevail on a state post-conviction motion alleging actual innocence is lower than either of the federal standards set forth above.

There is no case law, constitutional principle, policy consideration, or expression of legislative intent that compels or justifies application of the burden applied by the lower court in this case: clear and convincing evidence of actual innocence. Rather, the available authorities and policy considerations demonstrate

that the appropriate legal standard is that enacted by the legislature, rather than the heightened standard imposed by the lower court.

Likewise, there is no authority or justification for the lower court's requirement that a defendant, in order to obtain *any* relief, offer evidence sufficient to compel dismissal of the accusatory instrument, precluding the possibility of the lesser relief of reversal of defendant's conviction. Rather, the legislature has provided that a court that has found proof sufficient to grant an Article 440 motion may, in its discretion, dismiss the accusatory instrument or may, in the alternative, reverse defendant's conviction and order a new trial. The lower court offered no rationale for judicially excising this statutorily-conferred discretion from the statute. Even assuming, without conceding, that the heightened standard applied by the trial court is the correct standard for New York post-conviction actual innocence claims, Mr. Tankleff's hearing proof met this standard and his motion should have been granted on that basis.

The amici therefore urge this Court to clarify the appropriate standard by which lower courts should judge post-conviction actual innocence claims, as there is presently no appellate guidance on this issue and, following application of the appropriate standard to the evidence in this case, reverse defendant's conviction.

ARGUMENT

POINT I. THE LOWER COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO VACATE HIS

**CONVICTION BASED ON HIS CLAIM OF ACTUAL
INNOCENCE.**

It is now well-established that a defendant may bring a post-conviction motion to vacate his conviction based on a claim of actual innocence under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, Article I, § 6 of the New York State Constitution, and CPL § 440.10(1)(h).

ACTUAL INNOCENCE CLAIMS UNDER THE FEDERAL CONSTITUTION AND THE
STANDARDS OF REVIEW FOR SUCH CLAIMS: REASONABLE POSSIBILITY OF
ACQUITTAL VS. CLEAR AND CONVINCING PROOF OF INNOCENCE

In *Herrera v. Collins*, 506 U.S. 390 [1993], a federal habeas corpus petitioner alleged that he was actually innocent in spite of the fact that his conviction followed a trial devoid of constitutional error. Under these circumstances, six justices of the Supreme Court accepted Herrera's contention that a claim of actual innocence is cognizable in a federal habeas petition, since "executing the innocent is inconsistent with the Constitution" (*Id.* at 419, 429-436]). The Court held that in order to prevail, a petitioner must show that he is *actually* innocent through proof sufficiently convincing to render his execution "constitutionally intolerable," not simply demonstrate that he could establish a reasonable doubt of his guilt. This standard, articulated in *Sawyer v. Whitley*, 505 U.S. 333, 336 [1992] required Herrera to demonstrate "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found him guilty" (*Id.* at 429-436). Herrera, however,

alleged no constitutional error and instead argued that he was convicted in the absence of such error but was actually innocent and therefore, his execution would result in a “miscarriage of justice.” Because Herrera failed to meet this standard, relief was denied and he was executed.¹

In *Schlup v. Delo*, 513 U.S. 298 [1995], the Supreme Court rejected the *Sawyer* “clear and convincing” standard in cases where a habeas petitioner alleges that in spite of actual innocence he was convicted due to a constitutional violation. In such cases, the Court held that the standard set forth in *Murray v. Carrier*, 477 U.S. 478 [1977] – that the constitutional violation “probably” resulted in defendant’s conviction – is the correct test by which to judge his claim (*Schlup v. Delo, supra*, 513 U.S. at 316).

Schlup argued that he was actually innocent but was convicted because his counsel was ineffective and because the State failed to disclose critical exculpatory evidence (*Id.* at 307). The Court held that Schlup’s claimed constitutional violations created a “gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits” (*Id.* at 315).

¹ *Herrera* was decided before exonerations based on DNA testing became common (Innocence Project, *Causes and Remedies of Wrongful Convictions*, <http://www.innocenceproject.com/causes/index.php>; Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6>; National Institute of Justice, *Post-conviction DNA Testing: Recommendations for Handling Requests*, 1, 26-27, <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf>), the effect of which has been to render actual innocence claims more common and often more credible than when *Herrera* was decided.

Thus, cases like *Herrera* that raise “freestanding” innocence claims unaccompanied by any allegation of constitutional error are subject to the “extraordinarily high” *Sawyer* “clear and convincing evidence of innocence” standard (*Id.* at 315-316), while for “gateway” claims alleging actual innocence accompanied by constitutional error at trial the lower, *Carrier* standard applies. The *Schlup* Court reiterated that “we have consistently reaffirmed the existence and importance of the exception [to procedural rules barring courts from reaching the merits of constitutional claims] for fundamental miscarriages of justice” (*Id.* at 321).²

Subsequently, in *House v. Bell*, 126 S.Ct. 2064 [2006], the Supreme Court revisited actual innocence claims, holding that House satisfied the *Schlup/Carrier* standard for a “gateway” claim of actual innocence, but failed to satisfy the *Sawyer/Herrera* standard for a “freestanding” innocence claim. Because House alleged actual innocence in conjunction with constitutional violations at trial – a “gateway” claim – relief was granted (*Id.* at 2078-87).

The Court granted relief because House demonstrated that it was more likely than not that a reasonable juror viewing both the trial evidence and new evidence would have a reasonable doubt as to his guilt. The Court noted that while House was

² Nine years after *Schlup*, Congress passed the Innocence Protection Act codifying, among other things, a defendant’s right to seek and obtain post-conviction DNA testing, evincing society’s growing belief in the importance of the wrongfully convicted obtaining justice and suggesting that Congress has also found that the conviction of an actually innocent person is constitutionally unacceptable.

able to demonstrate the existence of a reasonable doubt, he had not met the higher *Sawyer* standard of demonstrating by clear and convincing evidence that he was actually innocent (*Id.* at 2086-87). The *House* Court left open the question of whether a petitioner can ever prevail on a freestanding innocence claim in a federal habeas proceeding, but reiterated its prior rulings that gateway-type claims are cognizable and entitled to Federal Constitutional protection.

Federal actual innocence jurisprudence has developed in the context of claims raised in federal habeas corpus cases, specifically, in cases involving “successor” petitions (second or subsequent habeas petitions raising defaulted or procedurally barred claims). *Herrera* and *Schlup* all involved successor habeas petitions, where each petitioner failed to raise a claim of actual innocence in his first petition and, consequently, were subject to more stringent standards of review (*see, Barefoot v. Estelle*, 463 U.S. 880 [1983]; *Wainwright v. Sykes*, 433 U.S. 72 [1977]), while *House* involved constitutional claims that were defaulted under state law and thus normally procedurally precluded from review. In such cases, the threshold question is whether a court can reach the merits of petitioner’s claims at all (much less grant relief), in spite of statutory and/or common law procedural hurdles.

In the case of a successor federal habeas petition, the petitioner has already been convicted before a trial court, had his conviction affirmed by at least one and perhaps two state appellate courts, filed a previous federal habeas petition, then filed a

successor petition raising claims that were not previously presented or have been otherwise waived or defaulted. In such a case, there are considerable “systemic interests in finality, comity, and conservation of judicial resources” not present to the same degree in state post-conviction proceedings (*Schlup v. Delo, supra*, 513 U.S. at 322).

Additionally, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) severely limited the filing of successor petitions, creating a statutory bar to reaching the merits of most claims so raised (*see*, 28 U.S.C. §§ 2244, 2255).

Against this backdrop, two standards of federal review of actual innocence claims have developed, dependent on the type of claim made.

In freestanding actual innocence claims alleging actual innocence in spite of a constitutionally-acceptable trial, clear and convincing evidence of actual innocence (not simply evidence that would create a reasonable doubt as to guilt) is required (*Herrera v. Collins, supra*, 506 U.S. at 429-436).

In “gateway” claims alleging a constitutional violation resulting in conviction in spite of actual innocence, a reasonable possibility of a more favorable outcome is all that must be shown (*Schlup v. Delo, supra*, 513 U.S. at 316). Both standards are purely creatures of federal habeas litigation, developed in the context of ameliorating the effects of procedural bars to reaching the substance of meritorious claims of actual innocence.

Because state-level claims of actual innocence do not implicate the statutory and procedural hurdles present in federal habeas litigation, the “gateway” versus “freestanding” distinction is inapplicable. There is no state statutory bar to consideration of actual innocence claims analogous to the federal AEDPA. Likewise, the procedural history of prior review in state cases is not nearly as extensive as in federal cases where there have been several additional opportunities for review by the time of the court’s review. Thus, the restrictions that justify higher burdens before granting relief in federal habeas successor proceedings are not presented by state-level actual innocence claims.

In spite of the federal procedural hurdles noted above, Justice White, concurring in *Herrera*, argued that a defendant should only be required to show “that based on proffered newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could [find] proof of guilt beyond a reasonable doubt” (i.e., the *Carrier*, not the *Sawyer*, standard) (*Herrera v. Collins, supra*, 506 U.S. at 429 [White, concurring]). The dissenting Justice argued that the standard should be lower still (*Herrera v. Collins, supra*, 506 U.S. at 442 [Blackmun, J., dissenting]).

Consequently, it is now beyond question that actual innocence may form a basis to challenge a defendant’s conviction in federal post-conviction proceedings. Once

such a claim is raised, the focus turns to what type of claim has been made and, based on the type of claim, what standard of proof the movant is required to satisfy.

ACTUAL INNOCENCE CLAIMS UNDER THE STATE CONSTITUTION

Defendant's right to present post-conviction claims of actual innocence is also protected by Article I, §§ 5 and 6 of the New York State Constitution, whose protections surpass those afforded by the Federal Constitution.

Even if parallel to a Federal constitutional provision, a State constitutional provision's presence in the document alone signifies its special meaning to the People of New York; thus, the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy" (*People v. Alvarez*, 70 N.Y.2d 375, 379 [1987] citing Kaye, *Dual Constitutionalism In Practice and Principle*, 42 Rec AB City NY 285, 297-299). "Time and time again in recent years, the Supreme Court as well as its individual Justices have reminded state courts not merely of their right but also of their responsibility to interpret their own constitutions . . ." (*People v. Scott*, *supra*, 79 N.Y.2d at 505 [Kaye, J., concurring]; *see also*, *People v. Keta*, 79 N.Y.2d 474, 495-96 [1992] [state courts are not bound by decisions of the Supreme Court construing similar provisions of the Federal Constitution]).

"Historically, the New York Constitution has at times provided greater guarantees for individuals than those provided by the Federal Constitution" (*People*

v. Cahill, 2 N.Y.3d 14, 97-98 [2003] [G.B. Smith, concurring], citing *People v. Scott*, 79 N.Y.2d 474, 491 [1992]; *People v. Bora*, 83 N.Y.2d 531, 535 [1994]; *People v. Harris*, 77 N.Y.2d 434, 437-441 [1991]; *People v. Torres*, 74 N.Y.2d 224, 226 [1989]; *People v. Griminger*, 71 N.Y.2d 635, 637-639 [1988]; *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304 n. 4, [1986], *cert. denied* 479 U.S. 1091).

Judge Smith went on to reason that:

in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is . . . not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States (*People v. Cahill*, 2 N.Y.3d 14, 97-98 [2003] [G.B. Smith, concurring][citations omitted]).

Conversely, while states may grant enhanced constitutional protections, they may not, in relying on their constitutions, deny individuals the minimum level of protection mandated by the Federal Constitution (*see, Sax v. Votteler*, 648 S.W.2d 661, 664 [Tex. 1983]). In fact, examples of rights for which New York courts have found that the State Constitution provides more protection than its federal counterpart abound.

Although the search and seizure language of the Fourth Amendment and of Article I, § 12 are identical and generally confer similar rights (*People v. Harris*, 77 N.Y.2d 434, 437 [1991]), the Court of Appeals “has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved” (*People v. Robinson*, 97 N.Y.2d 341

[2001], citing *People v. Scott*, 79 N.Y.2d 474 [1992]; *People v. Keta*, *supra*; *People v. Griminger*, 71 N.Y.2d 635 [1988] [search warrants]; *People v. P.J. Video*, 68 N.Y.2d 296, 304 [1986], *cert. denied*, 479 U.S. 1091 [1987] [search warrants for obscene materials]; *People v. Johnson*, 66 N.Y.2d 398 [1985] [warrantless arrests and searches]; *People v. Bigelow*, 66 N.Y.2d 417 [1985]; *see also*, *United States v. Falsetti*, 771 F.Supp. 452 [W.D.N.Y. 1988] [the “Court of Appeals . . . has consistently refused to adopt the *Gates* rule in a variety of contexts, holding that under the state constitution the more restrictive *Aguilar-Spinelli* test still applie{s}”]).

Likewise, the Court of Appeals has refused to adopt the federal *Strickland* test for determining ineffective assistance of counsel claims (*People v. Vilardi*, 76 N.Y.2d 67 [1990]; *People v. Rivera*, 71 N.Y.2d 705 [1988]; *People v. Benn*, 68 N.Y.2d 941 [1986]).

Construing State constitutional right to counsel protections, the Court held that:

So valued is the right to counsel in this state (NY Const, art I, 6), it has developed independent of its Federal counterpart (US Const, 6th Am). Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal – well before certain Federal rights were recognized (*People v. Settles*, 46 N.Y.2d 154, 161 [1978]).

Indeed, although “the Right to Counsel Clause in the New York State Constitution is more restrictive than that of the Sixth Amendment to the United States Constitution, the New York Court of Appeals has interpreted the State Constitution to provide far more expansive protection to a defendant than its federal counterpart”

(*People v. Martinez*, 151 Misc.2d 641, 649 [Sup. Ct. N.Y. Co. 1991] citing *People v. Bing*, 76 N.Y.2d 331, 338-339 [1990]; *People v. Davis*, 75 N.Y.2d 517, 521 [1990]; *People v. Hobson*, 39 N.Y.2d 479, 483-484 [1976]).

When construing state constitutional provisions, New York courts have placed special emphasis on those constitutional protections that insure the innocent are not subjected to criminal sanction. For example, the New York Constitution provides – over and above any Federal constitutional protections –

for indictment by a Grand Jury in order to protect an innocent suspect from false accusation (*People v. Infante*, 124 A.D.2d 86, 90 [2nd Dept. 1987]). The constitutional right to be present at trial is for “the protection of the innocent (*People v. Mullen*, 44 N.Y.2d 1, 4 [1978]). The constitutional bar against the introduction of [a] suggestive [identification] procedure is to diminish “the risk of convicting the innocent through tainted identification procedures” (*People v. Gee*, 99 N.Y.2d 158, 161-62 [2002]).

(*People v. Cole*, 1 Misc.3d 531 [Sup. Ct. Kings Co. 2003]).

Only two lower courts (and no appellate courts) in New York have directly addressed the question of whether an actual innocence claim exists under the State Constitution; both found that it does. The first case was *People v. Cole, supra*; the second was the lower court in this case, which adopted *Cole*’s rationale and reached the same conclusions.

In *Cole*, defendant brought a CPL § 440.10 motion alleging actual innocence based on newly discovered evidence. The court held that such a claim exists under the State Constitution, which provides greater rights to criminal defendants than the

Federal Constitution, in order to protect an innocent person from wrongful conviction (*People v. Cole, supra*, 1 Misc.3d at 537-39, 541).

The stated purpose for these expanded constitutional protections is New York's special interest in insuring that "the innocent go free" (*People v. Claudio*, 83 N.Y.2d 76, 79 [1993]) and that society's interest in convicting the guilty and acquitting the innocent is fulfilled (*People v. Roselle*, 84 N.Y.2d 350, 356 [1994]).

Factors considered when determining whether a provision of our State Constitution should be construed more broadly than its federal analog includes a review of the constitutional provision concerned, which "proceeds from a judicial perception of sound policy, justice and fundamental fairness" and seeks to discover, for example, "any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of that individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right" (*In the Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 677 [2005] citing *People v. P.J. Video, supra*, 68 N.Y.2d 68 at 303; see also, *People v. Hale*, 173 Misc.2d 140, 167 [Sup. Ct. Kings Co. 1997]). Finding any of these factors suggests that a broader reading of the state constitutional provision could be appropriate (*Id.*).

With respect to claims of actual innocence, the Court of Appeals, as set forth above, and the legislature, as set forth below, had identified this issue “as being one of peculiar State or local concern.” In *Cole*, the court held that a defendant may raise a claim of actual innocence under the State Constitution because the conviction or incarceration of a guiltless individual violates the Due Process Clause of Article I, § 6 and the Cruel and Unusual Punishment Clause of Article I, § 5 (*People v. Cole, supra*, 1 Misc.3d at 541-542). Because society’s interest is the conviction of the guilty and the acquittal of the innocent, an essential part of the State Constitution is to guarantee that the guiltless are not punished (*People v. Cole, supra*, 1 Misc.3d at 541). Likewise, because New York has demonstrated heightened concern in insuring that innocent are not convicted, the State Constitution affords more protection than its Federal counterpart with respect to claims of actual innocence (*Id.*).

After engaging in this analysis, the *Cole* court found State constitutional protection for claims of actual innocence in addition to that offered by the Federal Constitution; the lower court adopted *Cole*’s reasoning when recognizing the existence of defendant’s actual innocence claim in this case.

At minimum then, a defendant has a post-conviction right under the Federal Due Process Clause to claim that he is actually innocent but was convicted following a trial infected with constitutional error, made clear by *Schlup* and *House, supra*. To

prevail, the defendant need only show that he is probably not guilty – that no reasonable juror could lack a reasonable doubt based on all the evidence.

Finally, aside from Federal and State constitutional provisions supporting post-conviction claims of actual innocence, a defendant also has a statutory basis for such claim. Because imprisonment of one who is actually innocent violates the New York State constitution (*People v. Cole, supra*, 1 Misc.3d at 541), post-conviction claims of actual innocence allege constitutional violations cognizable under CPL § 440.10(1)(h), which specifically provides a vehicle to address such claims (*Id.*).

THE STANDARD OF REVIEW FOR ACTUAL INNOCENCE CLAIMS IN NEW YORK STATE

Although it properly acknowledged defendant's right to bring an actual innocence claim, the lower court applied the wrong legal standard when denying defendant's motion to vacate his conviction.

The lower court, following the reasoning of the *Cole* court, held that clear and convincing evidence of actual innocence is the standard by which post-conviction actual innocence claims must be judged in New York. The court characterized defendant's claim as a freestanding actual innocence claim (like that made in *Herrera*; actual innocence in the absence of any constitutional violation) and applied the *Herrera* evidentiary standard.

Defendant, however, did not so limit his claim. Rather, he claimed actual innocence resulting from, among other things, the People's failure to turn over

exculpatory material and the lead investigator's trial perjury, which went uncorrected by the prosecutor and was ineffectively challenged by his trial counsel, constitutional violations similar to those raised in *Schlup*.³ Defendant's claim was therefore more analogous to a gateway-type claim and consequently, the lower court should have applied, at most, the lower *Schlup/Carrier* standard of review. In fact, however defendant's claim is characterized, the lower court applied far too high a standard of review, as set forth below.

Just as importantly, assuming without conceding that the standard applied by the lower court is the correct standard for New York post-conviction actual innocence claims, Mr. Tankleff's hearing proof, as reviewed in detail in his appellate brief, was more than adequate to satisfy even this heightened standard. In fact, as more fully reviewed in Mr. Tankleff's brief, the hearing proof supplied overwhelming evidence of innocence, easily capable of satisfying the clear and convincing threshold applied by the lower court, and his motion should have been granted on that basis.

LEGISLATIVE INTENT CONCERNING THE APPROPRIATE
STANDARD OF REVIEW FOR ACTUAL INNOCENCE CLAIMS IN NEW YORK

As noted in *Cole*, post-conviction relief by trial courts is a creation of statute, and the court's power to grant such relief is strictly limited by the relevant statutory enactment (*People v. Cole, supra*, 1 Misc.3d at 534). In this regard, a trial court is

³ *Schlup* alleged that the prosecutor failed to turn over exculpatory evidence and that his trial counsel was ineffective by failing to investigate his alibi or interview alibi witnesses.

empowered to hear and determine post-conviction claims of actual innocence by CPL § 440.10(1)(h) (*Id.* at 542).

Our legislature determined that to be entitled to relief one who has been granted a hearing on his post-conviction motion, as defendant was, has the burden of proving every fact essential to support his claim by a preponderance of the evidence (CPL § 440.30[6]; *see, People v. Bridget*, 73 A.D.2d 291 [2nd Dept. 1980]), *not* by clear and convincing evidence, the standard applied by the lower court. Whatever standard may be applicable to a federal habeas proceeding, in New York, the height of the bar for defendant's proof may be set no higher than that established by the legislature. The lower court's decision failed to address this statutory pronouncement and failed to provide any explanation for why it was not bound to apply that legislatively-enacted standard, rather than the higher standard that it chose to apply.

Legislative intent, as expressed in CPL § 440.30(1-a) (giving defendants a statutory right to request post-conviction DNA testing) also supports application of a standard of proof to actual innocence claims far lower than the clear and convincing evidence standard. To prevail under section 440.30(1-a), a defendant need demonstrate only a reasonable probability of a more favorable verdict, a standard that illustrates the legislature's heightened interest in insuring, by the best means available, that determinations of guilt are reliable, and that such decisions not be avoided on purely procedural grounds.

In this regard, CPL § 440.30(1-a) presumes that the DNA evidence sought to be offered, of unknown value at the time of the motion, will if tested, prove favorable to defendant and the motion court is required to determine the motion from this perspective (*People v. Pugh*, 288 A.D.2d 634 [3rd Dept. 2001]; *People v. Smith*, 245 A.D.2d 79 [1st Dept. 1997]).

Further, the language of CPL § 440.30(1-a) is mandatory: “the court *shall* grant the application for forensic DNA testing of such evidence” once the applicant has made a showing that DNA *could* establish his factual innocence. Establishing or disproving factual innocence through scientific means is the goal, which is not to be thwarted by hyper-technical reliance upon procedural hurdles (*accord, People v. Hayes*, 284 A.D.2d 1008 [4th Dept. 2001]; *see also, People v. Pitts*, 4 N.Y.2d 303 [2005]).

Legislative activity since the original enactment of CPL § 440.30(1-a) further demonstrates the legislature’s commitment to insuring that the merits of post-conviction factual innocence claims be addressed, not avoided on purely technical or procedural grounds. In 1999 and 2000, the legislature enacted a previously-missing right to appeal from the denial of a CPL § 440.30(1-a) motion (*People v. Kellar*, 89 N.Y.2d 948 [1997]). In an almost unprecedented waiver of the strict rules for seeking leave, the parties were granted as much as nine months (rather than the usual 30 days) to file a request to the Court of Appeals for leave to appeal in such cases (L. 1999,

Chapter 560 § 9; L. 2000, Chapter 8 § 2), again demonstrating that the legislature viewed a reliable determination of factual innocence as a goal important enough to forego even those procedural hurdles that have long been customary in other cases.

THE CORRECT STANDARD FOR ACTUAL INNOCENCE CLAIMS
IN NEW YORK: PREPONDERANCE OF THE EVIDENCE, *NOT*
CLEAR AND CONVINCING EVIDENCE OF ACTUAL INNOCENCE

Cole and the lower court's decision in this case both apply the clear and convincing evidence standard to the defendants' actual innocence claims, although neither court cites any authority justifying, much less compelling, application of this higher standard, rather than the preponderance of the evidence standard enacted by the legislature.

The court in *Cole* (*supra*, at 542) reasoned that:

In determining the proper standard of proof in any situation, the court must weigh the public and private interests affected and evaluate how the risk of error should be distributed [citations omitted].

However, for post-conviction motions in New York, the legislature has already performed this balancing test and enacted, in CPL § 440.30(6), the standard that it found affords appropriate weight to these competing concerns. In light of this statutory pronouncement, the motion court need not, and indeed, may not, decide *sua sponte* to apply a different standard.

In dicta, the *Cole* court found that the defendant's proof created a 55% chance of a more favorable result.⁴ In other words, had the court applied the preponderance of evidence standard enacted by the legislature, Cole would have prevailed on his motion. Unlike the *Cole* court, the lower court in this case did not indicate whether defendant's evidence would have satisfied a lower standard of proof.

The *Cole* court considered, but rejected, the standard of proof applicable to newly discovered evidence claims: new evidence that demonstrates a reasonable probability of a more favorable result (a standard analogous to the *Schlup/Carrier* federal standard). The court reasoned that defendant's constitutional right to present proof of actual innocence precluded application of the statutory proscriptions applicable to other, non-constitutional claims (*Cole, supra*, at 543). The lower court in this case adopted *Cole's* clear and convincing evidence standard and therefore implicitly rejected the lower standard as well although, somewhat incongruously, both courts rejected the application of heightened procedural hurdles (due diligence) and evidentiary hurdles (otherwise inadmissible reliable evidence) to actual innocence claims (*see, Cole, supra*, at 543).

⁴ The court, acknowledging its own uncertainty as to the correct standard, made this finding in case an appellate court should find another standard to be correct, however Cole did not appeal.

Both the *Cole* court and the lower court in this case failed to appreciate that the procedural history and restrictions present in those federal cases from which the clear and convincing evidence standard was taken are not present in this case.

Even under the heightened federal standards justified by a more protracted procedural history and the statutory bars to successive review presented by federal habeas cases, because Mr. Tankleff did not claim he was convicted in spite of actual innocence following a constitutionally perfect trial but instead, that constitutional violations infected his trial and resulted in his conviction in spite of actual innocence, the applicable burden of proof – at highest – would be a reasonable possibility of a more favorable result (*House v. Bell, supra*, 126 S.Ct. at 2078-87). In other words, evidence that creates a reasonable doubt, rather than clear and convincing evidence of actual innocence which would preclude any reasonable juror from voting to convict, is all that would be required to prevail in a federal habeas proceeding, in spite of the additional procedural hurdles there which are not presented by state post-conviction motions (*Id.*).

The lower court did not acknowledge or discuss the procedural differences between federal and state claims or provide an explanation for why, in spite of those differences, the higher federal standard should apply to state-level actual innocence claims. The lower court did not offer any rationale for why, given these very different procedural postures and the state legislature's express intent to the contrary, the clear

and convincing evidence standard should be applied to state level post-conviction actual innocence claims. Finally, the court made no attempt to explain why the lower federal standard is not the correct standard or, in light of the constitutional principals and state statutes discussed above, why a more protective standard should not apply to a defendant's claim of actual innocence in this State.

As noted above, while State constitutions may offer more protections than their federal counterpart, they cannot offer less; in other words, the State cannot adopt a burden greater than that required to prevail on a federal constitutional claim, precisely what the lower court did in this case.

In further support of its denial of defendant's motion the lower court noted that this "case has been reviewed extensively," however that provides no justification for application of higher the "clear and convincing" evidence standard. *Schlup* and *House* had been reviewed far more extensively, yet the Supreme Court held in those cases that a lower standard applied – based not on the quality or quantity of prior review, but rather on the strength of the evidence offered in support of the motion.

Nor does the presumption of regularity justify application of a higher standard of review. Although there is a presumption of regularity that attaches to convictions, that presumption "exists only until contrary substantial evidence appears" (*People v. Richetti*, 302 N.Y. 290, 298 [1951]; *People v. Lopez*, 97 A.D.2d 5, 6-7 [1st Dept. 1983]). At a post-conviction hearing on a motion challenging a conviction, a

preponderance of evidence sustaining defendant's claims is all that is required to overcome the presumption of regularity (*People v. Hasenstab*, 283 A.D. 433 [4th Dept. 1954]).

There is no statute, common law authority, or decisional history justifying or compelling the application of the clear and convincing evidence standard to actual innocence claims. The lower court cited to no such authority, and adopted without analysis the *Cole* court's conclusion that clear and convincing evidence should be the applicable standard.

In fact, consistent with the intent of our legislature, discussed above, both the Supreme Court and the Court of Appeals have long recognized that a defendant's right to present evidence of third party guilt – i.e., that he is innocent – may not be unduly restricted by procedural or evidentiary hurdles (*Holmes v. South Carolina*, 126 S.Ct. 1727 [2006]; *see also, Davis v. Alaska*, 415 U.S. 308 [1974]; *Chambers v. Mississippi*, 410 U.S. 284 [1973]; *Washington v. Texas*, 388 U.S. 14 [1967]; *Pointer v. Texas*, 380 U.S. 400 [1965]; *People v. Hudy*, 73 N.Y.2d 40 [1988]; *People v. Gissendanner*, 48 N.Y.2d 543 [1979]). As then-Justice Titone noted in his dissent in *People v. Washington*, 99 A.D.2d 848 [2nd Dept. 1984],

... as Professor Wigmore cogently observed, “any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent” (5 Wigmore, *Evidence* [Chadbourn rev], § 1477, p 359; *see also, McCormick, Evidence* [2d ed], § 278, p 674; dissenting opn of Holmes, J., in *Donnelly v. United States*, 228 U.S. 243, 277-278 [1913]; *People v.*

Edwards, 396 Mich. 551 [1976]). Moreover, in criminal prosecutions, there are constitutional limitations on exclusion of evidence favorable to an accused (US Const, 6th, 14th Amdts; NY Const, art. I, § 6; *Chambers v. Mississippi*, 410 U.S. 284 [1973]; *Pettijohn v. Hall*, 599 F.2d 476, 480 [1st Cir. 1979], cert. den. 444 U.S. 946; *People v. Simone*, 59 A.D.2d 918, 919-920 [2nd Dept. 1977]).

In a more recent example, in *People v. Primo*, 96 N.Y.2d 351, 356-357 [2001], the Court of Appeals held that the admissibility of third-party culpability evidence is to be determined under the general balancing analysis that governs the admissibility of all evidence. The Court rejected those cases that required a higher standard – a “clear link” between the third party and the offense – on the grounds that such a restriction impairs a defendant’s constitutional right to offer reliable evidence suggesting lack of guilt.

For all of these reasons, the lower court erred when it denied Mr. Tankleff’s motion because he failed to demonstrate clear and convincing evidence of innocence.

THE LOWER COURT ERRED IN ITS DETERMINATION OF THE REMEDY
APPLICABLE TO DEFENDANT’S ACTUAL INNOCENCE CLAIM

The lower court, like *Cole*, held that the appropriate remedy where a defendant demonstrates clear and convincing evidence of innocence is reversal of the conviction and dismissal of the accusatory instrument, however no relief may be granted until defendant meets that threshold. This result is contrary to the legislature’s intent, as expressed on CPL Article 440.

As *Cole* noted, where a defendant demonstrates by clear and convincing evidence that he is actually innocent – i.e., that no reasonable juror could fail to have a reasonable doubt of his guilt – a new trial would serve little purpose, as he could not be convicted (*People v. Cole, supra*, at 544). While this rationale is justified where a defendant has offered clear and convincing evidence of his innocence (and, in fact, Mr. Tankleff contends that he offered just such evidence in this case, entitling him to reversal and dismissal of the indictment), it does not justify the denial of any relief where a defendant’s proof meets a lower standard, since the legislature chose not to require this heightened degree of certainty before a conviction may be vacated. Instead, where defendant is able to prove only that he may be not guilty, but not that he is actually innocent, the legislature provided for reversal of defendant’s conviction and a new trial in which a jury will judge the quality of the proof.

For example, in cases alleging grounds for relief other than actual innocence where a defendant has not sustained his claims by clear and convincing evidence, a motion court may exercise its discretion to reverse defendant’s conviction and dismiss the accusatory instrument (CPL §§ 440.10[4], [5]); after a hearing proof establishing defendant’s claims by a mere preponderance of the evidence is sufficient to support dismissal of the accusatory instrument. The motion court also has discretion to grant lesser relief, if it so chooses, again based proof establishing defendant’s claims by a preponderance of the evidence. Presumably the legislature granted the court the

discretion to provide a range of relief, depending on the quality of proof offered over and above the minimal standard required to prevail.

Both *Cole* and the lower court's decision in this case fail to acknowledge this statutorily-conferred discretion and, by implication, eliminate it for post-conviction actual innocence claims. Neither court offers any explanation or rationale for why clear and convincing evidence is required to dismiss an accusatory instrument when a defendant claims actual innocence, while a lesser standard of proof may justify dismissal of an accusatory instrument in the case of any other post-conviction challenge. Nor does either court explain why no relief may be granted in the case of actual innocence claims while a far lesser quality of proof will result in relief in any other post-conviction claim.

Consequently, the lower court erred when it held that a defendant who claims actual innocence must offer clear and convincing evidence of innocence before any relief may be granted.

CONCLUSION

Post-conviction claims of actual innocence are cognizable under the New York State Constitution and CPL Article 440. Such claims are to be judged by the preponderance of evidence standard enacted by the legislature rather than the clear and convincing evidence standard applied by the lower court. Based on application of the appropriate standard to defendant's proof, his conviction should be reversed and

the indictment dismissed or, in the alternative, a new trial granted. Even under the higher, clear and convincing standard of proof applied by the lower court, Mr. Tankleff's motion should have been granted, as his hearing proof also satisfied that heightened standard.

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Respectfully submitted,

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CERTIFICATION

I certify, as attorney for the amici, that the above brief complies with the requirements of 22 NYCRR § 670.10.3(f). The brief was computer-generated using double-spaced 14 point Times New Roman font, with the exception of the footnotes which are single-spaced 12 point Times New Roman font. The brief, exclusive of the Table of Contents, Table of Authorities, and Interest of the Amici, contains 6,751 words as calculated by the program used to prepare it, WordPerfect ver. X3.

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