

No. _____

In the
Supreme Court of the United States

◆

JAVIER FLORES GAYTAN,
Petitioner,

v.

MICHAEL HARDEE,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a State, consistent with due process, obtain a criminal conviction and 37-year prison sentence against a criminal defendant where the primary evidence of the defendant's guilt was a wire-recording that the defendant nor the jurors at the defendant's trial were permitted to hear, but instead whose contents were summarized by the defendant's arresting officer?

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PETITION FOR WRIT OF CERTIORARI

Javier Gaytan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The unpublished decision of the Fourth Circuit (Pet. App. 1a) is reported at 742 Fed.Appx 774 (Mem) (4th Cir. 2018). The decision of the district court (Pet. App. 5a-7a) is unreported.

JURISDICTION

The judgment of the Fourth Circuit was entered on November 20, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The constitutional provisions and statutes involved in this Petition are:

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder

would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to

all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

FACTUAL BACKGROUND

At Mr. Gaytan's 2013 cocaine possession and transportation trial, a Greensboro Police Officer named Roberto Monge testified that before trial, he listened to a recording from a wire worn by a confidential informant during the sting operation that resulted in Mr. Gaytan's arrest. Pet. App. 10a-12a. Officer Monge made notes about what he heard on the recording. *Id.* He testified that the voices in the wire recording spoke Spanish, so he translated the voices into English, identified Mr. Gaytan's voice, and testified as to the substance of incriminating statements allegedly made by Mr. Gaytan, the confidential informant, and Mr. Gaytan's companion. *Id.* Mr. Gaytan testified at his trial that Officer Monge's account of the contents of the wire recording was false. Pet. App. 17a.

Thereafter, on September 23, 2013, the jury found Mr. Gaytan not guilty of conspiracy, guilty of trafficking cocaine by transportation, and guilty of trafficking cocaine by possession. Pet. App. 11a.

STATEMENT OF THE CASE

On September 23, 2013, a Guilford County, North Carolina jury found Javier Gaytan, the Petitioner herein, guilty of trafficking cocaine by transportation and guilty of trafficking cocaine by possession. Pet. App. 8a-9a. The state trial court sentenced Mr. Gaytan to serve between 175 and 222 months on each count, the sentences to run consecutively, for a total sentence of 350 months to 444 months. Pet. App. 9a.

Mr. Gaytan appealed his conviction and sentence in open court. On direct appeal, the North Carolina Court of Appeals held there was no error in Mr. Gaytan's convictions or sentences. Pet. App. 9a. *State v. Gaytan*, 236 N.C. App. 658 (*unpub.* 2014).

On December 22, 2015, Mr. Gaytan filed a Motion for Appropriate Relief in Guilford County Superior Court. By Order filed on July 25, 2016, the state trial court denied Mr. Gaytan's Motion without a hearing. Pet. App. 24a-26a.

Mr. Gaytan then petitioned the North Carolina Court of Appeals for a writ of certiorari. The petition for writ of certiorari was denied without hearing by the North Carolina Court of Appeals by Order entered on November 28, 2016. Pet. App. 22a-23a. The denial by the state Court of Appeals of Mr. Gaytan's petition for writ of certiorari constituted the exhaustion of all remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A); N.C. Gen. Stat. § 15A-1422(f); N.C. R. App. 21(e).

Mr. Gaytan filed a petition for writ of habeas corpus in the District Court on October 25, 2017 pursuant to 28 U.S.C. §§ 2241 and 2254. On August 1, 2018, the District Court entered an Order and Judgment dismissing Mr. Gaytan's petition. Pet. App. 5a-7a. Mr. Gaytan appealed the order and judgment on August 20, 2018, pursuant to 28 U.S.C. § 2253. The Fourth Circuit Court of Appeals dismissed Mr. Gaytan's appeal and request for a certificate of appealability on November 20, 2018. Pet. App. 1a. The judgment of the Court of Appeals is reported at 742 Fed.Appx 774 (Mem) (4th Cir. 2018).

Mr. Gaytan contends that he was denied federal due process in the manner in which the wire-

recording evidence was presented at his trial and was denied effective assistance of counsel. Pet. App. 11a-12a.

Mr. Gaytan respectfully petitions the Supreme Court for writ of certiorari, pursuant to Supreme Court Rules 10, 12, 13, and 14, requesting review of the judgments of the lower courts, the vacating of his convictions and sentences or, in the alternative, a new trial.

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME IMPORTANT MATTER AS RAISED BY THE PETITIONER HEREIN.

The proper procedures developed in the District Courts for assessing the accuracy of the translations of foreign-language wire-recordings are meaningless without effective counsel. At the time of his trial, Mr. Gaytan was a 22-year-old native Spanish speaking criminal defendant who simply had no idea what constitutional rights he possessed and who totally relied upon his trial counsel for the effective protection and application of his rights.

Thus, Mr. Gaytan's claim that he was denied due process of law in the manner and conduct of his trial is necessarily intertwined with his ineffective-assistance-of-counsel claim. It was grossly improper to allow a member of Mr. Gaytan's police takedown team to identify speakers, translate their alleged statements, and paraphrase for the jury the contents

of a wire recording for the purpose of establishing Mr. Gaytan's guilt.

Mr. Gaytan was entitled, by way of due process and fair-trial rights secured under the Sixth and Fourteenth Amendments to the Constitution of the United States, to present an objective recitation of any statements made on the wire recording. Fundamental fairness required the jurors to consider the recording with the assistance of a neutral, certified interpreter, so that they could determine whether Mr. Gaytan in fact spoke during the transaction at issue and, if so, what he said.

A. Method followed by state court in presenting wire evidence ran far afield of constitutional standards.

The Circuit Courts of Appeal have prescribed methods for assessing the accuracy of translations of foreign-language wire-recordings in criminal cases.

The Eleventh Circuit, for example, detailed the procedure for addressing challenges to the accuracy of an English language transcript of a conversation conducted in a foreign language, in *U.S. v. Montor-Torres*, 449 Fed.Appx. 820, 822 (11th Cir. 2011). In that case, a criminal defendant argued that a federal district court erred by admitting as substantive evidence transcripts of wiretap recordings translated from Spanish into English. The "proper procedure for challenging the accuracy of an English language transcript of a conversation conducted in a foreign language, the Eleventh Circuit wrote,

"has been delineated as follows:

Initially, the district court and the parties should make an effort to produce an 'official' or

‘stipulated’ transcript, one which satisfies all sides. If such an ‘official’ transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side’s version.”

Montor-Torres, 449 Fed.Appx. at 822. (citing *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir.1985)).

The Fifth Circuit adopted the same procedure outlined by the Eleventh Circuit in *U.S. v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979).

The Seventh Circuit described a similar procedure in *U.S. v. Zambrana*, 841 F.2d 1320, 1337 (7th Cir. 1988). In *Zambrana*, the jury was entitled to listen to the recordings at issue, to consider the accuracy of translations from foreign languages into English in transcripts produced by the prosecution, and “the defendant had ample opportunity not only to challenge the accuracy of the government’s transcript through cross-examination and expert testimony, but also, if he so desire[d], to present his own transcript[.]”

The Eighth Circuit has adopted a procedure that provides to a criminal defendant who, like Mr. Gaytan, identifies inaccuracies in a transcript of a recording translated from a foreign language into English, the right to furnish the jury with transcripts of the translated recording and, if desired, to employ an independent translator and transcriptionist. *U.S. v. Guitierrez*, 367 F.3d 733, 736 (8th Cir. 2004).

The Second Circuit also has adopted a standard under which a criminal defendant has the right to present a competing translated transcript to the jury where an agreement cannot be reached between the parties as to the content of a foreign-language recording. *U.S. v. Ben-Shimon*, 249 F.3d 98, 101-102 (2nd Cir. 2001). Unlike the defendant in *Ben-Shimon*, Mr. Gaytan has challenged both the accuracy of the translation in his case and the status of the only translator in his case: his arresting officer.

The Ninth Circuit has adopted a detailed procedure for dealing with foreign-language recordings, generally providing unto jurors the original recordings to listen to, along with transcripts containing English translations of the recordings and instructions regarding the recordings, translation, and transcripts. *U.S. v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998).

The Sixth Circuit has ruled that it is not an abuse of discretion for a District Court to provide an English transcript of a foreign-language recording to jurors where a defendant does not offer a substitute version of the transcript. *U.S. v. Martinez*, 21 Fed.Appx. 338, 339-340 (6th Cir. 2001). Unlike *Martinez*, the prosecutor in Mr. Gaytan's case did not present an English transcript of the recording to the jury. Instead, Mr. Gaytan's arresting officer referred to notes he made after Mr. Gaytan's arrest and told the jury what he thought Mr. Gaytan and others said on the recording. The jury was provided no transcript.

The First Circuit Court of Appeals outlined procedures for translating a foreign-language recording in *U.S. v. Morales-Madera*, 352 F.3d 1, 7 (1st

Cir. 2003). “When an audio recording is in English,” the Court explained,

“the common practice is to play the recording, make a transcript available, mark the transcript as an exhibit, and use it as an aid. Our court, and many others, have approved such use of transcripts as aids to the jury, provided the court makes clear to the jury that the tape rather than the transcript constitutes the best evidence.”

Morales-Madera, 352 F.3d at 7. (citing *United States v. Ademaj*, 170 F.3d 58, 65 (1st Cir.1999)).

“In ordinary circumstances,” the First Circuit further explained, the district court may allow the jury in cases in which a foreign-language recording is translated “to use the transcripts during deliberations.” *Id.* (citing *U.S. v. Rengifo*, 789 F.2d 975, 980 (1st Cir. 1986)).

As the First Circuit Court of Appeals explained in *Morales-Madera*, “[t]he language of the federal courts is English. Participants, including judges, jurors, and counsel, are entitled to understand the proceedings in English.” *Id.* at 7. Thus, under the Jones Act—the federal act at issue in *Morales-Madera* — “[p]roviding “an English-language transcript of wiretap evidence... is necessary.” *Id.* at 8.

Before transcripts of recordings can be submitted to a jury, however, “issues must be addressed both about the reliability of the transcription in the original language of the wiretaps and about the accuracy of the translation of those transcripts from the original language to English (here, from Spanish to English).” *Id.*

The First Circuit addressed both the minimum duties of defense counsel, consistent with the Sixth Amendment, in the preparation of a defense in a case involving a wire recording, and the responsibility of prosecutors in ensuring criminal defendants receive fair trials, explaining that

“[c]ommonly, the transcripts and the English translations of those transcripts are produced by the government and copies are then given to the defendant. Sound trial management and considerations of fairness caution that the government provide these copies to defense counsel adequately in advance, so that disputes concerning the reliability of the transcription in the original language and of the English translation may be brought to the attention of the district court or resolved by agreement.”

Id. at 8.

The First Circuit outlined in *Rengifo*, 789 F.2d at 983, the proper procedure for ascertaining a true and accurate translation of a foreign-language recording, writing that the best practice is for the court to “to try to obtain a stipulated transcript from the parties before trial or... [f]ailing such stipulation, each party should be allowed to introduce its own transcript of the recording provided that it is properly authenticated.”

The First Circuit envisioned a jury receiving two transcripts of the same recording, and then being instructed that there is a difference of opinion as to the accuracy of the transcripts and that it is up to the jury to decide which “version to accept.” *Id.*

“In short,” the First Circuit explained, “if the defendant believes the transcription of the tape is in error as to what was said, then the dispute should be brought to the attention of the court. Usually, the judge either makes a determination as to the correct transcription after listening to the tape or determines that the dispute is an issue of fact for the jury to decide. This procedure applies to transcription disputes regarding both English and non-English transcripts.”

Id.

In *U.S. v. Capers*, 61 F.3d 1100, 1107 (4th Cir. 1995), criminal defendants challenged on appeal a District Court’s decision to allow the jury to follow transcripts prepared by the prosecution while listening to the recordings at issue in the case. In Mr. Gaytan’s case, by contrast, no transcript was made or provided to the jury, the jury was not permitted to listen to the recording, and Mr. Gaytan had no reasonable opportunity to submit his own transcript in support of his claim that Officer Monge’s translated summary was inaccurate. Pet. App. 16a, n. 4. Thus, the judgment in Mr. Gaytan’s case places the Fourth Circuit at odds with its own precedent and that of several other circuits.

B. Sanctioning the procedures undertaken in Mr. Gaytan's case places the Fourth Circuit in conflict with decisions from other circuits.

Mr. Gaytan took the stand at his trial to deny, under oath, making the statements attributed to him by the State. It is uncontested that his trial counsel never obtained a copy of the wire recording, never provided it to Mr. Gaytan to listen to before his trial, never translated it, never transcribed it, and took no steps to seek to introduce to the jurors an accurate account of what, if anything, Mr. Gaytan said on the date of his arrest. The ineffective assistance of Mr. Gaytan's trial counsel thus deprived him of even the opportunity to participate in the proper procedure for introducing wire-recording evidence to a jury in a criminal trial.

"A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials." *U.S. v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). The State should have ensured that the presentation of the wire-recording evidence comported with due process notwithstanding the ineffective assistance of Mr. Gaytan's trial counsel. Instead, the State seized upon the incompetence of Mr. Gaytan's trial counsel and sought to utilize Officer Monge's testimony to establish Mr. Gaytan's guilt.

The procedures for presenting foreign-language wire recordings in criminal trials employed by the other circuits were not employed in Mr. Gaytan's case, despite his testimony under oath that he never uttered the statements attributed to him by Officer

Monge. No transcript was made or provided to the jurors.

Officer Monge was permitted to testify from notes he made about the identity of the speakers on the recording and the substance of their alleged statements. The prosecutor highlighted these alleged statements in his closing argument, presenting them as facts and exhorting jurors to find Mr. Gaytan guilty based on them. Pet. App. 11a.

Where a criminal defendant disputes the substance of a foreign-language translation of a wire recording, the trial court should ensure that “English transcripts become part of the record by introducing them in evidence. The English transcripts should be marked and admitted in evidence in addition to the wiretaps themselves.” *Morales-Madera*, 352 F.3d at 9.

The rationale behind admitting reliable English transcripts in cases involving foreign-language wire recordings forms the very premise of Mr. Gaytan’s petition herein, namely that “the [recording itself] is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description of it.” *Gordon v. United States*, 344 U.S. 414, 421 (1953).

The Fourth Circuit, like the courts below, clearly erred in sanctioning the highly irregular procedure employed by the state trial court in presenting statements attributed to Mr. Gaytan on a wire recording.

The decision is in conflict with the decisions of other United States Courts of Appeal on the same important matter. In addition, the decision has so far departed from the accepted and usual course of

judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, as set out in Supreme Court Rule 10(a).

C. Mr. Gaytan ineffective assistance of counsel claim is inexorably linked to his due process claim.

Defense counsel failed to object when Officer Monge testified, failed to request that the recording be played for the jury, and failed to request that the recording be interpreted for the jury by a neutral interpreter. These failures demonstrate that trial counsel's conduct fell outside the range of professionally competent assistance, thus satisfying the first prong of the ineffective-assistance-of-counsel test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Proffitt v. Wainwright*, 685 F.2d 1227, 1247 (11th Cir. 1982).

Because the wire-recording evidence was the only objective evidence at Mr. Gaytan's trial connecting him to the contraband, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The best evidence of the wire-recording's contents was the recording itself. N.C. Gen. Stat. § 8C-1, Rule 1002. Since the speakers in the recording spoke in Spanish, it was necessary to interpret the recording for English-speaking jurors. Allowing Mr. Gaytan's arresting officer to summarize what he thought speakers on the recording said violated the best evidence rule. Trial counsel's failure to object to the testimony under the "best evidence rule" amounted to

ineffective assistance of counsel and likely changed the outcome of the trial.

Trial counsel was entitled to obtain the complete investigative files of all law enforcement and prosecutorial agencies involved in the investigation and prosecution of Mr. Gaytan. Competent counsel would have obtained the wire recording, would have listened to it, and would have made a transcript of it. Absent trial counsel's errors, there is a reasonable possibility that Mr. Gaytan would not have been convicted.

D. The error affecting Mr. Gaytan's trial was so egregious as to warrant review and reversal by this Court.

The wire recording was the primary evidence connecting Mr. Gaytan to the contraband. Without it, the case against Mr. Gaytan was "plainly insufficient." *Id.*

In *U.S. v. Rivera-Rosario*, 300 F.3d 1, 5 (1st Cir. 2002) the jury was deprived of having English-language transcripts at all. Mr. Gaytan's case is a virtual mirror-image of the problems outlined by the Court of Appeals in *Rivera-Rosario*.

First, like in *Rivera-Rosario*, the prosecution failed to provide English transcripts of the wire recording to Mr. Gaytan in advance of his trial, thus depriving him of a fair opportunity to raise and resolve issues of reliability as to the wire recording evidence that constituted the heart of the government's case.

Secondly, a dispute arose at trial between Mr. Gaytan and the State about the accuracy of the English translation of the wire-recording evidence.

Third, the dispute was not resolved by the trial court by obtaining an agreement from the parties, nor was the jury permitted to resolve the conflict by comparing any alternative translation.

Fourth, English transcripts were never submitted to the jury at all. The First Circuit saw this fourth factor as determinative in the *Rivera-Rosario* defendant's appeal. *Rivera-Rosario*, 300 F.3d at 8.

Fifth, the problem was not corrected by the court reporter's transcribing the taped conversations as they were played in open court or by the jury determining the correct translation.

Finally, while the Government in *Rivera-Rosario* failed to present the recording evidence in its own appeal, in Mr. Gaytan's case, the State has steadfastly refused to provide Mr. Gaytan or his counsel with a copy of the wire-recording evidence. Mr. Gaytan requested discovery in his habeas proceeding and asked for the opportunity to address the District Court through further pleading after examining the recording, however the District Court denied his discovery request, and the Fourth Circuit upheld the denial. The State has thus accomplished the feat of convicting a man and sentencing him to 37 years in prison on the strength of a wire recording that no one at the man's trial even heard.

The untranslated wire-recording evidence had the potential to affect the disposition of an issue raised on appeal, therefore the Fourth Circuit should have applied the reversible error standard, should have reversed Mr. Gaytan's conviction and sentence, and should have ordered a new trial. *Rivera-Rosario*, 300 F.3d at 9.

Even under the plain error standard, the error in failing to provide the jury with an English transcript of the wire recording seriously affected the fairness, integrity or public reputation of the judicial proceedings that resulted in Mr. Gaytan's imprisonment for 37 years. *United States v. Olano*, 507 U.S. 725, 731-32 (1993). To send Mr. Gaytan to prison for 37 years on the strength of wire-recording evidence that neither he nor the jurors at his trial were even permitted to listen to is surely a miscarriage of justice. *United States v. Young*, 470 U.S. 1, 15 (1985).

II. MR. GAYTAN'S CLAIMS WERE TIMELY UNDER 28 U.S.C. § 2244(d)(1)(D) OR, IN THE ALTERNATIVE, HIS CREDIBLE CLAIM OF ACTUAL INNOCENCE CREATED A "GATEWAY" TO FEDERAL HABEAS REVIEW.

The District Court concluded that Mr. Gaytan's claims were untimely, a conclusion the Fourth Circuit affirmed. Mr. Gaytan respectfully submits that his claims were timely or, in the alternative, that his credible claim of actual innocence created a gateway to federal habeas review.

28 U.S.C. § 2244(d)(1)(D) provides that a petitioner may file an application for a writ of habeas corpus within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

The factual predicate of Mr. Gaytan's claim is on the as-yet undisclosed wire recording. While he was present for the conversations purportedly depicted on the wire recording and knows his memory, Mr.

Gaytan has never listened to the recording, and his trial counsel did not even arrange for him to listen to the recording before his trial.

Mr. Gaytan's trial testimony demonstrated specifically how the wire recording would exculpate him, how it would impeach Officer Monge's translation, and how it was likely that, in receipt of objective evidence confirming Mr. Gaytan's testimony and directly impeaching Officer Monge's, "no reasonable juror would have found [Mr. Gaytan] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

Mr. Gaytan respectfully submits that his habeas claims were timely under 28 U.S.C. § 2244(d)(1)(D), as the factual predicate of his claims – the *substance* of the wire recording – has yet to be disclosed.

In the alternative, new, reliable evidence not presented at trial—the wire recording itself and a translated transcript—makes it "more likely than not that no reasonable juror would have convicted [Mr. Gaytan] in light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

In considering gateway claims, "the district court must consider 'all the evidence' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *Teleguz v. Pearson*, 689 F.3d 322, 328 (4th Cir. 2012) (*citing Schlup*, 513 U.S. at 327-28). "The district court must make a holistic determination of how a reasonable juror would perceive all of the evidence in the record." *Teleguz*, 689 F.3d at 330. If it is "more likely than not any reasonable juror would have reasonable doubt' as

to [Mr. Gaytan’s] guilt, then [he] has satisfied the *Schlup* standard.” *Id.* at 328 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). Once the *Schlup* standard is met, the district court must review the merits of Mr. Gaytan’s substantive claims and, if Mr. Gaytan passes through the gateway, he is entitled to a review of all barred claims on the merits regardless of the applicable statute of limitations. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

The wire recording contains evidence that will exculpate Mr. Gaytan. The evidence is new: the only person who has listened to the recording since Mr. Gaytan’s arrest is Officer Monge. Mr. Gaytan was entitled to provide to the jurors the recording itself or a transcript of it. Considering *all* available evidence including the actual wire recording, a reasonable juror would have reasonable doubt of Mr. Gaytan’s guilt.

III. TRIAL AND DISTRICT COURTS’ DECISIONS WERE CONTRARY TO AND CONSTITUTED UNREASONABLE APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW.

The denial of Mr. Gaytan’s due process and ineffective assistance claims was “contrary to” clearly established federal law under 28 U.S.C. § 2254(d)(1). It is evident that Mr. Gaytan was denied due process in the conduct of his trial—one in which the trial court abused its discretion in permitting Mr. Gaytan’s arresting officer to translate statements on a wire recording from Spanish into English and to tell the jury what Mr. Gaytan allegedly said, where the wire recording was available to be played to the jury and interpreted by a neutral witness. This error had a “substantial and injurious effect or influence in

determining the jury's verdict[,]” as did the failure of Mr. Gaytan's counsel to object to the admission of Officer Monge's testimony. *Kotteakos v. United States*, 328 U.S. 750, 76 (1946).

It is also evident that the rejection of Mr. Gaytan's ineffective-assistance-of-counsel claims was contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1), namely the *Strickland* jurisprudence described above. Mr. Gaytan's trial counsel failed to adequately prepare for trial by failing to translate and transcribe the wire recording, and he failed to provide Mr. Gaytan with a copy of the recording and the means to listen to it. At Mr. Gaytan's trial, counsel failed to object to the admission of Officer Monge's testimony about the wire on best evidence or other grounds.

The District Court's and Fourth Circuit Court of Appeals' decisions in Mr. Gaytan's habeas action featured “unreasonable application” of clearly established federal law under § 2254(d)(1) in that, while the courts cited the *Strickland* standard, they unreasonably applied it to the facts of Mr. Gaytan's case. *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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