

No. \_\_\_\_\_

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IN THE  
*Supreme Court of the United States*

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KENNETH CLARK

*Petitioner,*

v.

MATTHEW CATE

*Respondent*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

A state prisoner seeking federal habeas review can overcome a failure to comply with the AEDPA's 1-year statute of limitations by establishing actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). The actual innocence standard requires that the petitioner proffer new reliable evidence that, when taken in conjunction with all of the existing evidence, would leave any reasonable juror with reasonable doubt as to the petitioner's guilt. In *House v. Bell*, 547 U.S. 518, 539-40 (2006), this Court reiterated that the standard "requires a holistic judgment about all the evidence" and that "[a]s a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact...." Yet the contours of that general rule, and the exceptions thereto, remain elusive. As this case demonstrates, there is a growing divide amongst the circuits regarding the correct application of this standard, which begs the question: Must a habeas petitioner make a threshold showing of reliability before the reviewing court will consider the evidence in totality to determine whether the petitioner has established actual innocence?

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**OPINIONS BELOW**

The Ninth Circuit’s opinion affirming the dismissal of Kenneth Clark’s petition as untimely was not reported. *Clark v. Cate*, 777 Fed. Appx. 185 (9th Cir. 2019). Pet. App. 1-3.

**JURISDICTION**

The Ninth Circuit’s opinion was filed on September 16, 2019. Pet. App. 1-3. Petitioner’s timely petition for rehearing/rehearing en banc, was denied on February 28, 2020. Pet. App. 4. The Court’s jurisdiction is timely<sup>1</sup> invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Title 28 U.S.C. Section 2254(a): “The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

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<sup>1</sup> On March 19, 2020, this Court extended the deadline for filing petitions for writ of certiorari from 90 days after the denial of a timely filed petition for rehearing to 150 days. Order List 589.

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

## **STATEMENT OF THE CASE**

### **A. Procedural history**

A San Bernardino County jury found Clark guilty of one count of second-degree murder of Misael Rosales and found true a firearm enhancement. The trial court sentenced Clark to 55-years-to-life in prison. The California Court of Appeal and California Supreme Court affirmed. Pet. App. 15.

Clark then filed a habeas petition in state court. The Superior Court held an evidentiary hearing on Clark’s claim that Monroe Thomas, the state’s key eye witness at trial, had falsely implicated Clark in the murder. After hearing live testimony from Thomas, the Superior Court denied relief. Pet. App. 19-20. Clark then filed petitions for writs of habeas corpus in the California Court of Appeal and the California Supreme Court, but was denied relief. Pet. App. 15.

Clark filed a petition for writ of habeas corpus in the United States district court. The petition was denied on timeliness grounds. Pet. App. 15-16. On appeal, the Ninth Circuit affirmed the district court’s finding that Clark’s petition was untimely under the AEDPA 1-year statute of limitations. *Clark v. Cate*, 581 Fed. Appx. 654, 655-656 (9th Cir. 2014). However, after

the district court had dismissed Clark's petition, this Court held, in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), that actual innocence constitutes an equitable exception to AEDPA's one-year limitations period. Because the district court did not have the benefit of *McQuiggin*, it did not analyze Clark's actual innocence claim. The Ninth Circuit remanded the case for further factual development regarding Clark's showing of actual innocence. *Clark*, 581 Fed. Appx. at 656-57. Following an evidentiary hearing, the district court found that Clark failed to establish actual innocence and dismissed his petition as untimely. Pet. App. 5-33. The Ninth Circuit affirmed. Pet. App. 1-3.

## **B. Factual history**

On Saturday, May 8, 2004, Monroe Thomas and his friend Misael Rosales spent the day drinking beer and using drugs. When they finished all of their alcohol, cocaine, and heroin, they concocted a plan to get money to buy more intoxicants. Rosales drove he and Thomas to the hospital where Rosales worked as a janitor. Once there, the men stole a floor buffer, placed it in the back of Rosales' Ford Explorer and then drove to a few local bars in hopes of selling the buffer. When their efforts proved unsuccessful, Rosales drove to a parking lot that served a small strip mall containing Muscoy Liquor, a convenience store, and the Brothers of the Sun motorcycle club, which operated like a bar open to the public. Pet. App. 21.

This parking lot was a hotspot in the Delman Heights neighborhood of San Bernardino County. Locals would buy alcohol at Muscoy Liquor and then stand in the parking lot drinking their beverages and visiting with friends. Patrons of the Brothers of the Sun would stand outside smoking cigarettes and mingling with those in the parking lot. Drug dealers and hustlers would hang around the parking lot looking for opportunities to make fast cash.

Rosales parked his Ford roughly in the middle of the parking lot sometime before 1:00 a.m., and they set out to make a deal. They approached a group of men including Bobby Neal and Duval “Buddha” Thomas.<sup>2</sup> Buddha was a local drug dealer and was interested in brokering a deal with the men, if he could find a third party. His objective was to provide drugs to Rosales and Thomas in exchange for the buffer, which would go to a third party who would pay Buddha in cash. They found a potential third party in Willie Owens, a man who owned a janitorial business who was initially interested in the buffer but then lost interest and cancelled the deal. As Buddha and Rosales and Thomas continued to haggle, the interaction grew increasingly hostile. Thomas recalled that Buddha punched Rosales and pulled out a gun.

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<sup>2</sup> To avoid confusion with *Monroe* Thomas (no relation) and to maintain consistency with the lower court opinions, Duval Thomas will be referred to by his nickname “Buddha.”



Thomas heard someone say: “You ought to just shoot the motherfucker and take it.” Thomas grabbed the buffer, put it in the back of Rosales’ Ford, and both Thomas and Rosales, in fear for their lives, rushed to get into the Ford, back out of their parking space, and exit the parking lot. Pet. App. 21-22.

Meanwhile, Clark arrived at the parking lot and double-parked his Chevy Yukon behind, and perpendicular to, Rosales’ Ford. Clark was in the company of two women, Coral Nettles and Jessica, his girlfriend. Clark exited his Yukon and entered Muscoy Liquor. While Clark was in the store, Rosales backed his Ford into Clark’s Chevy. The collision was minor, but Jessica was briefly pinned between the two vehicles, and the parking lot crowd started yelling. Hearing the commotion outside, Clark walked quickly back to his Chevy where he met Rosales, and the two inspected the damage to their cars. The damage to Clark’s Chevy was minimal to non-existent, and Jessica suffered some minor bruising. Despite this, the crowd in the parking lot continued to harass Rosales and Thomas with taunting and threatening statements. Pet. App. 10, 19.

Rosales returned to his car to retrieve his insurance information and Thomas, who had helped translate for Rosales whose English was not particularly strong, went to the passenger side of the Ford to retrieve a cigarette. Thomas recalled Clark suddenly approaching him and punching him in the face. Thomas ran towards the Brothers of the Sun motorcycle

club, and turned to see Clark pacing and waving a gun around. Thomas walked back towards Muscoy Liquor and, as he entered the store, he heard a gunshot. When he turned, he saw people running. He did not see who fired the shot. After the crowd had scattered, Thomas left the store and went back out to the parking lot to find Rosales had been shot in the head and his car insurance information lay near his body. Rosales died from the gunshot wound. Pet. App. 18-20.

Thomas is a convicted felon and a long-term heroin addict. He has changed his version of exactly what happened the night of Rosales' murder several times starting from the first time he was interviewed by police on May 9, 2004 to the day he testified at Clark's 2016 federal evidentiary hearing. Pet. App. 18-22.

At Clark's 2016 federal evidentiary hearing, four witnesses Paul Terry, Willie Owens, Lafennus Lindquist, and Coral Nettles all testified that they saw the murder, that Clark did not commit the murder, and they identified Buddha as the actual shooter. Indeed, they demonstrated for the court in the exact same way how Buddha moved his arm when he shot Rosales. Each of these witnesses had either suffered felony convictions, or admitted to being involved in illegal activity at some point in their lives. Each witness admitted some connection to Clark ranging from being friendly with Clark, but not having seen him since his 2004 arrest, to knowing Clark, but not

particularly liking him. And each witness explained to the court the reason for any perceived delay in coming forward several years after the fact. Pet. App. 22, 26-30.

### **REASONS FOR GRANTING THE WRIT**

A federal habeas petitioner can overcome a failure to comply with the AEDPA's 1-year statute of limitations by demonstrating actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383 (2013). A petitioner establishes actual innocence by offering new, reliable evidence and establishing that in light of that evidence, "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

This Court explained that the *Schlup* inquiry "requires a holistic judgment about all the evidence and its effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and it is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses." *House v. Bell*, 547 U.S. 518, 539-40 (2006) (internal citations and quotations omitted).

The contours of that general rule, and the exceptions thereto, remain elusive. As such, the circuits are divided regarding the correct application of *Schlup* standard. The Ninth Circuit applies a standard whereby it initially

makes discrete factual findings concerning the reliability of the new evidence, and if that evidence does not meet a threshold showing of reliability, the Court does not evaluate the totality of the evidence. The Fourth Circuit, to the contrary, strictly adheres to the holistic approach this Court describes in *House* and considers reliability in conjunction with that evaluation.

*Clark* exemplifies the Ninth Circuit approach. Here, rather than looking at all of the evidence and making the required probabilistic determination, the lower court separated the trial testimony from the new evidence. The court deemed the trial testimony virtually unassailable, finding that the jury “could” still convict based on Thomas’ trial testimony without reconciling how any reasonable juror *would* convict considering the trial testimony plus the new evidence. Pet. App. 14. Instead, the court simply disregarded Thomas’ numerous recantations because recantations should be viewed “with great suspicion.” Pet. App. 2 (internal quotes omitted). The court never analyzed how a reasonable juror would pick and choose between Thomas’ many statements to ultimately decide on the one that inculpated Clark.

Similarly, with respect to Clark’s four eyewitnesses, the lower court relied on discrete factual determinations to conclude the witnesses were not credible due to their personal connections to Clark, their delay in coming forward to testify, and some inconsistencies in their versions of the events.

Pet. App. 3. The court never analyzed how a reasonable juror, weighing all of the evidence, would disregard the “significant amount of new evidence” (Pet. App. 3) Clark presented and instead credit Thomas’ trial testimony despite his numerous recantations and inconsistent pre-trial statements regarding the shooting.

This case is not an outlier. The Ninth Circuit’s general practice is to scrutinize and disregard evidence of actual innocence without actually conducting the holistic analysis instructed by this Court. *See, e.g., Tizeno v. Madden*, 765 Fed. Appx. 214 (9th Cir. 2019) (“Tizeno presents only unreliable and incredible evidence from a witness’s recantation testimony to establish actual innocence. This cannot meet *Schlup*’s high standard.”).

The Ninth Circuit’s practice deviates from other circuits who follow this Court’s jurisprudence more closely. The Fourth Circuit, for example, strictly adheres to the holistic approach advanced in *House v. Bell*. In *Finch v. McKoy*, the petitioner’s conviction was largely based on two eyewitness identifications. Rather than disregard the recantation simply because recantations should be viewed with skepticism, the Fourth Circuit analyzed how a reasonable juror would respond when confronted with both the trial testimony and the recantation. *Finch v. McKoy*, 914 F.3d 292, 300-301 (4th Cir. 2019). Indeed, in *Teleguz v. Pearson*, 689 F.3d 322 (4th Cir. 2012), the Fourth Circuit remanded for an evidentiary hearing despite the district court

following the Ninth Circuit’s approach of disregarding recantation evidence. Instead, the Fourth Circuit required that the lower court conduct an evidentiary hearing and consider the new evidence in conjunction with the evidence presented at trial. *Id.*

Were the Court to grant this petition, the Court could resolve this circuit split and clearly define the correct application of the *Schlup* inquiry. The Court could explain when lower courts may deviate from the general principle that the *Schlup* analysis does not turn on discrete factual findings. The Court could also clarify when a recantation should be viewed with skepticism and when such evidence should be viewed more objectively (perhaps because, as here, the recanting witness of his own accord approached the petitioner’s family to recant his trial testimony and offered logical reasons why he falsely implicated the petitioner). The Court could also clarify the appropriate level of deference that appellate courts give to the district courts who have decided the *Schlup* inquiry in the first instance. Pet App. 2 (“The standard of review for a *Schlup* claim is not entirely settled in this circuit.” *Stewart v. Cate*, 757 F.3d 929, 938 (9th Cir. 2014).).

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: July 27, 2020

By: /s/ Jonathan C. Aminoff  
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**CERTIFICATE PURSUANT TO RULE 33**

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Pursuant to Rule 33.2, I hereby certify that this petition is less than 40  
pages and was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA  
Interim Federal Public Defender

DATED: July 27, 2020

By: /s/ Jonathan C. Aminoff  
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