No. _____

IN THE

Supreme Court of the United States

JOHN WILLIAM CHILDERS,
Petitioner,
v.

SCOTT CROW,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a state prisoner seeks federal habeas relief under 28 U.S.C. § 2254, there are various procedural bars that often preclude relief on the merits. But a state prisoner's actual innocence is a well-recognized avenue to avoid these procedural bars. *See*, *e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 392-393 (2013). Below, over a dissent by Judge Seymour, the Tenth Circuit held that John Childers did not raise a gateway actual innocence claim in the federal district court to excuse his procedural defaults, and further held that he could not raise a gateway actual innocence claim for the first time on appeal. It did so despite the State's suggestion that the record on appeal was inadequate and that a remand to the district court to consider the claims on a fully developed record would be appropriate under the circumstances. The questions presented are:

I. Did Mr. Childers, as a pro se state prisoner, adequately allege a gateway actual innocence claim to permit the lower courts to excuse any procedural hurdles to relief on the merits in this § 2254 proceeding.

II. If Mr. Childers did not adequately allege a gateway actual innocence claim in the federal district court, did his failure to do so preclude him from raising the claim in the Tenth Circuit.

III. Alternatively, should this Court vacate the lower courts' decisions and send this case back to the district court to consider Mr. Childers' petition anew under a fully developed record.

RELATED PROCEEDINGS

Childers v. Crow, Case No. 4:17-cv-00416-GKF (N.D. Okla. Jan. 6, 2020)

Childers v. Crow, Case No. 20-5014 (10th Cir. June 14, 2021)

State v. Childers, Case No. CF-2007-341 (Del. Cnty. Okla. Sept. 8, 2009, Dec. 8, 2009, June 17, 2013, Mar. 20, 2014, & Sept. 22, 2016)

State v. Childers, Case No. CF-2007-359 (Del. Cnty. Okla. Sept. 8, 2009, Dec. 8, 2009, June 17, 2013, Mar. 20, 2014, & Sept. 22, 2016)

State v. Childers, Case No. C-2010-243 (Okla. Ct. Crim. App. Sept. 24, 2010)

State v. Childers, Case No. MA-2013-612 (Okla. Ct. Crim. App. July 11, 2013)

*State v. Childer*s, Case No. PC-2016-919 (Okla. Ct. Crim. App. Dec. 14, 2016)

State v. Childers, Case No. CF-1998-272 (Del. Cnty., Okla. June 5, 2006)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES CITED

PAGE

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner John William Childers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision is published at 1 F.4th 792 and is included as Appendix A. The Tenth Circuit's order granting a certificate of appealability is included as Appendix B. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix C. The district court's order denying Mr. Childers' federal habeas petition is available at 2020 WL 59822, and is included as Appendix D.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 2254. The Tenth Circuit dismissed the appeal and denied Mr. Childers' petition for rehearing en banc on October 13, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, *inter alia*:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2254 (full text included as Appendix E)

STATEMENT OF THE CASE

John Childers has three Oklahoma state sex offense convictions. Pet. App. 2a-3a. He spent around eight years in prison for those convictions. *Id.* After his release from prison, he pleaded guilty to two sex-offender-registration-related offenses (living too

close to a school and failing to report a change of address). Pet. App. 3a. Shockingly, an Oklahoma state court judge imposed two consecutive life sentences for these registration offenses. *Id.* Because Mr. Childers moved to a home near a school and failed to report the move, a state court judge sent him to prison for the rest of his life (plus another life).

That sentence would appear to shock the conscience (it does ours). But this petition is not about the sentence. At least not directly. This petition is about the two registration convictions underlying Mr. Childers' draconian consecutive life sentences. Those convictions should have never come about because, under the registration laws that applied to Mr. Childers, he was not even prohibited from moving to the home by the school, and he had already completed his sex-offender-registration obligations at the time of this move. Stated simply, Mr. Childers did nothing wrong when he moved. Yet, he is still in prison for the rest of his life (twice over). And he will remain there without this Court's intervention.

The lower courts (state and federal) never reached the merits of Mr. Childers' claims. *See* Pet. App. 4a-6a. That's because Mr. Childers, as a near illiterate pro se state prisoner, couldn't figure out the rules. The state habeas courts denied his petitions on procedural grounds, and a federal district court did the same with his federal habeas petition. *See* Pet. App. 4a-7a. Below, the Tenth Circuit initially did more than any other court had done – it granted a certificate of appealability and appointed counsel for Mr. Childers. Pet. App. 1a, 8a. But when counsel invoked actual innocence to avoid the various procedural hurdles, then attacked the convictions as

unconstitutional, the Tenth Circuit invoked its own procedural hurdles ("the general rule against considering issues for the first time on appeal," Pet. App. 9a-10a) to deny relief without reaching the merits. Pet. App. 9a-13a, 16a. According to the Tenth Circuit (over Judge Seymour's dissent), Mr. Childers (a near illiterate pro se state prisoner) did not invoke the actual-innocence exception in the federal district court, and for that reason, the Tenth Circuit refused to allow him (through counsel) to invoke the exception on appeal. Pet. App. 10a.

The Tenth Circuit's decision – that Mr. Childers did not invoke actual innocence in the district court – is contradicted by the record. Mr. Childers "repeatedly attack[ed] the constitutionality of his 2009 convictions" and asked the federal district court to void his convictions. Pet. App. 20a-21a. He also criticized the state courts for refusing to address the merits of his claims and for " 'allowing a 'manifest injustice' to remain uncorrected.'" Pet. App. 20-21a. The Tenth Circuit's contrary decision conflicts with this Court's precedent requiring courts to liberally construe pro se pleadings. *See*, *e.g.*, *Sause v. Bauer*, 138 S.Ct. 2561, 2563 (2018); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Especially under the unique facts of this case, review is necessary.

The Tenth Circuit's further decision – that Mr. Childers waived his gateway actual innocence claim because he did not raise it in the federal district court – cannot be squared with decisions from this Court. This Court has held that a state prisoner's actual innocence overcomes procedural bars to relief. *See*, *e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 392-393 (2013). And this Court has expressly held that this actual-

innocence exception applies equally to state procedural bars and federal procedural bars to relief. *Id.* at 394 ("It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States."); *see also Coleman v. Thompson*, 501 U.S. 722, 751 (1991) ("We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own."). The Tenth Circuit's decision below – refusing to consider the actual-innocence exception because of a federal waiver/forfeiture rule – is inconsistent with this precedent. It is also inconsistent with a well-established line of precedent that permits courts of appeals to consider new claims to avoid injustice. *See*, *e.g.*, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Review is necessary.

Review is also necessary because this second question is exceptionally important. Most state prisoners who seek federal habeas relief do so without counsel (like Mr. Childers here). Pro se state prisoners are not versed in court procedures and requirements. Unfortunately, they're often incapable of following the complex rules underlying federal habeas review. *See*, *e.g.*, *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (noting that federal habeas law's procedural-default doctrine is a "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions") (quotation omitted). To preclude a state prisoner from invoking the actual-innocence exception based on a procedural rule risks "the injustice of incarcerating an innocent individual." *McQuiggin*, 569 U.S. at 393.

On the merits, the Tenth Circuit's decision is incorrect. There is no persuasive basis to preclude a state prisoner from invoking the actual-innocence exception on appeal simply because the pro se state prisoner did not adequately invoke that exception in the federal district court. The Tenth Circuit's "general rule against considering issues for the first time on appeal," Pet. App. 9a-10a, cannot possibly outweigh a state prisoner's actual innocence.

This case is also an excellent vehicle to resolve this exceptionally important question. Mr. Childers received two consecutive life sentences because he moved to a home near a school and failed to report the move. Not only is that sentence indefensible, but, under the Oklahoma registration laws that applied to Mr. Childers, he was not even prohibited from moving to this home, nor was he even subject to registration requirements at the time of this move. Mr. Childers is actually innocent of these offenses, and the lower courts should address his claims on the merits, rather than refuse to do so on procedural grounds.

Alternatively, if this Court does not grant the petition outright, it should at least grant this petition, vacate the Tenth Circuit's decision, and remand this case to the federal district court to reconsider Mr. Childers' petition on a fully developed record. The State recommended this remedy below, and it is eminently reasonable under the unique facts of this case.

A. Legal Background

A state prisoner may challenge a state conviction in federal court if the state conviction violates federal law. 28 U.S.C. § 2254(a). But doing so is easier said than

done in light of the various procedural hurdles to relief. In general, federal courts will not consider unexhausted claims, 28 U.S.C. §225(b)(1), untimely claims, 28 U.S.C. § 2244(d)(1), or second or successive claims, 28 U.S.C. § 2244(b). Federal habeas courts also generally refuse to entertain procedurally defaulted claims – claims that the state prisoner did not properly raise in the state courts. *See Dretke v. Haley*, 541 U.S. 386, 392 (2004). This procedural-default doctrine "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *Id.* "[T]he doctrine has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Id.* The doctrine is grounded in "considerations of comity and concerns for the orderly administration of justice." *Id.* (quotations omitted).

To overcome a procedural bar, a state prisoner can show cause and prejudice. *Id.* Or a state prisoner can show that he is "actually innocent" of the offense. *Id.* This Court adopted the "actual innocence" exception in *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"). Actual innocence is not a freestanding claim, but instead "allow[s] a prisoner to pursue his constitutional claims [] on the merits notwithstanding the existence of a procedural bar to relief." *McQuiggin*, 569 U.S. at 392.

This Court has since applied the actual-innocence exception to permit state

prisoners to overcome various procedural hurdles, permitting successive petitions asserting previously rejected claims, abusive petitions asserting claims that could have been raised earlier, petitions where the prisoner failed to develop facts in state court, and petitions where the prisoner failed to observe state procedural rules, including filing deadlines. *McQuiggin*, 569 U.S. at 392-393 (citing cases).

This Court has also made clear that the actual-innocence gateway can overcome federal procedural rules as well. In *McQuiggin*, for instance, this Court rejected the state's argument that the actual-innocence gateway applied to state time-bars, but not federal time-bars: "It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States." 569 U.S. at 394. Rather, this Court has consistently held that the same actual-innocence standards apply to all procedural rules, regardless whether those rules are state or federal. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts"); *Coleman v. Thompson*, 501 U.S. 722, 751 (1991) ("We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own."). Finally, the actual-innocence exception is alive and well: the exception "survived AEDPA's passage." *McQuiggin*, 569 U.S. at 393.

State prisoners do not have the right to appointed counsel when litigating federal habeas petitions. So most § 2254 petitions are filed *pro se* (like the one at issue here). In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this Court, after acknowledging that

most pro se pleadings are done "inartfully," held that pro se filings are held "to less stringent standards than formal pleadings drafted by lawyers." In subsequent cases, this Court has made clear that a "handwritten pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This is so because "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims." *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *see also Neitzke v. Williams*, 490 U.S. 319, 330 (1989) (noting that pro se litigants are "less capable of formulating legally competent initial pleadings"). As Justice Scalia put it, it is an "injustice" to "let[] the [pro se] litigant's own mistake lie." *Castro v. United States*, 540 U.S. 375, 386-387 (2003) (Scalia, J., concurring in part).

Under this liberal-pleading rule, "[a]n application for [collateral] relief ought not to be held to the niceties of lawyers' pleadings." *Sanders v. United States*, 373 U.S. 1, 22 (1963).

> Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition.

Price v. Johnson, 334 U.S. 266, 292 (1948).

When a litigant fails to raise a claim in the district court, an appellate court ordinarily will not consider that claim. *Hormel*, 312 U.S. at 556 (1941). But there is an exception to this rule "where injustice might otherwise result." *Id.* at 557; *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (same). This "injustice" exception

parallels this Court's actual-innocence precedent, as a gateway claim of actual innocence is also known as the "fundamental miscarriage of justice exception." *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

B. Proceedings Below

1. In 1999, Mr. Childers pleaded guilty in an Oklahoma state court to three sex offenses committed in 1992. Pet. App. 2a-3a. The state court imposed 10-year consecutive sentences. Pet. App. 3a. Two of the three sentences were suspended, however. R1.8-9.[1] After Mr. Childers successfully completed a sex offender treatment program while incarcerated, he was released from prison (in March 2005). R1.8-9; *see* Pet. App. 3a. Upon release, Mr. Childers registered under Oklahoma's Sex Offenders Registration Act (SORA). Pet. App. 3a.

2. In September 2007, the state charged Mr. Childers with two sex-offender-registration-related offenses: (1) living within 2,000 feet of a school, Okla. Stat. tit. 57, § 590; and (2) failure to report a change of address, Okla. Stat. tit. 57, § 584(D). Pet. App. 3a. Mr. Childers was charged under the then-current versions of those statutes, rather than the versions that existed at the time of his sex-offense convictions or his sex-offense conduct. Pet. App. 3a. Indeed, § 590 was not enacted until 2003 (and, thus, did not even exist when Mr. Childers was convicted of his underlying sex offense). Pet. App. 44a-45a. And at the time Childers committed the sex offenses in 1992, the registration period was only two years for any individual who successfully completed a sex offender treatment program. Okla. Stat. titl. 57,

[1] For information not included within the relevant lower court decisions, we cite to the record on appeal in the Tenth Circuit.

§ 583(C) (1991). That two-year period would have ended in March 2007, two years after Childers' release from prison following his completion of a sex offender treatment program (and before his registration offenses occurred).

Yet, Mr. Childers pleaded guilty to both offenses in September 2009. Pet. App. 3a. The SORA provisions carry minimal prison terms. Okla. Stat. tit. 57, § 590 (one-to-three years in prison); Okla. Stat. tit. 57, § 587 (up to five years in prison for a SORA conviction). But Oklahoma authorizes severe punishment – up to life imprisonment – for recidivist offenders. Okla. Stat. tit. 21, § 51.1(C) (authorizing a life term of imprisonment for any person "who, having been twice convicted of felony offenses, commits a subsequent felony offense within (10) years of the date following the completion of the execution of the sentence"). The state court sentenced Childers to serve two consecutive life terms for his registration convictions. Pet. App. 3a.[2]

3. Mr. Childers unsuccessfully moved to withdraw his plea, unsuccessfully appealed, and unsuccessfully sought state habeas relief. Pet. App. 3a-4a. On direct appeal, Mr. Childers "alleged ineffective assistance of counsel, that his sentences were excessive, and that his plea was not knowing and voluntary." Pet. App. 3a. He did not raise the underlying due-process claim at issue here. In his first pro se state habeas petition, Mr. Childers "raised several claims related to the factual basis for his guilty plea, double jeopardy, alleged conflicts of interest, and ineffective

[2] Mr. Childers' sex-offense-registration convictions are premised on his underlying sex-offense convictions, and, under Oklahoma law, "if an offense requires proof of a prior conviction, that prior conviction may not be used to enhance punishment." *Ruth v. State*, 966 P.2d 799, 801 (Okla. Ct. Crim. App. 1998). Thus, for this reason as well, there is serious doubt on this (undeveloped) record whether this recidivist-sentencing statute should have applied to Mr. Childers.

assistance of counsel." Pet. App. 4a. Again, he did not raise the underlying due-process claim at issue now. In his second pro se state habeas petition, Mr. Childers merely "request[ed] permission to file an unspecified document out of time due to a mailing error." Pet. App. 4a.

In his third (and most recent) pro se state habeas petition, Mr. Childers raised four claims: "(1) that he did not have as many prior convictions as the state claimed and his life sentences were therefore improperly enhanced; (2) that his life sentences rested on an unconstitutional retroactive application of SORA; (3) that his guilty plea was not knowing and voluntary; and (4) that he received ineffective assistance of counsel." Pet. App. 4a. The second claim is "the only claim that remains in this appeal." Pet. App. 4a. That claim was premised primarily on two then-recent Oklahoma Supreme Court decisions: *Starkey v. Okla. DOC*, 305 P.3d 1004 (Okla. 2013), and *Cerniglia v. Okla. DOC*, 349 P.3d 542 (Okla. 2013). Pet App. 4a. Those two decisions (decided after Mr. Childers filed his first two state habeas petitions) "together held that a retroactive application of SORA violated the ex post facto clause of the Oklahoma Constitution, and therefore the applicable version of SORA is the one in effect when a person is convicted of the underlying sex offense and becomes subject to SORA's provisions." *Id.* In Mr. Childers' words, his "rights [were] violated by ex post facto application of laws not in effect at the time of conviction," R1.8. And as he read the law, the version of SORA that applied to him limited the statutory maximum penalties on his two counts of conviction to one year and five years. Pet. App. 5a.

Mr. Childers' pro se state habeas petition was "messy," and his "allegations [were] tangled and difficult to distinguish." Pet. App. 19a. The petition "weave[d] together facts, arguments, and legal theories, often jumping from one claim to another," and "interveave[d] ex post facto arguments against both his sentence and his convictions." *Id.* "In short, Mr. Childers' petition [did] not disguise the fact that he [was] pro se." Pet. App. 20a.

The state court denied the petition on procedural grounds (finding that the first claim was raised in a prior petition), and the state court of criminal appeals affirmed on procedural grounds (because three of the four claims were adjudicated in prior petitions). Pet. App. 5a-6a. Neither court expressly addressed the ex-post-facto-related due process claim. *Id.* The court of criminal appeals nonetheless held that "'all issues not raised in the direct appeal, which could have been raised, are waived.'" Pet. App. 6a.

4. In 2017, Mr. Childers filed a pro se federal habeas petition under 28 U.S.C. § 2254. Pet. App. 6a. He raised four claims: "(1) his sentence constituted unconstitutional ex post facto punishment; (2) his sentence was contrary to a provision of Oklahoma law that governs multiple punishments for the same crime, Okla. Stat. tit. 21, § 11; (3) his guilty plea was not knowing or intelligent due to ineffective assistance of counsel; and (4) the Oklahoma courts had violated state law by making inadequate findings of fact with respect to his post-conviction motions." Pet. App. 6a. Mr. Childers alleged that he was "improperly convicted" based on a "void conviction." *See* Pet. App. 25a. The district court acknowledged that Mr. Childers

challenged "his convictions," but dismissed the petition on procedural grounds (as untimely). Pet. App. 22a. The district court did not address whether Mr. Childers could overcome this procedural default via a gateway actual innocence claim. Pet. App. 7a, 22a.

5. Mr. Childers appealed, and Judge McHugh granted a certificate of appealability (COA) on one substantive issue: "whether Childers' two convictions violate due process." Pet. App. 47a. Judge McHugh explained that the "requirement to register as a sex-offender is an essential element of both charges brought against Mr. Childers." Pet. App. 54a. "If Mr. Childers was no longer required to register in 2009, then his convictions—both of which rested on the registration requirement—violate his due process rights." Pet. App. 54a. Judge McHugh noted Mr. Childers' allegations that his SORA registration obligation "would have expired in 2008 under the 1998 version of SORA" (before he was charged with violating SORA). Pet. App. 53a.

Judge McHugh also found that "[r]easonable jurists could debate whether Childers has advanced a colorable claim of actual innocence" to overcome any procedural hurdles. Pet. App. 48a. This was so because, if Childers proved his ex-post-facto-related due process claim, "he will have shown that he was convicted of an act that was not criminal under Oklahoma law." Pet. App. 53a. "In other words, he will have demonstrated actual innocence." Pet. App. 53a. Citing *Bousley v. United States*, 523 U.S. 614, 624 (1998), Judge McHugh noted that "an intervening judicial decision may provide the basis for a viable actual innocence claim that was not previously available." Pet. App. 52a.

Judge McHugh acknowledged that Mr. Childers "did not use the phrase 'actual innocence' in his application for a [certificate of appealability]," but noted that "his ex post facto argument necessarily implicates his guilt." Pet. App. 52a n.3. For that reason, Judge McHugh liberally construed Mr. Childers' pro se application "as raising an actual innocence claim." Pet. App. 52a n.3. The Tenth Circuit appointed counsel to represent Mr. Childers. Pet. App. 1a, 55a.

6. Mr. Childers (through appointed counsel) filed a supplemental brief, "raising ex post challenges to his convictions," namely, that he was convicted and sentenced under statutes that did not apply to him under *Starkey* and *Cerniglia*. Pet. App. 9a. Defense counsel acknowledged that the pro se argument made by Mr. Childers was not entirely accurate, and so he tweaked the claim in two respects. First, he explained that the residency restriction did not apply to Mr. Childers at all under *Starkey* and *Cerniglia* because that provision was not in effect when he committed/was convicted of the underlying sex offense. Pet. App. 14a. Second, he further explained that, because he was only subject to a two-year registration period under the version of SORA applicable when he committed the underlying sex offenses, he was not required to register at the time he committed his registration offenses. Pet. App. 14a. Defense counsel asked the Tenth Circuit to expand the certificate of appealability to address these versions of his constitutional claims. Pet. App. 14a.

Mr. Childers also raised a "gateway actual innocence claim." Pet. App. 9a. He explained that, because he was improperly convicted, he was actually innocent, which "allow[ed] him to overcome the time bar and any other, possible procedural hurdle."

Supp. Br. 11, 14, 25-30, 56-61. Mr. Childers argued that it was irrelevant whether his claims "differ[ed] somewhat from the one[s] Childers pressed in the Oklahoma courts." *Id.* 56. "'If actual innocence is sufficient to overcome procedural rules that protect the weighty state interests implicated by federal habeas review, it is necessarily sufficient to overcome the interests served by a federal procedural rule.'" Pet. App. 16a.

7. In response, the State did not dispute the merits of Childers' due process claims. Nor did the State otherwise argue that Mr. Childers had not challenged his convictions in his habeas petitions. Pet App. 17a, 27a (acknowledging that Mr. Childers challenged "his convictions"). Instead, the State raised two procedural hurdles: untimeliness and failure to exhaust. State's Br. 12-13, 28-42. The State acknowledged that actual innocence could overcome these procedural hurdles, but argued that Mr. Childers' claims relied on "legal innocence," and thus, the actual-innocence exception did not apply. *Id.* 13-28, 42-47. The State also perfunctorily argued that Mr. Childers did not raise "a claim of actual innocence" in the district court, and, thus, the claim "warrants only plain error review, if not total forfeiture." *Id.* 12 n.5, 15. Alternatively, the State suggested that this Court "should remand to the District Court to consider the merits of his claims in the first instance on a fully developed record." *Id.* 47. "These merits issues make it impossible to determine, on the present record, whether Petitioner's ex post facto claim is meritorious, either as an actual innocence claim or as a constitutional claim on the merits." *Id.* 49.

8. Although Judge McHugh granted the certificate of appealability, she was not

on the three-Judge panel (Judges Moritz, Seymour, and Briscoe) that considered the appeal. Pet. App. 1a. In a published opinion, Judge Briscoe (joined by Judge Moritz) vacated the certificate of appealability and dismissed the appeal. Pet. App. 16a. The panel held that Mr. Childers "did not raise a claim of actual innocence before the district court or in his application for a COA." Pet. App. 1a. "Accordingly, Childers waived his claim of actual innocence by failing to raise it before the district court and we decline to consider it." Pet. App. 12a. The panel also held that Mr. Childers' "ex post facto arguments on appeal have changed substantially from those he presented in his COA application." Pet. App. 1a. The claims went "'beyond the scope of [the] [certificate of appealability],'" and the panel declined to expand the certificate of appealability to include those claims. Pet. App. 14a-16a. The panel rejected Mr. Childers' argument that "claims of actual innocence should overcome any federal waiver rules" because "Childers provide[d] no direct authority for this contention and we can find none." Pet. App. 16a.

9. Judge Seymour dissented. She would have liberally construed the § 2254 petition as challenging Mr. Childers' convictions and as raising the actual-innocence exception. Pet. App. 24a-38a. Judge Seymour also explained that, to the extent the district court had not considered the claims raised in Childers' supplemental brief, the Court should remand to allow it to do so. Pet. App. 44a-46a.

10. Mr. Childers (represented by different counsel) filed a petition for rehearing en banc, but the Tenth Circuit denied the petition in a one-page unpublished order. Pet. App. 56a. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. Review is necessary because the Tenth Circuit's decision conflicts with this Court's precedent on liberally construing pro se filings.

This Court has consistently held that courts should liberally construe pro se pleadings. *Haines*, 404 U.S. at 520; *Estelle*, 429 U.S. at 106; *Hughes*, 449 U.S. at 15; *Neitzke*, 490 U.S. at 330. This includes pro se habeas petitions. *Sanders*, 373 U.S. at22. To do otherwise would be to punish the pro se litigant "for his failure to recognize subtle factual or legal deficiencies in his claims." *Hughes*, 449 U.S. at 15. After all, "we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law." *Tomkins v. Missouri*, 323 U.S. 485, 487 (1945). "Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition." *Price*, 334 U.S. at 292.

The Tenth Circuit acknowledges this liberal pleading requirement. *See*, *e.g.*, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). In the Tenth Circuit, "this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id.* But the Tenth Circuit also cautions that it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." *Id.*; *see also United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) ("[T]his rule of liberal construction stops [] at the point at which we begin to serve as [the pro se litigant's] advocate."). Under

this reasoning, courts "may 'not rewrite a petition to include claims that were never presented.'" *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999).

Below, the two-judge Tenth Circuit panel invoked this "role-of-advocate" precedent to refuse to construe Mr. Childers' pro se habeas petition liberally to raise a gateway actual-innocence claim. Pet. App. 10a-11a. According to the two-judge panel, it would have had to "rewrite" Mr. Childers' pro se petition to include a gateway actual innocence claim. Pet. App. 11a. This Court should review that decision for five reasons.

1. The Tenth Circuit's "role-of-advocate" precedent is not a faithful interpretation of this Court's liberal-pleading precedent. In practical terms, by requiring courts to liberally construe pro se pleadings, this Court necessarily requires courts to become advocates for pro se litigants at least one narrow circumstance: when determining the claims raised by those litigants. After all, pro se litigants are "less capable of formulating legally competent initial pleadings." *Neitzke*, 490 U.S. at 330. For that reason, "[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims." *Hughes*, 449 U.S. at 15. This is why, in determining *what claims a pro se prisoner has raised*, this Court construes the pleadings liberally. Otherwise, "injustice" results. *Castro*, 540 U.S. at 386-387 (Scalia, J., concurring in part). It is not that lower courts must "rewrite" pro se pleadings. Pet. App. 11a. It is that lower courts must give pro se litigants the benefit of the doubt when identifying the claims raised by those litigants.

The Tenth Circuit's decision also conflicts with the way in which other courts of appeals have considered similar claims. *See*, *e.g.*, *United States v. Garth*, 188 F.3d 99, 108 (3d Cir. 1999) (construed liberally, prisoner's "failure to specifically articulate his claim as one of 'actual innocence' should not preclude review of his claim" where the prisoner "clearly argued that the government could not satisfy the factual predicates" of the crime); *Mills v. Jordan*, 979 F.2d 1273, 1277-1278 (7th Cir. 1992) ("Strictly applying the waiver rule where the petitioner has arguably invoked the 'miscarriage of justice' doctrine would be inconsistent with" the doctrine's role). Unlike these other courts of appeals, the Tenth Circuit does not in practice liberally construe pro se pleadings in this context (as this case illustrates). Review is necessary.

2. Review is particularly appropriate here because the Tenth Circuit effectively split two-judge-to-two-judge over whether Mr. Childers adequately alleged a gateway actual innocence claim. While the two-judge panel answered that question in the negative, Pet. App. 10a-11a, Judges Seymour and McHugh answered that question in the affirmative, Pet. App. 28a-38a, 54a. There is no rational reason why one view has prevailed over the other (just luck of the draw). At this point, only this Court can break the tie. And it should. Mr. Childers should not linger in prison under such precarious circumstances.

3. Review is also necessary because the two-judge Tenth Circuit's panel's decision is incorrect. As Judge Seymour explained below, Mr. Childers has consistently claimed that "he was erroneously convicted of violating versions of SORA that were inapplicable to him." Pet. App. 34a. In doing so, Mr. Childers has consistently relied

on "a familiar 'actual innocence' framework that [this] Court adopted in *Bousley*." Pet. App. 34a-36a. The decisions in "*Starkey* and *Cerniglia* are 'new evidence' that Mr. Childers was not subject to 2006 SORA at the time of his convictions." Pet. App. 34a n.6. Mr. Childers has consistently claimed that "*Starkey* and *Cerniglia* invalidated the judgment against individuals convicted under a later version of SORA to ensure their constitutional rights were no longer violated." Pet. App. 36a. "Because [Mr. Childers'] petition unequivocally attacks his 2009 convictions and because it uses a familiar 'actual innocence' framework, liberally interpreting his petition readily yields his actual innocence claim." Pet. App. 36a. "[I]dentifying his innocence claim requires neither that we supply facts, allegations, or a legal theory on Mr. Childers' behalf, nor that we rewrite his petition to include claims not presented." Pet. App. 36a (citations omitted). The two-judge panel erred in holding otherwise below.

4. The Tenth Circuit's refusal to liberally construe Mr. Childers' petition as raising a gateway actual innocence claim undermines the essential purposes of the writ of habeas corpus. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969).

> The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Id. at 291.

And this is particularly true for claims of actual innocence. "[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325. In light of Mr. Childers' allegations in his § 2254 petition, the Tenth Circuit should have construed those allegations as raising a gateway claim of actual innocence so that Mr. Childers could "pass through the gateway and argue the merits of his underlying claims." *Id.* at 316.

5. Review is also necessary because Mr. Childers was never put on notice that he was required to raise, in express terms, a gateway claim of actual innocence. The United States Code does not put him (or any other litigant) on such notice. The code uses the phrase "actual innocence" once, in a statute about DNA testing. 18 U.S.C. § 3600(a)(6)(B). The phrase "actual innocence" is not used at all within the federal habeas statutes. Thus, a pro se habeas prisoner who consults the federal code would not know that he must allege actual innocence to overcome a procedural bar or that the failure to allege actual innocence waives the exception in future proceedings.

The federal code includes "Rules Governing Section 2254 Cases in the United States District Courts." Rule 2 is entitled, "The Petition." It provides that a state prisoner allege three things: (1) "the grounds for relief available to the petitioner"; (2) "the facts supporting each ground"; and (3) "the relief requested." Rule 2 says nothing about "actual innocence." Nor does it tell prisoners that they must raise any exceptions to any procedural hurdles. And actual innocence is not a "ground for relief"

in the Tenth Circuit. *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001). It is, rather, a mechanism to overcome procedural bars to merits relief. Pet. App. 30a-31a. Thus, Rule 2 also does not inform prisoners that they must allege the actual-innocence exception.

Rule 2(d) instructs prisoners that any "petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule." The form appended to the rules (and which the Northern District of Oklahoma uses) also does not mention "actual innocence." While the form instructs prisoners that they must have exhausted "each ground on which you request action," it says nothing of exhausting exceptions to procedural bars. While the form requires a prisoner to "explain why you did not raise" any unexhausted ground, it does not require a prisoner to allege an actual innocence exception to any procedural bar (nor would it make sense for a litigant to state that he failed to raise a claim because of actual innocence). And while the form instructs prisoners to explain why the statute of limitations in 28 U.S.C. § 2244(d) does not bar the petition, none of the four statutory triggering dates have anything to do with actual innocence. Thus, federal law does not instruct a prisoner to raise the actual-innocence exception. Knowing this, it is even more important that the lower courts construe pro se § 2254 petitions liberally as raising gateway actual innocence claims. Because that did not happen here, review is necessary.

II. Review is necessary to resolve whether a pro se state prisoner who does not adequately invoke actual innocence in the lower courts can do so on appeal.

Assuming that Mr. Childers did not adequately raise a gateway actual innocence claim in the federal district court, for six reasons, this Court should grant this petition to determine whether federal waiver rules trump a state prisoner's actual innocence.

1. The two-judge Tenth Circuit panel's decision is inconsistent with this Court's precedent. The panel held that a state prisoner who does not raise a gateway actual innocence claim in the federal district court waives that claim on appeal. Pet. App. 9a-10a. It did so by employing its "general rule against considering issues for the first time on appeal." Pet. App. 10a. But this Court has repeatedly held that a gateway actual innocence claim permits a court to consider procedurally-flawed claims. *See*, *e.g.*, *McQuiggin*, 569 U.S. at 392-393. The Tenth Circuit's "general rule against considering issues for the first time on appeal" is a procedural rule. It necessarily follows that a state prisoner's actual innocence allows that prisoner "to pursue his constitutional claims [] on the merits notwithstanding the existence of [this] procedural bar to relief." *Id.* at 392. It makes no sense to hold that a gateway actual-innocence claim can be procedurally barred, when the entire point of the claim is to overcome any procedural bars. "Sensitivity to the injustice of incarcerating an innocent individual," *id.* at 393, must permit a court to review a constitutional claim via a gateway showing of actual innocence whenever that claim is raised.

The two-judge Tenth Circuit panel effectively drew a line between state procedural bars and federal procedural bars, holding that an actual-innocence claim

overcomes the former, but not the latter. Pet. App. 9a-12a, 16a. But this Court rejected that line drawing long ago: "the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991); *see also Coleman*, 501 U.S. at 751 ("We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own."). To reiterate, in *McQuiggin*, the Court rejected the state's argument that the actual-innocence gateway applied to state time-bars, but not federal time-bars: "It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States." 569 U.S. at 394. The Tenth Circuit's refusal to consider a gateway actual-innocence claim based on a federal procedural rule cannot be squared with this precedent.

2. The two-judge Tenth Circuit panel's decision also cannot be squared with this Court's decision in *Hormel*, 312 U.S. at 556. *Hormel* holds that "[o]rdinarily an appellate court does not give consideration to issues not raised below." Id. But *Hormel* further holds that

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Id. at 557. Thus, courts must consider claims "where injustice might otherwise result." *Id.*; *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (same).

Hormel's "fundamental justice" and "injustice" language parallels this Court's actual-innocence precedent, as a gateway claim of actual innocence is also known as the "fundamental miscarriage of justice exception." *Herrera*, 506 U.S. at 404. Thus, read together, because it is a fundamental miscarriage of justice to continue to incarcerate a prisoner who is actually innocent, a prisoner must be permitted to raise a gateway actual-innocence claim for the first time on appeal. After all, "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup*, 513 U.S. at 324. The Tenth Circuit's contrary holding below – refusing to consider a gateway claim of actual innocence simply because the pro se state prisoner did not adequately invoke actual innocence in the district court – does not "promote the ends of justice," it "defeat[s] them." *Hormel*, 312 U.S. at 557.

3. We have found no case from any other court of appeals that holds that a prisoner can waive a gateway actual innocence claim. The Tenth Circuit's decision in this case is truly extraordinary. Again, the entire point of the gateway actual-innocence exception is to excuse procedural bars to relief. It cannot be that a gateway actual-innocence claim is itself subject to procedural bars. The two-judge Tenth Circuit panel's decision below turns the exception on its head and precludes relief to prisoners who have valid actual innocence claims (like Mr. Childers).

4. Review is also necessary because this question is exceptionally important to the administration of federal habeas law. Most state prisoners who file federal habeas petitions do so pro se. Those prisoners "are often unlearned in the law and unfamiliar with the complicated rules of pleading." *Price*, 334 U.S. at 292. Like Mr. Childers

here, pro se state prisoners are often simply incapable of following the complex rules Congress and the courts have drawn up to obtain habeas relief. As explained above, federal law does not put pro se prisoners on notice that they must allege a gateway actual innocence claim. The federal habeas statutes do not discuss gateway actual innocence claims, the federal habeas rules do not discuss gateway actual innocence claims, and the federal habeas forms for pro se prisoners do not include a section to raise gateway actual innocence claims. As a near-illiterate pro se state prisoner, it should surprise nobody that Mr. Childers failed to include an artful actual-innocence gateway claim. Yet, under the Tenth Circuit's decision in this case, that failure precludes a gateway actual-innocence claim on appeal (even when two Circuit judges think that the pro se prisoner did enough to invoke actual innocence below, Pet. App. 24a, 34a).

The published decision in this case has serious consequences for federal habeas law. "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris*, 394 U.S. at 290-291. Its "scope and flexibility," which permit it "to cut through barriers of form and procedural mazes," has always been "jealously guarded by courts and lawmakers." *Id.* at 291. It must "be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Id.* And "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup*, 513 U.S. at 324. "Indeed, concern about

the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325.

The Tenth Circuit's decision ignores all of this. In the Tenth Circuit, a gateway actual innocence claim can now be cast aside whenever two judges think that a near illiterate pro se state prisoner didn't use the right words when raising his claims in the federal district court. In the Tenth Circuit, actual innocence matters only if pro se state prisoners strictly follow the Tenth Circuit's procedural rules. And those rules are not found in statutes or the federal rules, but instead in case law. Pro se state prisoners who have valid actual innocence claims in the Tenth Circuit must now know and strictly follow Tenth Circuit procedural precedent or risk waiving valid constitutional claims for relief. Petitioners improperly serving life sentences (like Mr. Childers) are left with no recourse. It would be an injustice if this Court let the Tenth Circuit's decision lie. *See Castro*, 540 U.S. at 386-387 (Scalia, J., concurring in part).

5. On the merits, the Tenth Circuit's decision is incorrect. As already explained, the decision is inconsistent with this Court's precedent (precedent wholly ignored below), unsupported in federal law, and unsupported by any other court of appeals. The decision below relied primarily on three unpublished Tenth Circuit decisions, but those decisions have no reasoning at all on this issue. *See* Pet. App. 10a. The two-judge Tenth Circuit panel also cited a few cases where the Tenth Circuit had declined to consider a substantive claim because it was "'not raised before the district court as part of the habeas petition." Pet. App. 11a-12a. But a gateway showing of actual-innocence would have permitted the Tenth Circuit to consider those substantive

claims on appeal. *McQuiggin*, 569 U.S. at 392-393. And while the Tenth Circuit was concerned that it would become a "court of review, not of first view," Pet. App. 16a, nothing prevents the Tenth Circuit from remanding to the district court to consider a gateway actual-innocence claim in the first instance, as Judge Seymour explained in her dissent, Pet. App. 44a-46a, and as the State suggested below, State's Br. 47-49. *See also Hammons v. Saffle*, 348 F.3d 1250, 1258 (10th Cir. 2003) (remanding habeas claim to district court).

Finally, the Tenth Circuit refused to apply Tenth Circuit precedent that makes clear that the "general rule against considering issues for the first time on appeal," Pet. App. 10a, "is not absolute," *Hooker v. Mullin*, 293 F.3d 1232, 1241 (10th Cir. 2002). In other contexts, the Tenth Circuit departs from the general rule "when manifest injustice would otherwise result." *Maralex Res. v. Barnhardt*, 913 F.3d 1189, 1197 (10th Cir. 2019). The Tenth Circuit recently explained that "[t]he actual innocence standard is designed to 'ensure[ ] that petitioner's case is truly 'extraordinary' while still providing [a] petitioner a meaningful avenue by which to avoid a manifest injustice.'" *Fontenot v. Crow*, 4 F.4th 982, 1031 (10th Cir. 2021). Yet, under the published decision below, a gateway actual-innocence claim is never a "manifest injustice" that would avoid the Tenth Circuit's general waiver rule. Because the Tenth Circuit's decision cannot possibly be correct, review is necessary.

6. This case is also an excellent vehicle to resolve this critically important issue. Mr. Childers received two consecutive life sentences because he moved to a home near

a school and failed to report the move.[3] Yet, under the Oklahoma registration laws that applied to Mr. Childers, he was not even prohibited from moving to this home, nor was he even subject to registration requirements at the time of this move.

Mr. Childers' conviction for living within 2,000 feet of a school, Okla. Stat. tit. 57, § 590, is constitutionally invalid because that statute did not exist when Mr. Childers was convicted of the underlying sex offense. *Cerniglia*, 349 P.3d at 544. Yet, Mr. Childers is serving a consecutive life sentence for violating a statute that does not apply to him. He has easily shown that "he was convicted of an act that was not criminal under Oklahoma law," Pet. App. 53a, in violation of his federal due process rights, *In re Winship*, 397 U.S. 358, 364 (1970) (the Due Process Clause requires the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged").

Mr. Childers' other conviction for failure to report a change of address under Okla. Stat. tit. 57, § 584(D) is also constitutionally infirm because he had completed his registration requirements at the time of this registration violation. At the time Childers committed the sex offenses in 1992, the registration period was only two years for any individual who successfully completed a sex offender treatment program. Okla. Stat. titl. 57, § 583(C) (1991). That two-year period would have ended in March 2007, two years after Childers' release from prison after he completed a sex offender treatment program (and before his registration offenses occurred). The Oklahoma Supreme Court's decision in *Starkey* makes clear that SORA's application

[3] Mr. Childers has since indicated in his pro se filings that he never actually changed residences (he still lived at his home; he just slept at the other residence on occasion).

must ultimately turn on the date the defendant committed the underlying sex offense. 305 F.3d at 1018 ("'the criminal quality *attributable to an act*, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission *should not be altered* by legislative enactment, *after the fact*, to the disadvantage of the accused'"; further noting that a legislature is barred "from enacting 'any statute . . . which makes more burdensome the *punishment for a crime, after its commission*'"); an Oklahoma law cannot "inflict[] greater punishment than the law annexed to the crime at (the) time it was committed") (emphases added). For the same reasons discussed above, Mr. Childers' conviction under this inapplicable law also violated his due process rights.

In the end, Mr. Childers is actually innocent. Yet no court has ever been willing to consider his constitutional claims on the merits. "With a lifetime of lost liberty hanging in the balance," *McGee v. McFadden*, 139 S.Ct. 2608, 2611 (2019) (Sotomayor, J., dissenting from the denial of cert.), this Court should grant this petition.

III. At a minimum, this Court should vacate the lower courts' decisions and send this case back to the district court to consider Mr. Childers' petition anew under a fully developed record.

At a minimum, this Court should grant this petition, vacate the Tenth Circuit's decision, and remand this case back to the lower courts for further proceedings because the lower courts resolved the case on an inadequate record. As the State explained below, the "bulk of the state court records . . . are largely outside the current record on appeal." State's Br. 4. As the State further explained, the "inadequacy of

the record on appeal . . . create[d] a substantial challenge to [the Tenth Circuit's] ability to properly weigh the merits of Petitioner's claims." *Id.* The State suggested that the Tenth Circuit "remand to the District Court to consider the merits of his claims in the first instance on a fully developed record." *Id.* 47. "These merits issues make it impossible to determine, on the present record, whether Petitioner's ex post facto claim is meritorious, either as an actual innocence claim or as a constitutional claim on the merits." *Id.* 49.

We agree with this reasoning. Considering that Mr. Childers is serving two consecutive life sentences for registration-related offenses, and that a state prisoner typically has only one opportunity under AEDPA to challenge his state convictions in federal court, a remand for further proceedings on a fully developed record is imperative in this case. It is a small price to pay to ensure that Mr. Childers does not spend the rest of his life in prison because he failed to update his address after allegedly moving near a school, when state law did not even prohibit the move.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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