No. 24-5644

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

JOSÉ MORENO, PETITIONER

vs.

JIM ROBINSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

José Moreno
IN PRO PER
210 Shasta Street
Watsonville, CA 95076
(831) 726-6017

QUESTIONS PRESENTED

1. Whether the actual-innocence exception to AEDPA's statute of limitations applies to someone who is legally or statutory innocent, in where an individual is convicted under a statute that, properly interpreted, does not proscribe the underlying conduct? Stated differently, but for constitutional error, that same someone would be factually innocent, which begs the question: whether as a matter of equity legally innocent defendants can invoke the actual-innocence exception to AEDPA's statute of limitations?

2. What deference, if any, should a federal habeas court give to the State court's conviction under an "actual innocence" gateway claim?

3. Whether a Certificate of Appealability should issue if a habeas petitioner, as in here, can establish that the District Court plainly erred in its procedural ruling by misconstruing his claim and further establish a constitutional violation?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix E to the petition and is

[x] unpublished.

The opinion of the United States District Court appears at Appendix C to the petition and is

[x] unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 5/28/2024.

[x] A timely petition for rehearsing was denied by the United States Court of Appeals on the following date: 7/01/2024, and a copy of the order denying rehearing appears at Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Set out verbatim the constitutional provisions, treaties, statutes, ordinances and regulations involved in the case. If the provisions involved are lengthy, provide their citation and indicate where in the Appendix to the petition the text of the provisions appears.

Please see Appendix G for the text of the provisions.

STATEMENT OF THE CASE

Moreno provides the following statement of the case, consisting of the procedural history and relevant facts of the case that are material to the consideration of the questions presented within the instant petition.

Procedural History of the Case

At the time of filing his original habeas petition in federal court, Moreno was unlawfully under parole supervision and, thus, in constructive custody by the California Department of Corrections and Rehabilitation (CDCR) pursuant to a judgment of the Superior Court of California for Sacramento County in *People v. Moreno*, case number 10F06494.

On November 8, 2012, the People filed an information charging Moreno with 11 counts of first-degree burglary (CA Pen. C. § 459), three counts of unauthorized computer access (§ 502(c)(4)), three counts of wiretapping (§ 631(a)), two counts of stalking (§ 646.9(a) and (b)), and two counts of misdemeanor possession of stolen property (§496). On December 3, 2012, a jury found Moreno guilty as charged. On January 4, 2013, Moreno was sentenced to 19 years and four months in prison.

On December 3, 2014, the California Court of Appeal for the Third District affirmed Moreno's judgment in all relevant respects. On January 9, 2015, Moreno filed a petition for review with the California Supreme Court, which was denied on February 25, 2015.

On June 11, 2018, Moreno filed a motion to correct the calculation of his presentence custody credits, which the trial court denied on July 2, 2018. Moreno filed a timely notice of appeal, and on October 30, 2019, the California Court of Appeal for the Third District directed the trial court to award Moreno 709 days of presentence custody credits, which is 177 days of credits more than originally awarded. On March 3, 2020, the trial court resentenced Moreno and amended its abstract of judgment, awarding him 709 days of presentence custody credits.

After exhausting his state remedies, by filing habeas petitions in all three court levels, Moreno filed the instant federal habeas petition on September 27, 2021. On July 29, 2022, the assigned Magistrate Judge

issued Findings and Recommendations (F&R) recommending that Respondent's motion to dismiss with prejudice be granted. On March 1, 2023, the assigned District Judge adopted the F&R in full and granted Respondent's motion to dismiss the petition with prejudice and declined to issue a certificate of appealability (COA).

On March 20, 2023, Moreno filed a timely Notice of Appeal. On April 6, 2023, Moreno filed a motion for COA to the U.S. Court of Appeals for the Ninth Circuit (9th Circuit). On May 28, 2024, the requested COA was denied by the 9th Circuit. On June 10, 2024, Moreno filed a combined motion for reconsideration and motion for reconsideration en banc, which was denied on July 1, 2024.

Statement of Relevant Facts of the Case

The undisputed facts, and the prosecution's argument, are straightforward. Moreno and Doe, both being UC, Berkeley alumni, met each other through mutual friends on the social media website Myspace.com. [Reporter's Transcript (RT) 513.] They became a couple in April 2007. [Id.] In May 2009, Moreno moved to New York City to complete a master's degree at Columbia University. [RT 513-14.] In January 2010, Doe broke-off the relationship. [RT 514.] In March of 2010, the two began to talk with each other on a daily basis after Moreno visited Sacramento during his grad program's spring break. [RT 1129-30, 1135.] It was during this week-long visit that Moreno stayed at Doe's apartment and, subsequently, installed an internet monitoring software (i.e., eBlaster) on her laptop. [RT 1132.] The two went out on dates and had sexual relations throughout his visit. [RT 1136-37.]

Upon graduating from his graduate program in May of 2010, Moreno moved back to Sacramento into Doe's apartment. [RT 1140.] It was agreed that it was a temporary arrangement until Moreno obtained employment and his own apartment. [RT 531; 1140.] During this period, the two engaged in regular couple activities such as cooking for each other, going out on dates and having sexual relations. [RT 1142.] On July 16, 2010, the couple argued and broke up. [RT 534.] On the following morning, Moreno moved out of her apartment. [RT 535.]

In the following weeks, the two stayed in touch and had a few interactions, including a dinner cooked by Doe and an intimate night at Moreno's apartment on August 1, 2010. [RT 1157-58.] The next day, Moreno went to Doe's apartment with her cooking hardware and utensils that she had left at his apartment from the previous night, along with the unfinished bottle of wine. [RT 1170.] The two had sexual relations and Moreno spent the night at her apartment. [RT 1170.] It was at the end of this night that the two scheduled to have a discussion as to the status of their relationship for August 4th. [RT 1171.] It was around this time that Moreno discovered that Doe had met Victor Garcia, a new romantic prospect. [RT 1133-34.] Moreno was distraught by his discovery and grew desperate to win Doe back. [RT 1171, 1178, 1180-81.]

On the morning of August 27, 2010, Doe discovered in her bedroom a wireless Sharx camera hidden among the stuffed animals on her filing cabinet and a second wireless Sharx camera under her dresser. [RT 676-77, 893-94, 913-18.] The cameras are designed to be accessed remotely through the internet. [RT 359-61, 1033-37.] The eBlaster software's activity reports and the recorded camera videos were accessed by Moreno via the internet. [RT 1420, 1421-22, 1453-58.]

The crux of Moreno's instant petition regards legal implication of undisputed facts to Moreno's wiretapping convictions under Cal. Pen. C. Section 631(a). Moreno was charged with three counts of wiretapping (Counts 3, 14 and 15). [Clerk's Transcript (CT) at 858-66.] The prosecution relied on two theories in support of these charges: (1) the installation of the SpectorSoft's eBlaster internet monitoring software on Doe's laptop for Count 3 [RT 1420.]; and (2) the installation of two internet-wireless cameras, which are designed to be accessed remotely through the internet, for Counts 14 and 15. [RT 1420, 1453-58; see also, Direct Appeal Respondent's Brief (RB) at 43-44; Answer to Petition (Answ.) at 17 ("Defendant was convicted of three counts of wiretapping (§ 631, subd. (a)). The first count[, Count 3,] related to the installation of the eBlaster software in March. The second two, counts 14 and 15, related to the cameras installed in late August.")(emphasis added).] In fact, the prosecutor, in closing, emphatically argued

> "Also wiretapping. It also related to the eBlaster software that he had installed on her computer and how the eBlaster software utilized her router and her Internet services to forward those activity report

to him at his email address. Those are wiretapping violations as well as the also [sic] him installing the cameras at her N Street apartment. He connected them to her router. Her router was utilizing the services of the Internet. And he was connecting to her router and her Internet service to obtain the videos that had been stored on the cameras. That's the wiretapping charges."

[RT 1420 (emphasis added).] The prosecutor further argued, "Because it is the cable modum, the cable line, that is providing those internet services. That is the basis for these wiretapping charges." [RT 1421-22, 1543-58; see also, RB at 43-44, 47; Answ. at 18.]

REASONS FOR GRANTING THE PETITION

Moreno asserts that his instant petition raises important questions of federal law that have not been, but should be, settled by this Court:

1. Whether the actual-innocence exception to AEDPA's statute of limitations applies to someone who is legally or statutory innocent, in where an individual is convicted under a statute that, properly interpreted, does not proscribe the underlying conduct? Stated differently, but for constitutional error, that same someone would be factually innocent, which begs the question: whether, as a matter of equity, legally innocent defendants can invoke the actual-innocence exception to AEDPA's statute of limitations?
2. What deference, if any, should a federal habeas court give to the State court's conviction under an "actual innocence" gateway claim?
3. Whether a Certificate of Appealability should issue if a habeas petitioner, as in here, can establish that the District Court plainly erred in its procedural ruling by misconstruing his claim and further establish a constitutional violation?

Moreno will articulate his position on each question in turn after establishing the relevant substantive law pertaining to the statute of conviction.

I. Relevant Substantive Law Pertaining to the Statute of Conviction

Moreno's instant petition raises two claims pertaining to his three wiretapping convictions. The first claim is a gateway actual-innocence claim in where Moreno asserts that he is actually innocent as a matter of law because the scope of the convicting statute [i.e., Cal. Pen. C. Section 631(a).] does not proscribe Moreno's underlying conduct. This is a statutory or legal actual innocence claim, meaning that Moreno was convicted and sentenced under a statute that, properly interpreted, does not apply to him. The second claim is a substantive actual innocence claim in where Moreno asserts that due to ineffective assistance of counsel he was found unconstitutionally guilty of wiretapping.

Moreno contends that he is entitled to an appeal of the dismissal of his habeas petition as the District Court's procedural ruling and denial of a certificate of appealability are abuse of the court's discretion. Indeed, the District Court's legal reasoning for its procedural ruling here is fundamentally flawed for two reasons. First of all, legal innocence is tantamount to factual innocence for purposes of the "actual-innocence

gateway" or "miscarriage of justice exception" to excuse any procedural default. Secondly, the District Court inexplicably misconstrued Moreno's actual innocence claim as an instruction error claim, which renders the court's legal reasoning for its procedural ruling wrong. Moreno further asserts that, under the actual innocence standard articulated by the Supreme Court in *Bousley*, he can establish that he is actually innocent of the wiretapping charges, which opens the gateway for a federal court to consider his otherwise defaulted ineffective assistance of counsel claim on its merits.

Cal. Pen. C. Section 631(a) reads, in pertinent part, as follows:

> "Any person who, by means of any machine..., intentionally taps, or makes any unauthorized connection..., with any telegraph or telephone wire... of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication... reads..., the contents or meaning of any message, report, or communication while the same is in transit... is punishable by..."

Although the statute has 27 instances of the word "or," the trial court here inexcusably read into the statute two disjunctive clauses, demarcated on the eight "or." Consequently, the court instructed the jury that it could find Moreno guilty of wiretapping if it found either independent element to be true: If Moreno, by means of any machine (a) intentionally tapped or made any unauthorized connection with any telegraph or telephone wire; or (b) intercepted a communication willfully and without the consent of all parties to the communication. [CT 943.]

Wiretapping, under Section 631, is a part of the Invasion of Privacy Act. [§§ 630 et. seq.; the Act.] In enacting the Act, the Legislature declared in broad terms its intent "to protect the right of the people of this state" from what it perceived as "a serious threat to the free exercise of personal liberties [that] cannot be tolerated in a free and civilized society." [§ 630; *Tavernetti v. Superior Court* (1978) 22 Cal.3d 187, 194.]

Section 631 has been labeled "quite ambiguous" [*Warden v. Kahn* (1979) 99 C.A.3d 805, 811.] and "patently ambiguous." [*People v. Wilson* (1971) 17 C.A.3d 598, 602.] However, beginning with the statutory text, it is patent that "Section 631 contains two separate clauses dealing with wiretapping activities, the first making it an offense to '[tap], or [make] any unauthorized connection' with telephone or telegraph wires or

equipment and the second forbidding the interception of messages in transit or during transmission and reception 'without the consent of all parties." [*Warden*, 99 C.A.3d at 811 fn.3.] Accordingly, these two clauses constitute the substantive elements of the criminal offense of wiretapping.

Further, these two elements must be in the conjunctive, for otherwise, if they were in the disjunctive, such an interpretation would result in absurd consequences. For instance, how does one intercept a communication "during transmission and reception" without a connection, authorized or not, to a "telegraph or telephone wire, line, cable, or instrument"? It simply cannot be done. Conversely, making an unauthorized connection in it of itself, without any further act, does not invade anyone's right of privacy.

In fact, Section 631's purpose has long been established by the state Supreme Court when it held that the wiretapping statute "serves purpose of protecting secrecy of telegraphic and telephone messages." [*People v. Trieber* (1946) 28 Cal.2d 657, 664.] Stated more precisely, the wiretapping statute's purpose is "to protect the right to privacy" [§ 630.] from the completion of its two substantive elements in the conjunctive: "Section 631 'prohibits "wiretapping," i.e., intercepting communications by an unauthorized connection to the transmission line.'" [*People v. Guzman* (2017) 11 C.A.5th 184, 192 (emphasis in original)(quoting *People v. Ratekin* (1989) 212 C.A.3d 1165, 1168).] In other words, the statute serves its purpose "of protecting secrecy of telegraphic and telephone messages" by prohibiting "any person" from making an unauthorized connection to a telegraph or telephone transmission line in order to facilitate the interception of a communication while it "is in transit." [§ 631(a); *Trieber*, 28 Cal.2d at 664; *Guzman*, 11 C.A.5th at 192.]

The state Supreme Court has also interpreted Section 631's objective. In *Ribas v. Clark*, the Court held that the Legislature's express objective in enacting Section 631 was designed to protect a person placing or receiving a call from a situation where the person on the other end of the line permits an outsider to tap his telephone or listen in on the call. [(1985) 38 Cal.3d 355, 363.] This interpretation of the statute binds all courts [*West v. American Tel. & Tel. Co.* (1940) 311 U.S. 223, 236.], especially where "consideration of stare decisis has special force in the area of statutory interpretation." [*People v. Latimer* (1993) 5 Cal.4th 1203, 1213.]

To be clear, "[i]n order to violate section 631 it is necessary that the intercepted communication be carried over '... telegraph or telephone wire, line, cable, or instrument of any internal telephonic communication system...'" [*Ratekin*, 212 C.A.3d at 1168; *People v. Ulrich* (1975) 52 C.A.3d 894, 898-99 (wiretapping "statute prohibits three ways of obtaining information being sent over a telegraph or telephone line").]

Further, the intercepted communication must be contemporaneous with its transmission. [*Ribas*, 38 Cal.3d at 360 ("the plain language of section 631" requires for an intercepted "communication [be] while the same is in transit..., or is being sent from, or received at any place within this state..."); *Wilson*, 17 C.A.3d at 603 (holding that section 631 does not apply where information was obtained after and not "while" it was in transit or passing over a wire).]

The eavesdropping statute is also part of the Act. [§ 632.] Sections 631 and 632 deal with the same subject matter: electronic surveillance. Wiretapping, as the name itself suggests, refers to the interception of wire (i.e., telephone) communications. Stated simply, "[w]iretapping refers to the interception by any method of telegraphic or telephonic communications; the term electronic eavesdropping encompasses all other forms of electronic surveillance." [Van Boven (1969), *Electronic Surveillance in California: A study in State Legislative Control*, 57 Cal.L.Rev. 1182, 1183, fn.6.] In other words, "[eavesdropping] is different from wiretapping... insofar as it does not require an unauthorized connection to a transmission line, whereas wiretapping does." [*Gusman*, 11 C.A.5th at 192 fn.7 (emphasis in original); cf, *Ulrich*, 52 C.A.3d at 898-99 (wiretapping "statute prohibits three ways of obtaining information being sent over a telegraph or telephone line")(emphasis added).]

The Court of Appeals, in *Ratekin*, explained the distinction of both statutes further. Although sections 631 and 632 "envision and describe the use of similar or the same equipment to intercept communications, the manner in which such equipment is used is clearly distinguished, separate and mutually exclusive. Penal Code section 631 prohibits 'wiretapping,' i.e., intercepting communications by an unauthorized *connection* to the transmission line. Penal Code section 632 prohibits 'eavesdropping,' i.e., the interception of

communications by the use of equipment which is not connected to any transmission line. In order to violate 631 it is necessary that the intercepted communication be carried over '... telegraph or telephone wire, line, cable, or instrument of any internal telephonic communication system...' No such limitation is found in section 632." [212 C.A.3d at 1168 (emphasis in original).] In sum, besides the requirement of an unauthorized connection to a transmission line within the wiretapping statute, "[i]n all other substantive respects the conduct prohibited by the two statutes is the same." [*Guzman*, 11 C.A.5th at 192.]

Under these authorities, it is patent that the trial court misconstrued the wiretapping statute in the disjunctive and, consequently, erred in instructing the jury with two independent elements on the wiretapping charges. The court's formulated second element of the instruction, further, is indistinguishable from Section 632 and thus making the eavesdropping statute superfluous within the Act. [Cf, *Ribas*, 38 Cal.3d at 361 (a surreptitious "recording" of a private conversation is, by definition, a "violation of section 632").]

The trial court's error violated the general rule that "when confronted with two statutes dealing with the same subject matter, they should, if possible, be harmonized and effect given to both." [*Brandt v. Superior Court* (1967) 67 Cal.2d 437, 442.] Moreover, a statute is to be construed as a whole in reference to the entire scheme of law which it is a part. [*People v. Shirokow* (1980) 26 Cal.3d 301, 306-07.] These rules of statutory construction dictate that Section 631 must be read in light of Section 632. Here, contrary to these established rules of statutory construction, the trial court clearly duplicated the eavesdropping statute's language within the second "element" of its formulated instruction for the wiretapping charges.

Therefore, Moreno relies on the principle that "[a] criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute." [*Kordel v. U.S.* (1948) 335 U.S. 345, 348-49.] Here, the trial court clearly violated this principle and, in doing so, exceeded its jurisdiction by misinterpreting the wiretapping statute. [See, *Ex parte Siebold*, (1880) 100 U. S. 371, 376–377 (noting that a court's "authority" to "try and imprison" an individual stems from a particular statute and therefore a court has "no jurisdiction" if the law does not lawfully apply to the prisoner); *In re Harris* (1993) 5 Cal.4th 813, 839 ("a misinterpretation of the penal statute would result in a longer sentence that was permitted by law,

and imposition of the sentence was therefore in excess of the trial court's jurisdiction"); *In re Miller* (2017) 14 C.A.5th 960, 979 ("a court acts in excess of its jurisdiction by imposing a punishment for conduct not prohibited by the relevant penal statute").] The trial court further compounded its fundamental jurisdictional error by committing a fundamental Due Process error by convicting Moreno "for conduct that its criminal statute, as properly interpreted, does not prohibit." [*Fiore v. White* (2001) 531 U.S. 225, 226.]

It stands to reason that, when the wiretapping statute is properly construed, a properly instructed jury would be constitutionally precluded from convicting Moreno for wiretapping. [*Martin v. Ohio* (1987) 480 U.S. 228, 234 (jury may not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt); *Sanders v. Superior Court* (1999) 76 C.A.4th 609, 614 fn.4 ("The finding of instruction error, in a way, was not required for the court's decision. Stated otherwise, since we found no evidence was adduced at trial to prove the false representation necessary to a conviction of theft of real property, even had the jury been properly instructed, the conviction would have been required to be reversed.").]

Indeed, under the foregoing authorities, it is axiomatic that, but for the trial court's fundamental jurisdictional and constitutional errors, Moreno is actually innocent – factually and legally – of wiretapping as his conduct could not be proscribed under a correct interpretation of the statute. [See, *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 455 n.17 (describing actual innocence as meaning that there is a fair probability that, in light of all the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of that particular crime); *Bousley v. United States* (1998) 523 U.S. 614, 623-24 (recognizing that actual innocence can be established if the defendant's conduct did not fall within the scope of the relevant criminal statute); *Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 860 n. 21 ("The concept of 'innocence of the crime' means that the constitutional violation resulted in the conviction of one who was innocent of the *particular* crime for which he or she was charged and convicted."); see also, *U.S. v. Bruchhausen* (9th Cir. 1992) 977 F.2d 464, 469 (holding that the "indictment was insufficient as a matter of law" and stating that

defendant "may be subject to punishment under other statutes, but his alleged conduct does not constitute wire fraud").]

II. Important Questions of Federal Law That Should be Settled by this Court

Moreno contends that the three questions presented in the instant petition are important questions of federal law that should be settled by this Court. The resolution of these questions is imperative for the thousands of other similarly situated defendants throughout our nation and to increase the integrity or public reputation of judicial proceedings.

A. The Court Should Hold That the Rule That Actual Innocence Excuses the Statute of Limitations Encompasses Cases of Legal Innocence

The dispositive question here case touches upon equitable exceptions to the statute of limitations of the venerated writ of habeas corpus—the only writ that is expressly mentioned in the Constitution. [U.S. Const. Art. I, §9, cl. 2; *Holland v. Florida* (2010) 560 U.S. 631, 649.] This Court has held that a federal court may hear the merits of untimely habeas claims if the failure to hear the claims would constitute a "miscarriage of justice." [*McQuiggin v. Perkins* (2013) 569 U.S. 383, 391-93 (holding that miscarriage of justice (actual innocence) showing applies to claims filed after the AEDPA statute of limitations has run, as well as to successive, abusive and procedurally defaulted claims).]

The Court articulated the standard for determining actual innocence in *Kuhlmann*: "[T]he prisoner must 'show a fair probability that, in light of all the evidence... the trier of the facts would have entertained a reasonable doubt of his guilt.'" [477 U. S. at 455, n. 17, quoting Friendly, Henry J. (1970), *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160.] The Court subsequently rephrased the standard: a habeas petitioner may have his claim heard on the merits "if he can establish that the constitutional error in his trial has probably resulted in the conviction of one who is actually innocent. To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him" of the substantive offense. [*Bousley*, 523 U.S. at 623 (internal citation and quotation marks omitted).]

To be sure, the Court, in *Sawyer v. Whitley*, stated that "the miscarriage of justice exception is concerned with actual as compared to legal innocence." [(1992) 505 U.S. 333, 339; See, *Jones v. Hendrix* (2023) 599 U.S. ___, ___ (J. Jackson dis, slip op., at 1 fn. 1)(noting the interchangeability of the terms "statutory innocence" and "legal innocence," where "[b]oth refer to a situation where an individual was convicted under a statute that, properly interpreted, did not reach his conduct").] Similarly, in *Bousley* the Court stated "that 'actual innocence' means factual innocence, not mere legal insufficiency." [523 U.S. at 623 (citing *Sawyer*).] Nevertheless, under the Court's settled precedent, legal innocence claims fit the category of "miscarriage of justice."

To begin, this Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice." [*Hill v. United States* (1962) 368 U. S. 424, 428.] In *Davis v. United States*, the Court held that where a precedent later establishes that the prisoner was convicted and punished "for an act that the law does not make criminal," then "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice.'" [(1974) 417 U. S. 333, 346.] The Court has subsequently recognized, as stated above, that one way a habeas petitioner may be actually innocent is if the petitioner's conduct falls outside the scope of the criminal prohibition. [*Bousley*, 523 U.S. at 623-24.]

Furthermore, in a criminal trial, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." [*Jackson v. Virginia* (1979) 443 U.S. 307, 316.] This standard of proof is "indispensable" to our criminal justice system and preserves three distinct interests. [*In re Winship* (1970) 397 U.S. 358, 364.] First, it protects the defendant's interest in being free from unjustified loss of liberty and the stigmatization that results from conviction. [Id. at 363.] Second, it engenders community confidence in the administration of justice by giving "concrete substance" to the presumption of innocence. [Id. at 363-64.] Third, it ensures "that the moral force of the criminal law [is not] diluted by a standard of proof that leaves people in doubt whether innocent [people] are being condemned." [Id. at 364.]

Thus, for a jury to convict a defendant under this high burden of proof, the jury must "reach a subjective state of *near certitude* of the guilt of the accused." [*Jackson*, 443 U.S. at 315 (emphasis added).]

Under these precedents, it is settled that if a habeas petitioner can establish that he is convicted under a statute that, properly interpreted, did not reach his conduct then his conviction represents "a complete miscarriage of justice." [See, *U.S. v. Addonizio* (1979) 442 U.S. 178, 186-87 (discussing how a change in the substantive law of conviction in *Davis* required habeas relief, otherwise "[t]o have refused to vacate his sentence would surely have been "a complete miscarriage of justice," since the conviction and sentence were no longer lawful.").]

If the circumstances found in both *Davis* and *Bousley*, where a precedent *later* establishes that a defendant was convicted for conduct that falls outside the scope of the criminal statute, "'inherently results in a complete miscarriage of justice.'" [*Davis*, 417 U. S. at 346.] It follows, accordingly, that it is equally a miscarriage of justice for a defendant to be convicted for "'the erroneous application or interpretation' of relevant law" *from the outset*. [*Boumediene v. Bush* (2008) 553 U.S. 723, 779 (quoting *INS v. St. Cyr* (2001) 533 U. S. 289, 302).] Stated differently, but for "a fundamental defect" (i.e., the erroneous application or interpretation of relevant law) [*Hill*, 368 U.S. at 428.], the legally innocent defendant would be able to establish his *factual* innocence, which would unquestionably constitute "a complete miscarriage of justice." [*Addonizio*, 442 U.S. at 186-87.]

It is worth emphasizing that "[a] judge's overly broad construction of a penal statute," which results in a "legally innocent" defendant, "can be much more harmful to a defendant" than many constitutional errors. [*Is Innocence Irrelevant?* 38 U. Chi. L. Rev. at 157; see also, *U.S. v. Parr-Pla* (9th Cir. 1977) 549 F.2d 660, 662 (per curiam)("It is the duty of the court, not counsel, to advise the jury as to the law...").] Indeed, a legally innocent defendant by necessity is claiming, as in here, that he was denied his Sixth Amendment right to a jury finding of guilt beyond a reasonable doubt for every element of a crime with which he was charged. [*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.]

If a court misinterprets a statute and fails to instruct the jury as to all of the elements of the offense, the jury will, naturally, be unable to make findings on every element of the offense. [Cf, *Neder v. U.S.* (1999) 527 U.S. 1, 7, 12 (addressing a claim that the jury was improperly instructed in violation of the Sixth Amendment because the court misinterpreted a statute not to contain a particular element); *U.S. v. Pepe* (9th Cir. 2018) 895 F.3d 679, 691 (where defendant contended that the statutory language did not encompass his conduct, the court vacated defendant's convictions by stating that "[b]ecause the jury was not properly instructed on the travel element, we vacate Pepe's convictions and sentence").] Under such circumstances, there is insufficient *factual* basis for the defendant's conviction, which renders him actually innocent: factually and legally. In other words, all of the evidence adduced at trial, establishing the defendant's conduct, did not support a conviction under the statute, properly interpreted. [See, *House v. Bell* (2006) 547 U.S. 518, 556 (stating that the dispositive question under an actual innocence claim is "whether all the evidence, considered together, proves that [the defendant] was actually innocent, so that no reasonable juror would vote to convict him"); *Hargett*, 978 F.2d at 860 n. 21.]

Yet more pernicious to the defendant under such a posture is the utter denial of a fair trial. "The right to a fair trial [is] guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment." [*Cone v. Bell* (2009) 129 S. Ct. 1769, 1772.] While "[t]he Constitution guarantees a fair trial through the Due Process Clause... it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." [*U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146.] The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall have the right... to have the Assistance of Counsel for his defense." This right has been "deemed fundamental and essential to fair trial." [*Gideon v. Wainwright* (1963) 372 U.S. 335, 344; accord, *Mickens v. Taylor* (2002) 535 U.S. 162, 166 (quoting *U.S. v. Cronic* (1984) 466 U.S. 648, 659) (the right to counsel "has been accorded... 'not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'").]

Foremost among the attributes of a fair trial is the requirement that it be adversarial in nature: "[t]he very premise of our adversary system of criminal justice is that partisan advocacy of both sides of a case will

best promote the ultimate objective that the guilty be convicted and the innocent go free." [*Herring v. New York* (1975) 422 U.S. 853, 862.] "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." [*Cronic*, 466 U.S. at 656.] However, for a legally innocent defendant, as in here, the record would plainly disclose that neither defense counsel nor the trial court "correctly understood the essential elements of the crime with which he was charged." [*Bousley*, 523 U.S. at 618-19.] As a result, the jury charge "was plainly wrong in application to the proof made; and the error pervaded the entire charge... indeed the entire trial." [*Kotteakos v. U.S.* (1946) 328 U.S. 750, 768.] Such a chain of events for a legally innocent defendant unquestionably constitutes "extreme malfunctions in the state criminal justice systems" [*Harrington v. Richter* (2011) 562 U. S. 86, 102–103.] In fact, such a fundamental defects "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." [*U.S. v. Marcus* (2010) 560 U.S. 258, 262.]

It is, therefore, a matter of equity for the Court to hold that the rule that actual innocence excuses the statute of limitations encompasses cases of legal innocence. After all, a legally innocent defendant does not need an intervening change in substantive law nor new evidence to establish his *actual innocence*. He simply needs "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." [*Boumediene*, 553 U.S. at 779.]

Procedurally, adjudication of such a claim is evident from the record and needing no redetermination of facts, which does not significantly impact the state's interest in finality of judgments. [*Harris*, 5 Cal.4th at 841; see also, L. Litman (2018), *Legal Innocence and Federal Habeas*, 104 Va. L. Rev. 417, 480-81 ("Petitioners who are legally innocent may not need to rely on evidence aside from what is already in the state record – the facts adduced at trial or a plea colloquy – to establish that a statute, as subsequently interpreted, does not apply to them.").] The sole issue is the applicability of the statute of conviction to the evidence adduced at trial, which is a question of law. [*Neal v. State of California* (1960) 55 Cal.2d 11, 17 (the applicability of a statute to conceded facts is a question of law).]

In *Fiore v. White*, this Court held that a State cannot, consistently with the Due Process clause, convict a defendant for conduct that its criminal statute does not prohibit. [531 U.S. at 226 (per curiam); see also, *Bunkley v. Florida* (2003) 538 U.S. 835, 840 (retroactivity analysis will be rendered unnecessary where Due Process was violated because the correct interpretation of the statute makes clear the defendant did not violate the statute); *Sanders*, 76 C.A.4th at 614 fn.4.] The meaning of such a ruling is both simple and forceful: there is no statute or procedural rule that will prevent habeas remedy if the federal constitution so demands it. [Id. (holding that "Fiore's conviction fails to satisfy the Federal Constitution's demands").]

Consequently, if a defendant is legally innocent, as in here, because "his conviction rests upon a violation of the Federal Constitution" [*Trevino v. Thaler* (2013) 569 U.S. 413, 421.], the state has no "sovereign" power to override this prohibition. [See, *Wade v. Mayo* (1948) 334 U.S. 672, 683 (holding that a Due Process violation "renders void the judgment and commitment under which petitioner is held"); *Siebold*, 100 U.S. at 376–377.]

Holding that actual innocence encompasses cases of legal innocence as found in the instant petition is particularly imperative given the "equitable principles [that] have traditionally governed the substantive law of habeas corpus." [*Holland*, 560 U.S. at 646.] In fact, the principal purpose of the Great Writ is to serve as a bulwark against convictions that violate fundamental fairness and one of the basic safeguards of personal liberty. [See, *Lassiter v. Dep't of Social Servs.* (1981) 452 U.S. 18, 25; *Bowen v. Johnston* (1939) 306 U.S. 19, 26.] Such a holding would be tuned to the rationale underlying the miscarriage of justice exception—i.e., ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." [*Herrera v. Collins* (1993) 506 U.S. 390, 404.] It would, moreover, be empathetic with our society's "fundamental value determination... that it is far worse to convict an innocent man than to let a guilty man go free." [*Winship*, 397 U.S. at 372 (Harlan, J., conc.).]

Although it might sound obvious under the foregoing authorities, it is still worth emphasizing that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly

never to repose." [*Montgomery v. Louisiana* (2016) 136 S. Ct. 718, 732 (quoting *Mackey v. U.S.* (1971) 401 U.S. 667, 693 (Harlan, J., con. in judgments in part and dis. in part)).]

B. The Court Should Hold That a Federal Court Owes No Deference to a State Court's Conviction Under an Actual-Innocence Gateway Claim

If a habeas petitioner, as in here, asserts an actual-innocence gateway claim, then by necessity the petitioner is contending that he or she was prejudiced from one or more fundamental constitutional errors that manifest "extreme malfunctions in the state criminal justice systems." [*Harrington*, 562 U. S. at 102–103.] Such a claim, if substantiated, would absolutely disparage the "integrity or public reputation of judicial proceedings." [*Marcus*, 560 U.S. at 262.] To paraphrase Justice Gorsuch, who would not hold a rightly diminished view of our courts if they allowed an individual to be treated as a convict only because they refused to correct an obvious judicial error? [*Hicks v. United States* (2017) 137 S. Ct. 2000, 2001 (Gorsuch, J., conc.).]

It follows, accordingly, that when a petitioner, as in here, accompanies his claim of innocence with an assertion of constitutional error at trial, his conviction may not be entitled to "an 'extraordinarily high' standard of review" as one that is the product of an error-free trial. [*Schlup v. Delo* (1995) 513 U.S. 298, 315-316 (citing *Herrera*, 506 U.S. at 419, 426 (O'Connor, J., conc.).] In fact, although stringent, the standard of proof for "actual innocence" is not as stringent as the standard of proof governing claims of constitutional insufficiency of the evidence under *Jackson v. Virginia*. [See, *Schlup*, 513 U.S. at 323 n. 38; *Jackson*, 443 U.S. at 324.]

The Court has stated that "[t]hough the *Carrier* standard [of actual innocence] requires a substantial showing, it is by no means equivalent to the *Jackson* standard that governs review of claims of insufficient evidence." [*Schlup*, 513 U.S. at 330; accord, *House*, 547 U.S. at 538 ("as the *Schlup* decision explains, the gateway actual-innocence standard is 'by no means equivalent to the standard of *Jackson v. Virginia*,...' which governs claims of insufficient evidence"); *Jones v. Calloway* (7th Cir. 2016) 842 F.3d 454, 461-62 ("The actual-innocence standard isn't deferential to the verdict, like the legal standard for evaluating

challenges to the sufficiency of the evidence.").] Further, under this standard, "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather, the standard requires the district court to make a probabilistic determination about what reasonable, *properly instructed jurors* would do." [*Schlup*, 513 U.S. at 329 (emphasis added).]

Put simply, under an actual-innocence gateway claim a federal court is not deferential to the verdict, nor harmless error analysis required. The dispositive question before the reviewing court, thus, boils down to a simple "Yes" or "No" answer to whether the record establishes the requisite elements of the convicting statute, with no deference to the state's conviction or its legal conclusions. Such none-deferential standard is validated by this Court's case law.

As mentioned above, under a claim of legal innocence as a result of statute misinterpretation, the sole issue is the applicability of the statute of conviction to the evidence adduced at trial, which is a question of law. [*Neal*, 55 Cal.2d at 17.] A federal court reviews questions of law de novo, owing no deference to a state court's legal conclusions. [*Williams v. Taylor* (2000) 529 U.S. 400 (O'Connor, J., conc.); *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1000 (en banc).] Further, where the construction of a penal statute is involved, as in here, defendant must be given the benefit of every reasonable doubt as to whether the statute was applicable to him. [*In re Zerbe* (1964) 60 Cal.2d 666, 668.] This is in line with "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant." [*Hughey v. U.S.* (1990) 495 U.S. 411, 422; see also, *Crandon v. U.S.* (1990) 494 U.S. 152, 160 ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader tan that clearly warranted by the text.").] After all, "[i]t is the policy of [California] to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit." [*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.]

Although the state's interest in the finality of its judgments is strong, "where such review does not require a redetermination of the facts, and thus poses a strictly legal issue, the state's interest is reduced. In

such circumstances, an individual's interest in obtaining judicial review of an allegedly illegal sentence cannot be ignored." [*Harris*, 5 Cal.4th at 841; see also, *Shepley v. Cowan* (1875) 91 U.S. 330 (finality attaches only to the determination of questions of fact).]

Indeed, this Court has stated that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." [*Sanders v. U.S.* (1963) 373 U.S. 1, 8.] Consequently, the State's sovereign power to enforce "societal norms through criminal law" is annulled if it violates the Constitution. [*Calderon v. Thompson* (1998) 523 U. S. 538, 556 (internal quotation marks omitted).] In short, if a petitioner's "conviction fails to satisfy the Federal Constitution's demands" [*Fiore*, 531 U.S. at 226.], "the State's interest in finality deserves little weight." [*Buck v. Davis* (2017) 580 U.S. 100, 126.]

As established above, a legal innocence claim implicates fundamental Due Process principles. It has long been established that "the Due Process Clause... forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." [*Fiore*, 531 U.S. at 228-29.] Accordingly, Due Process requires that a state vacate a conviction, even a final conviction that has been affirmed on appeal, where a proper interpretation reveals that a defendant was convicted "for conduct that [the state's] criminal statute [ ] does not prohibit." [*Fiore*, 531 U.S. at 228.]

In sum, if a petitioner, as in here, buttresses his actual innocence gateway claim with a Due Process violation, then he "renders void the judgment and commitment under which petitioner is held." [*Wade*, 334 U.S. at 683.] A voided judgment does not merit any deference whatsoever and, thus, is open to attack anytime. [See, *Lambert v. Blackwell* (E.D. PA 2001) 175 F.Supp.2d 776 (a void judgment is not entitled to the respect accorded to, and is attended by none of the consequences of, a valid adjudication); *Mathews v. Mathews* (KY App. 1987) 731 S.W.2d 832, 833 (a void judgment is not entitled to any respect or deference by the courts).] This is especially so, as mentioned above, because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly *never* to repose." [*Montgomery*, 136 S. Ct. at 732 (emphasis added).] Moreover, "a § 2254 petitioner is entitled to have [an] actual innocence

issue addressed and disposed of [on the merits] in the district court." [*Wolfe v. Johnson* (4th Cir. 2009) 565 F.3d 140, 164 (citing *Bousley*, 523 U.S. at 623).]

C. The Court Should Hold That a Certificate of Appealability Should Issue if a Habeas Petitioner Can Establish That the District Court Plainly Erred in its Procedural Ruling by Misconstruing His Claim and Further Establish a Constitutional Violation

Moreno contends that the District Court's legal reasoning for its procedural ruling, to dismiss Moreno's habeas petition as untimely without reaching Moreno's underlying constitutional claim of ineffective assistance of counsel, is fundamentally flawed for two reasons. First of all, as established above, Moreno's legal innocence claim is tantamount to factual innocence for purposes of the "actual-innocence gateway" or "miscarriage of justice exception" to excuse any procedural default. Secondly, the District Court inexplicably and improperly misconstrued Moreno's actual innocence claim as an instruction error claim. If the District Court's legal reasoning for its procedural ruling is flawed, as it is here, then it follows, accordingly, that such ruling is debatable among jurists of reason to justify issuance of a COA in the instant matter. [See, *Slack v. McDaniel* (2000) 529 U.S. 473, 484.] Further, Moreno buttresses his actual innocence claim with an intertwined ineffective assistance of counsel claim.

1. The District Court's Legal Reasoning for Its Procedural Ruling is Flawed, as It Improperly Misconstrued Moreno's Actual Innocence Claim as an Instruction Error Claim, Rendering Its Ruling Wrong

Here, although the District Court acknowledged that Moreno argued "that his untimely petition qualifies under the miscarriage of justice exception to untimeliness" [Doc. No. 24 (Court Order) at 2.], the District Court misconstrued the crux of Moreno's central argument as being "that the jury at his trial in state court *was not properly instructed* as to the elements of wiretapping..." [Id. at 3 (emphasis added).] The court went on to state that Moreno

> "presents no new evidence in support of his claim, which he characterizes as one of 'actual innocence.' Instead, petitioner merely argues that the jury at his trial in state court was improperly instructed on the elements of wiretapping in violation of... § 631(a) and that if properly instructed no reasonable jury could have convicted him of the wiretapping counts. This is not a claim of factual innocence which qualifies to

pass through the *Schlup* gateway so that petitioner's otherwise time-barred claim may be heard on the merits because it invokes a purported legal defense, not factual innocence."

[Id. at 4 (emphasis added).] Within a footnote, the court further muddled the legal analysis by noting that Moreno's insufficiency of the evidence claim of his wiretapping convictions was denied on direct appeal. [Ibid.] To be clear, Moreno's habeas claims are that he is actually innocent of the wiretapping charges, not instructional error or insufficiency of the evidence.

Undeniably, legal innocence that results from an error of statutory interpretation may present as a claim that the jury instructions omitted or misdescribed an element of the criminal offense, thereby denying a defendant his Sixth Amendment right to a jury finding of guilt beyond a reasonable doubt for every element of a crime with which they are charged. [*Apprendi*, 530 U.S. at 477.] More critically, claims of instructional errors are generally subject to harmless error analysis. [*Hedgpeth v. Pulido* (2008) 555 U.S. 57, 60-61.] Such claims are subject to their own standard: a habeas petitioner is not entitled to relief unless the constitutional error had a substantial and injurious effect or influence in determining the jury's verdict. [*Brecht v. Abrahamson* (1993) 507 U.S. 619, 638.] Further, this standard must be analyzed for reasonableness under the AEDPA's deferential standard of review. [See, *Davis v. Ayala* (2015) 135 S. Ct. 2187, 2198-99.]

Likewise, "[i]n some respects, legal innocence resulting from an error of statutory interpretation is similar to sufficiency of the evidence claims, which concern whether the evidence at trial was sufficient to prove the defendant's guilt beyond a reasonable doubt. But sufficiency claims do not challenge the nature and contours of the crime that the jury was supposed to determine if the defendant committed." [*Legal Innocence and Federal Habeas*, Virginia Law Review 104 at 446; See, *House*, 547 U.S. at 538 ("When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict.").] "That is, in sufficiency claims, the defendant's argument takes the nature of the offense and the legal definition of the crime as a given and challenges whether the facts at trial establish that the defendant committed that crime (as described to the jury and interpreted by a court)." [Ibid; cf, *Sanders*, 76 C.A.4th at 614 fn.4.]

Unsurprisingly, an insufficiency of the evidence claim has its own demanding legal standard, which this Court has stated is more stringent than the standard of proof for an actual-innocence gateway claim. [*House*, 547 U.S. at 538 ("as the *Schlup* decision explains, the gateway actual-innocence standard is 'by no means equivalent to the standard of *Jackson v. Virginia*,...' which governs claims of insufficient evidence"); see also, *Jones*, 842 F.3d at 461-62.]

In sum, under an actual-innocence gateway claim, there is neither harmless error analysis nor deferential treatment to the verdict required, unlike under an instruction error or insufficiency of the evidence claim. Further, when a petitioner accompanies his claim of innocence with an assertion of constitutional error at trial, as in here, his conviction may not be entitled to "an 'extraordinarily high' standard of review" as one that is the product of an error-free trial. [*Schlup*, 513 U.S. at 315-316.] Moreover, the actual innocence "standard does not require absolute certainty about the petitioner's guilt or innocence." [*House*, 547 U.S. at 538.] Under such a gateway claim, thus, the dispositive question before the Court boils down to a simple "Yes" or "No" answer to whether the record establishes the requisite elements of the wiretapping statute. [See, *Vosgien v. Persson* (9th Cir. 2014) 742 F.3d 1131, 1135 ("Vosgien need not demonstrate that he was actually innocent of *any* criminal wrongdoing. He need only demonstrate that he was actually innocent of compelling prostitution, the counts under which he was convicted.")(emphasis in original).] It follows, accordingly, that there is a significant difference between an actual innocence claim versus an instruction error or insufficiency of the evidence claims.

With such a fundamentally flawed legal reasoning underlying the District Court's ruling, it is no surprise that the court was able to quickly dismiss Moreno's actual-innocence gateway claim. In reaching its ruling, the District Court

> "observe[d] that petitioner's focus in arguing that he has stated a cognizable due process violation claim is misplaced. The question before this court in ruling upon the pending motion to dismiss is not whether petitioner has stated a cognizable claim for habeas relief. Rather, the question is whether the claim or claims brought by petitioner in this case, which are otherwise barred by the applicable statute of limitations, should nonetheless be considered on their merits because his case qualifies as one of the

'extremely rare' and 'narrow class of cases' in which the *Schlup* gateway or escape hatch applies. The court has concluded that the answer to that question is 'no.'"

[Doc. No. 24 at 4-5.] Such a posture by the court essentially puts the horse before the cart. By reflexively invoking procedural bars at the outset, how does a federal court enable a habeas petitioner an equitable opportunity to make the requisite "showing of actual innocence" in order to have his constitutional claims considered on their merits? [See, *McQuiggin*, 569 U.S. at 386.]

Indeed, by refusing to engage in any minimal amount of analysis of an actual innocence claim, such a court will never be able to determine if the instant matter is "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." [*Murray v. Carrier* (1986) 477 U.S. 478, 496; accord, *McQuiggin*, 569 U.S. at 392 (stating that habeas courts have an obligation "to see that federal constitutional errors do not result in the incarceration of innocent persons").] After all, "habeas corpus is, at its core, an equitable remedy." [*Schlup*, 513 U.S. at 319.] As such, "habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes." [*Brown v. Vasquez* (9th Cir. 1992) 952 F.2d 1164, 1166; cf, *Miller*, 14 C.A.5th at 978 ("The federal Constitution therefore requires reversal of the special circumstances finding against defendant, [where they lacked substantial evidence,] and the Attorney General's procedural arguments can be no match for the United States' Constitution's demands.").]

Moreno is well aware that "[t]he federal courts handle thousands of noncapital habeas petitions each year, only a tiny fraction of which ultimately yield relief. While the volume is high, the stakes are as well. Federal judges grow accustomed to reviewing convictions with sentences measured in lifetimes, or in hundreds of months. Such spans of time are difficult to comprehend, much less to imagine spending behind bars. And any given filing—though it may feel routine to the judge who plucks it from the top of a large stack—could be the petitioner's *last, best shot* at relief from an unconstitutionally imposed sentence. Sifting through the haystack of often uncounseled filings is an unglamorous but vitally important task." [*McGee v. McFadden* (2019) 139 S. Ct. 2608, 2611 (Sotomayor, J., dis. from denial of certiorari)(internal citation

omitted)(emphasis added).] It is for this very reason that Moreno wants to emphasis his concern that a federal court's "press of competing priorities may turn the circumscribed COA standard of review into a rubber stamp, especially for pro se litigants." [Ibid.]

It is quite axiomatic to understand the District Court's plain error here. As demonstrated above, a petitioner that needs to assert a legal actual innocence claim does so only because there has been a fundamental constitutional breakdown in the trial. However, just because Moreno's actual innocence claim includes instructional error that does not mean that his claim should be adjudicated under a harmless error standard. [See, *Stephens v. Herrera* (9th Cir. 2006) 464 F.3d 895, 899 ("the mere fact of an improper instruction is not sufficient to meet the test for actual innocence").] In short, Moreno has demonstrated that reasonable jurists could conclude that the District Court's procedural ruling here was wrong, for a federal court has determined that there is more than "[o]ne way a petitioner can demonstrate actual innocence" than under the *Schlup* new evidence standard that the district court adjudicated under. [*Vosgien*, 742 F.3d at 1134.]

2. Moreno Demonstrates a Substantial Showing of the Denial of His Constitutional Right to Effective Assistance of Counsel for it to be Heard on the Merits

The remaining question is whether Moreno is "in custody in violation of the Constitution." [28 U.S.C. § 2254(a).] If he is, Moreno is entitled to habeas relief as "[a]nything contrary to the Constitution must, of course, yield in its wake." [*Aetna Cas. Sur. v. Spartan Mechanical* (E.D. NY 1990) 738 F. Supp. 664, 669 fn. 2.] It is a bedrock constitutional principle that the United States Constitution is the supreme law of the land. [U.S. Const. Art. VI, cl. 2.] Fidelity to the Constitution is thus compelled in all aspects. In fact, it is the duty of citizens, executive officers and courts to recognize, observe, respect and bow to the provisions of that law. [U.S. Const. Art. VI, cl. 3.] It follows, accordingly, that neither Congress nor a state can legislate around its strictures. Similarly, courts cannot implement rules, doctrines or the like to circumvent the Constitution's provisions. In short, if the Constitution compels a result, there is no impediment whatsoever to its discharge.

Moreno contends that defense counsel, Jesse Ortiz, was ineffective for failing to investigate and present a readily available absolute defense of actual innocence, as a matter of law, to the wiretapping charges. As established above, the instant claim is inextricably intertwined, relying on the same underlying facts and substantive law, with the actual innocence claim in that it is the other side of the same coin: had Ortiz performed effectively, Moreno would have not been convicted for any of the wiretapping charges.

For Moreno to prevail on his ineffective assistance of counsel claim, he must satisfy a two-prong test: (1) counsel's performance was deficient, and (2) prejudice resulted from the deficient performance. [*Strickland v. Washington* (1984) 466 U.S. 668, 687.] To prove deficient performance, Moreno must show Ortiz's representation fell below an objective standard of reasonableness. [Id. at 687-88.] Moreno must also show prejudice, such that there is a reasonable probability that, but for Ortiz's unprofessional errors, the result of the proceeding would have been different. [Id. at 694.]

(a) Defense Counsel's Performance Was Deficient

The crux of this claim, just as the previous claim, regards legal implications of undisputed facts to Moreno's wiretapping convictions. As established above, Moreno was charged with three counts of wiretapping in violation of Section 631(a). The prosecution relied on two theories in support of these charges: (1) the installation of the computer spyware on Doe's laptop for Count 3 [RT 1420.], and (2) the installation of two internet-wireless cameras for Counts 14 and 15. [RT 1420, 1454-57.] As there was no pattern CALCRIM jury instruction for "wiretapping," the trial court formulated its jury instruction based on its misinterpretation of the statute. Consequently, the trial court broke down the wiretapping statute into two independent "elements," in where it permitted the jury in its charge to find Moreno guilty of wiretapping if it found either or both "elements" true. [RT 1375, 1396; CT 943,]

During the jury instruction conference, the trial court addressed Ortiz's request to argue that Section 631 did not apply in this case because there was a Comcast cable internet connection in Doe's apartment, not a telephone connection. [RT 1351-52.] The trial court inquired, "were you able to find any case law that supports that position?" [RT 1352.] Ortiz replied, "The statute itself." [Id.] The court asked, "But no – no

case law that's interpreted that or discussed that?" Ortiz answered, "No." [Id.] Although the trial court initially ruled that it "would be a misstatement of the law" if Ortiz argued to the jury that the unauthorized wiretap had to be on a telephone wire [RT 1352, 1375.], the court subsequently withdrew its ruling on its own. [RT 1376-80, 1450.]

Ortiz then stated his position for the record that under Section 631 the interception of communication must be contemporaneous with the transmission. [RT 1353-59.] The court disagreed with Ortiz's reading of the statute but offered, "if you find any case law... that would take your position on that, I'll be happy to reconsider that over the lunch hour." [RT 1359.] The court observed, "I'm shocked at the lack of case law in this area," and Ortiz agreed, "Right. *There is none*." [Id. (emphasis added).] The court ultimately ruled that if Ortiz argued to the jury that the law requires for the illegally intercepted communication to be contemporaneous with transmission that the court "would sustain that as a misstatement of the law." [RT 1375.]

However, such a ruling "ignored the plain language of section 631, subdivision (a), that provides for the punishment of one 'who willfully and without the consent of all parties... reads, or attempts to read, or to learn the contents... of a... communication while the same is in transit..., or is being sent from, or received at any place within this state...'" [*Ribas*, 38 Cal.3d at 360 (emphasis in original); *Ulrich*, 52 C.A.3d at 898-99 (wiretapping "statute prohibits three ways of obtaining information being sent over a telegraph or telephone line")(emphasis added); *Wilson*, 17 C.A.3d at 603 (holding that section 631 does not apply where information was obtained after and not "while" it was in transit or passing over a wire).]

Further, Ortiz's assertion to the court that there was no case law requiring for any intercepted communication to be carried over a telephone line, under Section 631, is patently false. [RT 1352.] Wiretapping, as the name itself suggests, refers to the interception of wire (i.e., telephone) communications. As established above, California's wiretapping statute's purpose and objective are well-settled. The state Supreme Court has held that the statute's purpose is to protect "secrecy of telegraphic messages." [*Trieber*,

28 Cal.2d at 664.] The Court further held that the Legislature's express objective in enacting Section 631 was designed to protect telephonic conversations. [*Ribas*, 38 Cal.3d at 363.]

In other words, "Penal Code section 631 prohibits 'wiretapping,' i.e., intercepting communications by an unauthorized connection to the transmission line... In order to violate section 631[, thus,] it is necessary that the intercepted communication be carried over '... telegraph or telephone wire, line, cable, or instrument of any internal telephonic communication system...'" [*Ratekin*, 212 C.A.3d at 1168 (emphasis in original); *Ulrich*, 52 C.A.3d at 898-99 (wiretapping "statute prohibits three ways of obtaining information being sent over a telegraph or telephone line").] As such, the wiretapping statute has never been interpreted to proscribe anything approaching the type of conduct at issue here – i.e., the installation of a computer spyware and surveillance cameras. [See, *Kordel*, 335 U.S. at 348-49 ("A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute.").]

It is plain from the record that the trial court invited Ortiz to do research to inform himself on the law of wiretapping and, if need be, correct the court's interpretation of the statute and its requisite elements. Ortiz failed to take the court's invitation. [See, *People v. Ledesma* (1987) 43 Cal.3d 171, 222 ("Criminal defense attorneys have a duty to investigate carefully all defenses of fact and law that may be available to the defendant."); see also, *Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 (counsel are expected to possess the knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques).] Therefore, Ortiz's failure to investigate and present a readily available absolute defense of innocence as a matter of law was not a tactical decision but, rather, the record "suggest[s] that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." [*Wiggins v. Smith* (2003) 539 U.S. 510, 526.]

Strickland affords counsel wide latitude in making tactical and strategic decisions relating to the presentation of evidence and examining witnesses, but ignorance of the relevant law can never be presumed to be strategic. In fact, an uninformed strategy is not a reasoned strategy; it is, indeed, no strategy at all.

[*Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 949.] The record here establishes that Ortiz's performance was not "within the range of competence demanded of attorneys in criminal cases." [*Hill v. Lockhart* (1985) 474 U.S. 52, 56.] This Court has recognized that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." [*Hinton v. Alabama* (2014) 134 S. Ct. 1081, 1089 (per curiam) (finding counsel's "inexcusable mistake of law" to be constitutionally inadequate assistance of counsel).] Here, as in *Hinton*, the record plainly reflects Ortiz's inexcusable ignorance of criminal law and effectively establishes the first prong "of unreasonable performance under Strickland." [Id.]

(b) Moreno Was Prejudiced by Defense Counsel's Deficient Performance

As stated above, for Moreno to prevail on this claim he must show that prejudice resulted from Ortiz's deficient performance. Such a showing is not difficult here as the record plainly discloses that neither Ortiz nor the trial court "correctly understood the essential elements of the crime [of wiretapping] with which [Moreno] was charged." [*Bousley*, 523 U.S. at 618-19.] As a result, the jury charge "was plainly wrong in application to the proof made; and the error pervaded the entire charge... indeed the entire trial." [*Kotteakos*, 328 U.S. at 768.]

Under current case law, where there is no material dispute as to the facts relating to Moreno's wiretapping convictions, it is self-evident that Section 631(a) did not prohibit his conduct as wiretapping as a matter of law. It stands to reason that, when the wiretapping statute is properly construed, a properly instructed jury would be constitutionally precluded from convicting Moreno for wiretapping. [*Martin*, 480 U.S. at 234.] Consequently, due to Ortiz's deficient performance, Moreno was invalidly convicted of wiretapping as "the jury understood the instructions to allow conviction based on proof insufficient to meet" the constitutionally required "reasonable doubt" standard. [*Victor v. Nebraska* (1994) 511 U.S. 1, 6.] Further compounding such prejudice was that fact that Ortiz inexplicably failed to argue to the jury, in his summation of the case, a single word in defense to any of the wiretapping charges.

Under these circumstances, it is beyond dispute that Ortiz failed his "duty to investigate carefully all defenses of fact and law that [were] available to [Moreno]." [*Ledesma*, 43 Cal.3d at 222.] It is equally beyond question that Ortiz's performance "so upset the adversarial balance... that the trial was rendered unfair and the verdict rendered suspect." [*Kimmelman v. Morrison* (1986) 477 U.S. 365, 374.]

Thus, Ortiz's failure to investigate and argue an absolute defense of actual innocence as a matter of law amounted to constitutionally ineffective assistance since there is a reasonable probability that, but for Ortiz's unprofessional error, the result of the proceeding would have been different. [Cf, *Ledesma*, 43 Cal.3d at 222-23 (counsel rendered ineffective assistance by failing to investigate the facts or the law regarding diminished capacity); *People v. Pope* (1979) 23 Cal.3d 412, 425-26 ("where the record shows that counsel failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel").]

In fact, the jury charge and the closing arguments were permeated with the prohibited failure to disclose to the jury a viable defense of law. Upholding the wiretapping convictions where neither the government nor Moreno argued their case on a constitutionally valid theory, under a properly interpreted wiretapping statute, constitutes a miscarriage of justice. [See, *U.S. v. Garrido* (9th Cir. 2013) 713 F.3d 985, 998 (money laundering convictions were reversed because jury instructions permitted the jury to convict on an unconstitutional theory).]

In sum, the unique facts of the instant matter and the applicable law dictate that a COA should be issued and Moreno's habeas claims be considered on their merit. Otherwise, the Court would thereby "endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent" remain treated as a convict. [*San Martin v. McNeil* (11th Cir. 2011) 633 F.3d 1257, 1267–68.]

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CONCLUSION

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

Respectfully submitted,

Date: 9/23/24