NO. _____

In The
Supreme Court of the United States

In re ROSENDO RODRIGUEZ, III, *Petitioner*

PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

Carlo D'Angelo
THE D'ANGELO LAW FIRM
100 East Ferguson; Suite 1210
Tyler, TX 75702
Caro@dangelolegal.com

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 1440
Houston, TX 77002
seth@kretzerfirm.com

[Tel.] (713) 775-3050
[Fax] (713) 929-2019
Member, Supreme Court Bar

March 26, 2018

I

CAPITAL CASE

QUESTIONS PRESENTED

Mr. Rodriguez's habeas petition presents exceptional circumstances that have confounded the courts below. Since Mr. Rodriguez's murder conviction, public reports have revealed that the State may have suppressed evidence that its expert witness presented false and misleading testimony and material exculpatory evidence that showed Mr. Rodriguez's innocence. Despite substantial new evidence of his innocence, no court has ever held a hearing to assess the new witnesses that show that Mr. Rodriguez is innocent.

The question presented is:

1. Whether transfer to the district court for a hearing pursuant to this Court's original habeas jurisdiction is warranted in the exceptional capital case where the petitioner has raised a substantial case of innocence and no State or federal court has held an evidentiary hearing to examine his new evidence?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Rosendo Rodriguez, was the movant before the United States Court of Appeals for the Fifth Circuit. Mr. Rodriguez is a prisoner sentenced to death and in the custody of Lorie Davis, Director, Texas Department of Criminal Justice on **March 27, 2018.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

TABLE OF APPENDICES

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Rosendo Rodriguez respectfully requests that this Court transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b).

OPINION BELOW

The opinion of the Unites States Court of Appeals for the Fifth Circuit denying COA is *Rodriguez v. Davis*, 693 F. App'x 276 (5th Cir. 2017) and attached at Appendix A.

The Fifth Circuit's opinion denying leave to file a successor writ is dated March 23, 2018 and attached as Appendix B (case number: 18-10337).

STATEMENT OF JURISDICTION

The order of the court of appeals denying authorization to file a successive petition was entered on March 23, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the U.S. Constitution.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment of the United States Constitution states, in relevant part: "nor cruel and unusual punishments inflicted."

28 U.S.C. § 2241 (2009): Appendix D.

28 U.S.C. § 2244 (2009): Appendix E

28 U.S.C. § 2254 (2009): Appendix F

STATEMENT OF FACTS

In late 2017, reports arose in the local media of the settlement by way of payment of a large amount of money to a whistleblower. This whistleblower brought to light fraudulent practices and procedures by Lubbock Medical Examiner Dr. Sridhar Natarajan, who testified against Rodriguez at trial and in his state habeas hearing. Specifically, Dr. Natarajan is alleged to have directed untrained technicians to perform autopsies, tampered with government documents, and backdated autopsy reports, among other fraudulent practices. The following story was reported out of Lubbock newsmedia:

> LUBBOCK, TX -- A former Deputy Medical Examiner says the Lubbock County Chief Medical Examiner lied in his petition to dismiss her lawsuit.
>
> Dr. Luisa Florez responded on camera to Dr. Sridhar Natarajan's motion to dismiss the lawsuit. She filed the lawsuit on August 19.
>
> In her lawsuit, Florez claims Natarajan had untrained technicians perform autopsies.
>
> "I did confront him when I found some mismanagement," said Florez. "He told me that when he goes to court, he testifies that everything was done under his supervision, which is untrue."

"Whenever I found something that was wrong, or I never agreed with, I would always tell him. And I would show him which are the reasons," said Florez. "Since the very beginning, my goal has been that things need to be done correctly, according to the law. We have to follow the law because the job we do is so important. It can put someone in jail who is an innocent person, or allow someone that is guilty to walk off free."

Florez said her former boss had previously praised her work, writing her a recommendation to the Lubbock County Commissioners for a raise, which was approved.

"In the year and-a-half before, I was an excellent employee," she said. "He praised my skills, my professional abilities. He wrote a letter to the commissioner's court asking for a raise of $17,000, which was approved at the end of 2014."

"As soon as I filed the complaint, I became the worst employee ever," said Florez.

Natarajan's written response to the whistleblower lawsuit includes comments about Florez's citizenship status and arrest record. This means, he admits hiring some he believed to be a felon, and an illegal United States citizen.

"It doesn't make any sense, because it's not true," Florez said. "If I was a convicted felon, I wouldn't have my Texas Medical License. If I was an illegal immigrant, he couldn't legally hire me."

. . .

[Florez’s attorney] Kerensky said Natarajan's reply to the initial lawsuit is filled with false statements.

"What his false statements prove is that Dr. Natarajan is willing to use false statements, inaccurate information, in an effort to defend his position in this case," Kerensky said.

"We have evidence of tampering with government documents, backdating of autopsy reports, in an apparent attempt to try to make them look as if they were done on a timely basis. We have alteration of Dr. Florez's reports without her knowledge, and re-signing of those reports by Dr. Natarajan. Dr. Natarajan delegated a large amount of authority to his nurse, his head nurse, and allowed her essentially to practice medicine, to make decisions that only he and the Deputy Medical Examiner were allowed to make, by law," said Kerensky.

He said despite multiple attempts to internally resolve the conflict, her inquiry was not met with any support.

"We did everything we could to try and get this worked out so these problems could get solved," he said. "We were ignored at every turn."

"The real issue is the illegal activities that I reported to the DA and to the commissioners and to Human Resources," Florez said, "and of course the subsequent retaliation because I told them to please do a proper

investigation."

. . .

See Rapaport, W., "Whistleblower Goes One-on-One, Accuses Lubbock Official of Lying," http://www.everythinglubbock.com/news/kamc-news/whistleblower-accuses-lubbock-official-of-lying/219751042 (emphasis added).

On or about February 16, 2018, the undersigned counsels became aware of the civil lawsuit that was filed in Lubbock County District Court against the medical examiner who allegedly conducted the autopsy in this case, Lubbock County Chief Medical Examiner Dr. Sridhar Natarajan. See Dr. Luisa Florez, M.D. vs. Lubbock County, et. al., Lubbock County Judicial District Case Number 2015-517,110.

The lawsuit was filed on August 19, 2015, by an associate of Dr. Natarajan, Lubbock County Deputy Medical Examiner Dr. Luisa Florez, MD. Id. The suit alleged that Dr. Florez discovered irregularities in how Dr. Natarajan handled his official duties as Chief Medical Examiner. Id. at 5. According to the complaint, Dr. Natarajan delegated critical decisions to a senior forensic nurse, Honey Haney Smith. Id. at 5. These decisions included what forensic tests were to be performed in particular cases. Id. at 5.

The lawsuit further alleged that Dr. Natarajan was often away from his post tending to his private consulting practice and that in his absence Nurse Smith would act as his proxy making decisions that only a duly deputized assistant medical examiner was authorized to make. Id. at 5. Dr. Florez also revealed that Dr. Natarajan was not performing his own autopsies, but was instead delegating the "cutting, removal of tissue and organs, and collection of forensic evidence to technicians who were not

licensed or trained doctors or forensic pathologists." Id. at 5. These technicians would perform the autopsies and collect the crucial evidence without Dr. Natarajan being present in the autopsy suite. Id. at 5.

Moreover, "Dr. Natarajan would allow these unqualified technicians to make medical evaluations … [regarding] the presence or absence of trauma." Id. at 5. Dr. Florez asked Dr. Natarajan how he testified about the observations actually made by untrained staff and the chain of custody of evidence collected when he was not present during the autopsy. Id. at 5. Dr. Flores made it known that Dr. Natarajan glibly stated, "I just say it was done under my supervision." The lawsuit also alleged that Dr. Natarajan conspired with Nurse Smith to backdate autopsy reports. Id. at 6. Dr. Natarajan's conduct, as alleged in the complaint, fell below professional medical standards and amounted to a clear violation of Texas Penal Code, Art. 37.10, which prohibits tampering with governmental records. In addition, Dr. Natarajan's conduct as alleged in the complaint also violates section 9(a) of Texas Code of Criminal Procedure, Art. 49.25 which requires that an autopsy be performed by a duly licensed medical examiner or duly appointed deputy. If the autopsy was unlawfully obtained, the evidence, including the medical examiner's testimony, would be suppressed under Rule 38.23 of the Texas Code of Criminal Procedure.

On or about November 7, 2107, Dr. Natarajan and Lubbock County settled the lawsuit and paid Dr. Florez the sum of $230,000. See http://www.kcbd.com/story/36789861/lubbock-county-reaches-no-fault-settlement-with- former-deputy-medical-examiner. The case was settled at the same time the state district court signed Rodriguez's death warrant. The District Attorney, acting here, represented Lubbock County in the civil lawsuit. The District Attorney negotiated a quarter million settlement, and, presumably recommended the payment to the county's insurance carrier, which was funded within a few days of the signing of Rodriguez's death warrant. No one told Rodriguez's counsel about

any of this; it was discovered by a third party.

> As a corollary, it must be noted that the suit against Natarajan implicates a potential issue under *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (where a testimonial certified forensic lab report is offered for its truth as evidence in a criminal prosecution, the accused has at least the right to confront the scientist who performed, observed, or supervised the analysis.). Even if Dr. Natarajan did not explicitly lie as such about his autopsy, Rodriguez was denied the opportunity to engage in meaningful cross-examination.

The Court of Appeals Decision

The Fifth Circuit denied Mr. Rodriguez permission to file a second habeas petition asserting a stand-alone innocence claim in the district court. This Opinion is presented to this Court for inclusion as Appendix A .

REASONS FOR GRANTING THE WRIT

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.2. 258, 260 (1947). Title 28 U.S.C. 2244(b)(3)(E) prevents this Court from reviewing the court of appeals' order denying Mr. Rodriguez leave to file a second habeas petition by appeal or writ of certiorari. The provision, however, has not repealed this Court's authority to entertain original habeas petitions, *Felker v. Turpin*, 518 U.S. 651, 660 (1996), nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;"

(2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker*, 518 U.S. at 662-63.

Mr. Rodriguez's last hope for an evidentiary hearing to prove his innocence lies with this Court. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers.

I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Rodriguez states that he has not applied to the district court because the circuit court prohibited such an application. *See* Appendix A. Mr. Rodriguez exhausted his State remedies for his stand-alone innocence claim. Following discovery of new evidence of innocence, on February 20, 2018, Rodriguez filed in the state district court a motion for stay of execution, asking the court to withdraw his execution date. The court denied the motion on March 6, 2018. Rodriguez filed a successive writ in the state court on March 12, 2018, pursuant to Texas Code of Criminal Procedure Article 11.071 § 5 and Article 11.073; and a motion for discovery on March 14, 2018. On March 16, he filed a motion for stay of execution pending the outcome of his successive writ. The CCA dismissed his application as an abuse of the writ, without reviewing the merits, and denied his motion for stay of execution. Ex parte Rodriguez, WR-78,127-02 (Tex. Crim. App. March 19, 2018). The CCA dismissed his motion for discovery without written order. Rodriguez filed for permission by the court of appeals to file a second habeas petition; the Fifth Circuit denied authorization, and, as a result, Rodriguez cannot obtain relief in any other form or any other court.

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION

A. The Suspect Testimony In This Case Is Rare and Exceptional

This Court has held that "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." *In re Michael*, 326 U.S. 224, 227 (1945). A study of federal habeas case law reveals no case in which a medical examiner falsely and dispositively testified about an autopsy that he performed, much less a case where his false testimony in potentially this and numerous other cases

caused the District Attorney representing the respondent in this case to settle the matter for hundreds of thousands of dollars, without disclosing fraud or settlement to petitioner's counsel.

With an evidentiary hearing, Rodriguez has an opportunity to get a recantation of the dispositive medical testimony. When recantations are made, federal courts have often granted habeas relief. *See, e.g.*, *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (habeas relief granted on second habeas petition based on recantation of State witness-victim); *Alexander v. Smith*, 2009 WL 426261 at *8 (6th Cir. 2009) (hearing held to examine recantation of fellow inmate); *In Re McDonald*, 514 F.3d. 539, 547 (6th Cir. 2008) (single recantation of State witness who knew defendant sufficient for §2244 permission to file successive habeas petition); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (finding actual innocence based on recantations of 2 of 3 State forensic experts); *Dixon v. Snyder*, 266 F.3d 693, 704-705 (7th Cir. 2001) (granting habeas relief on trial recantation of bystander witness); *Amrine v. Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (en banc) (remand for evidentiary hearing as a result of three recantations from State eyewitnesses who were bystanders); *see also State ex rel Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (granting habeas relief); *Imbler v. Craven*, 298 F. Supp. 795 (D.C. Cal. 1969) (habeas relief granted on recantation of passer-by eyewitness).

In *Herrera v. Collins* this court denied habeas relief because petitioner's new evidence failed to show he was innocent. 506 U.S. 390, 396 (1993). The contrast between the evidence in *Herrera* and Mr. Rodriguez's petition could not be more stark. Herrera pled guilty to one of the two murders for which he was convicted, left his bloody social security card at the scene of the murder, was identified by two police officers as the shooter and -- when he was arrested -- was found with the victim's blood on his clothes and a handwritten confession in his pocket. *Id*. at 394. In an attempt to prove his innocence, Herrera offered only affidavits from family members and their associates attempting to show that Herrera's brother, who had died seven years earlier, had confessed to the crime. *Id*. at 396-97. The Court emphasized that the affidavits were inconsistent and failed to undercut the strong physical evidence tying Herrera to the murders. *Id*. at 418.

In contrast, Mr. Rodriguez's new evidence eviscerates the State's case against him.

The facts that Mr. Rodriguez has asserted, when proven in a hearing, will show that no credible inculpatory evidence remains.

III. THE COURT OF APPEALS ERRED IN BARRING MR. RODRIGUEZ' SECOND PETITION

The purposes of § 2244(b)(2) that "inform" this Court's consideration of Mr. Rodriguez's original habeas petition are twofold: Section 2244(b)(2)(B)(ii) requires that the petitioner diligently discover and present his new evidence in his first habeas petition. Mr. Rodriguez has diligently done so. Section 2244(b)(2)(B)(i) requires that the claim raised in a second petition "impugn" the reliability of the underlying conviction. Mr. Rodriguez's stand-alone innocence claim does exactly that.

A. The Factual Predicate For The Claim Could Not Have Been Discovered Previously Through The Exercise Of Due Diligence.

Section 2244(b)(2)(B)(i) requires that a claim brought in a second petition must be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." The clear purpose of this provision is to ensure that petitioner's diligently discover all evidence and present it to the district court in the first federal habeas petition.

Here, all of the evidence underlying Mr. Rodriguez' *Herrera* claim was discovered as soon as the facts were made public and the undersigned counsels found out about these facts. It must be noted that no one in the DA's Office ever informed Rodriguez's counsels about the suit or it settlement.

B. MR. RODRIGUEZ' SECOND PETITION

MEETS THE REQUIREMENTS OF 28 U.S.C. § 2254

1. Mr. Rodriguez is Entitled to An Evidentiary Hearing

If this Court transfers Mr. Rodriguez' habeas petition to the district court, Mr. Rodriguez would be entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Subject to the requirements of § 2254, a federal evidentiary hearing is required "unless the state-court trier of fact has after a full hearing reliably found the relevant facts," *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (*overruled on other grounds*).

Section 2254(e)(2) does not preclude an evidentiary hearing in this case because Mr. Rodriguez consistently, but unsuccessfully, sought an evidentiary hearing to prove his innocence in State court. By the terms of its opening clause, § 2254(e)(2) bars an evidentiary hearing only to prisoners who have "failed to develop the factual basis of a claim in State court proceedings." In *Williams v. Taylor*, this Court held that a petitioner who did not receive a hearing in State court may receive an evidentiary hearing in federal court "unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 529 U.S. 420, 435 (2000). The Court held that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." To no avail, Mr. Rodriguez asserted his innocence and requested an evidentiary hearing at every level of the State proceedings.

2. The Texas Court's Minimal Factual Findings Deserve No Deference under § 2254

The Texas Court of Criminal Appeals' review of Mr. Rodriguez's Rule 11.07 application is entitled to no deference under § 2254 since the state court failed to conduct an evidentiary hearing and made an unreasonable determination of the facts in light of the evidence Mr. Rodriguez had presented.

Under AEDPA's amendments to § 2254, a federal court may grant habeas relief if the state court's decision "was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Factual determinations made by State courts are presumed correct unless rebutted by "clear and convincing evidence." § 2254(e)(1). When the state court conducted an evidentiary hearing, this Court has held that these standards are "demanding but not insatiable" as "deference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

AEDPA's provisions deferring to State court factual determinations are inapplicable where, as here, the petitioner did not have the opportunity for a full and fair hearing in State court. There is a split among the circuits as to whether § 2254(d)(2) and § 2254(e)(1) apply when the State court failed to conduct an evidentiary hearing. The Tenth and Ninth Circuits have held that the presumption of correctness contained in § 2254(d)(2) and (e)(1) does not apply if the habeas petitioner did not receive a full, fair and adequate hearing on factual determination sought to be raised in the habeas petition. *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003). In *Bryan v. Mullin*, for example, the Tenth Circuit, sitting en banc, afforded no deference to the State court factual findings, reasoning that "because the state court did not hold an evidentiary hearing, we are in the same position to evaluate the factual record as it was." 350 F.3d at 1216.

Conversely, the Fifth Circuit has held that a "full and fair hearing is not a precondition" to accord the State court's factual determinations deference under § 2254(d)(2) or (e)(1).

Valdez v. Cockrell, 274 F.3d 941, 951 (2001). The First and Third Circuits have taken the middle ground, finding that the lack of an evidentiary hearing in State Court should be a consideration in applying deference under § 2254(d)(2) and (e)(1). *Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007) ("While it might seem questionable to presume the correctness of material facts not derived from a full and fair hearing in state court, the veracity of those facts can be tested through an evidentiary hearing before the district court where appropriate"); *Rolan v. Vaughn*, 445 F.3d 671, 679-80 (3d Cir. 2006) ("after AEDPA, state fact-finding procedures may be relevant when deciding whether the determination was 'reasonable' or whether a petitioner has adequately rebutted a fact, the procedures are not relevant in assessing whether deference applies to those facts."); *see also Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007) ("Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court.").

3. EXECUTION OF MR. RODRIGUEZ WITHOUT AN EVIDENTIARY HEARING WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES

Mr. Rodriguez's execution without a full and fair hearing in which he could make a truly persuasive demonstration that he is actually innocent will violate his federal constitutional rights to due process and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments *See Herrera*, 506 U.S. at 417 (assuming a "truly persuasive demonstration of actual innocence made after trial would render execution of a defendant unconstitutional"); *House v. Bell*, 547 U.S. 518, 554 (2007). (same).

Because Mr. Rodriguez presents compelling, credible evidence that he is actually innocent of capital murder, he is categorically excluded from eligibility for the death penalty. Because he is actually innocent and therefore categorically excluded from the class of people eligible for execution, any statutory bars to presenting these claims are unconstitutional. *Herrera v. Collins*, 506 U.S. 390 (1993).

Beyond the categorical exclusion, condemned inmates who can present substantial cases of actual innocence cannot be prevented access to federal courts due to legal technicalities. To do so violates the Suspension Clause of the United States Constitution. *Cf. Boumediene v. Bush*, U.S. 723, 729, 733 (2008) discussing the

guarantee to petition for a writ of habeas corpus that cannot be replaced by an ineffective and inadequate statutory scheme).

Additionally, a freestanding claim of actual innocence is the most important concern of the Great Writ of habeas corpus. Because it is so central, federal courts must issue the writ to protect that fundamental concern. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 362 (2004) (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) ("Great Writ's basic objectives" include "protecting the innocent against erroneous conviction"); *Dretke v. Haley*, 541 U.S. 386, 398–99 (2004) (Stevens, J., dissenting) ("Habeas corpus is, and has for centuries been, a 'bulwark against convictions that violate fundamental fairness.' "); *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("one of the 'principal functions of habeas corpus [is] "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." ' "); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) ("basic purposes underlying the writ of habeas corpus" include curing "error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person"); *Schlup v. Delo*, 513 U.S. 298, 324–25 (1995) ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. 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." (footnote omitted; citing numerous authorities)); *id.* at 326 ("paramount importance of avoiding the injustice of executing one who is actually innocent"); *id.* at 326 n.42 ("fundamental injustice would result from the erroneous conviction and execution of an innocent person"); *Jacobs v. Scott*, 513 U.S. 1067, 1067–70 (1995) (Stevens, J., dissenting from denial of stay, joined by Ginsburg, J.) (prosecutor admittedly made inconsistent arguments at petitioner's trial and at his sister's trial about whether petitioner or sister actually committed the capital murder, and "[i]f prosecutor's statements at the [sister's] trial were correct, then [petitioner] is innocent of capital murder"; case accordingly presents "self-evident" and "deeply troubling" "injustice" warranting stay of execution to consider petitioner's claims); *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part) (discussing "the ultimate equity on the prisoner's side—a sufficient showing of actual innocence"); *id.* at 718 (Scalia, J., concurring in part and dissenting in part) ("The most significant countervailing equitable factor [on which habeas corpus petitioner may seek to rely is] possibility that the assigned error produced the conviction of an innocent person….").

a. An Evidentiary Hearing is Required to Assess Mr. Rodriguez' *Herrera* Claim

This Court has recognized that "[i]n capital proceedings generally, this Court has demanded that fact- finding procedures aspire to a heightened standard of reliability" *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion). In *Ford*, Justice Powell's controlling opinion found that Florida's refusal to consider relevant evidence of insanity before an execution of a defendant who had made a substantial showing of incompetence violated due process. *Id*.

Similarly, in *Panetti*, this Court recently held that failing to allow the defendant to submit relevant evidence of insanity violated due process. 127 S. Ct. at 2857-58. The exclusion of relevant evidence was sure to "invite arbitrariness and error" in the state court's determination of

whether the Eighth Amendment barred execution and, thus, violated due process. *Id.*

In *Ford* and *Panetti*, this Court limited the strain that non-meritorious insanity claims may have on the judicial system by requiring "a substantial threshold of insanity" before requiring a hearing. *Panetti*, 127 S. Ct at 2856 (*citing Ford*, 477 U.S. at 426, 424). Similarly, the facts of this case limit the requirement of a hearing to instances where the defendant faces imminent execution despite substantial new admissible innocence evidence that has never been the subject of a State or federal court evidentiary hearing.

CONCLUSION

The petition for a writ of habeas corpus should be transferred to the district court for a hearing and determination.

Respectfully submitted.

Carlo D'Angelo
THE D'ANGELO LAW FIRM
100 East Ferguson; Suite 1210
Tyler, TX 75702
Caro@dangelolegal.com

Seth Kretzer
LAW OFFICES OF SETH KRETZER
440 Louisiana Street; Suite 1440
Houston, TX 77002
seth@kretzerfirm.com

[Tel.] (713) 775-3050
[Fax] (713) 929-2019
Member, Supreme Court Bar

March 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of March 2018, a true and correct copy of this petition was e-mailed to:

AAG Tomee Heining
Office of the Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

/s/ Seth Kretzer

Seth Kretzer